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CALIFORNIA REPORTER

IN VOLUME

17 PACIFIC REPORTER
SECOND SERIES

217 Cal. 1

UHL v. COLLINS, Registrar of Voters of the
City and County of San Francisco.

S. F. 14793.

Supreme Court of California.

Dec. 19, 1932.

1. Municipal corporations ⇨46.

Constitutional procedure for amending city charters is exclusive, and any charter provision in conflict therewith is invalid (Const. art. 11, § 8, as amended in 1930).

2. Municipal corporations ⇨46.

Signers of initiative petition for amendment of city and county charter may withdraw names before filing of petition, but not thereafter (Const. art. 4, § 1, and art. 11, § 8, as amended in 1930).

3. Municipal corporations ⇨46.

Such signatures of initiative petition for city and county charter amendments as had no dates affixed thereto held invalid (Const. art. 4, § 1, and art. 11, § 8, as amended in 1930; Pol. Code, § 1083a, as amended by St. 1931, p. 805).

4. Municipal corporations ⇨46.

Statute requiring signatures on initiative petition to have dates of signing affixed held constitutional (Const. art. 4, § 1, and art. 11, § 8, as amended in 1930; Pol. Code, § 1083a, as amended by St. 1931, p. 805).

In Bank.

Petition by Adolph Uhl against C. J. Collins, as Registrar of Voters of the City and County of San Francisco, and the authority having charge of the registration of the City and County of San Francisco, for a writ of mandate directed to respondent.

Alternative writ of mandate, heretofore issued, discharged.

Milton T. U'Ren, of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (John J. Dailey, of San Francisco, of counsel), for respondent.

Herbert C. Jones, of San Jose, and Lloyd A. Mason, for League to Protect the Initiative as amici curiæ.

LANGDON, J.

This is a petition for a writ of mandate to compel respondent registrar of voters to verify signatures on certain initiative petitions.

On September 6, 1932, and September 8, 1932, certain initiative petitions were filed with the board of supervisors of the city and county of San Francisco, proposing amendments to its charter. Upon the filing thereof the board delivered them to respondent, who

commenced the work of verifying the signatures. Prior to completion of this task a large number of the signers communicated with him requesting the withdrawal of their signatures. Respondent accordingly disregarded such names in computing the number of valid signatures. Many of the signers had also failed to affix the date of signing after their signatures, and these names were also disregarded. It is conceded that, if either of these two groups of discarded signatures is left out of the computation, the petitions fail.

[1] The first question is whether signers had a right to withdraw their names after the filing of the petitions with the board. The California Constitution, art. 11, § 8, provides that a charter may be amended "by proposals therefor submitted by the legislative body of the city on its own motion or on petition signed by fifteen per cent of the registered electors, or both." Article 4, § 1, dealing with the initiative and referendum, concludes with the following provision: "This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." The procedure for amending charters specified in article 11, section 8, is exclusive and controlling, and any charter provision in conflict therewith is invalid. *Garver v. Council of the City of Oakland*, 96 Cal. App. 560, 274 P. 375.

[2] No provision appears either in our Constitution or general laws for withdrawal of names from an initiative petition. Nevertheless, the great majority of the cases recognize the right of withdrawal as incidental to the right of petition itself. A conflict exists, however, as to the period within which this right may be exercised. Many of the decisions hold that withdrawal is permissible up to the time that "final action" is taken, or until "the jurisdiction of the officer to whom the petition is addressed attaches." See *State ex rel. Mohr v. Seattle*, 59 Wash. 68, 109 P. 309, 311; *Littell v. Board of Supervisors*, 193 Ill. 205, 65 N. E. 78; *Territory ex rel. Stockard v. Mayor and City Council of Roswell*, 16 N. M. 340, 117 P. 846, 35 L. R. A. (N. S.) 1113. We deem it unnecessary to embark upon a discussion of these authorities, for in this state a different rule has been laid down, restricting the right of withdrawal to the period before the filing of the petition with the officer or body authorized to receive it. In *Beecham v. Burns*, 34 Cal. App. 754, the court said at page 758, 168 P. 1058, 1061: "The remaining question in this case is based upon the claim that certain signers of the recall petition requested the clerk to withdraw their names therefrom after the petition was filed with the clerk and before that officer had certified the result of his examination as required by the statute. * * *

The clerk is not clothed with authority to alter the petition when it has been filed; he is not authorized to receive extraneous evidence of its contents, or to base his certificate upon statements made to him by electors who have signed it. His certificate must show the result of an examination whereby 'from the records of registration' he shall ascertain whether or not 'said petition' is signed by the requisite number of qualified voters. In our opinion, the signers of such petitions may not withdraw their names or have their names withdrawn by the clerk at any time after the petition has been filed." There is nothing contrary to this view in our decision in *Doyle v. Jordan*, 200 Cal. 170, 252 P. 577, wherein we commented upon *McAulay v. Board of Supervisors*, 178 Cal. 628, 174 P. 30, and *Covell v. Lee*, 71 Cal. App. 361, 235 P. 79, as follows (page 183 of 200 Cal., 252 P. 577, 583): "In neither of these cases, however, were the withdrawals attempted to be made after the petition had been filed with the person or board whose duty it was to act thereon."

On principle, it seems clear that the elector whose name is placed upon a petition through fraud, inadvertence, or upon insufficient reflection, should not be irrevocably bound by the mere signing, but should be permitted to correct his error and assume his true position with regard to the proposed measure, if this can be done without injury to the initiative system. But, if the alleged right of withdrawal, based upon change of mind, is to be exercised to the destruction of the initiative procedure, then we may well question its justification. In order to accomplish anything, the proponents of a measure must be able to rely upon signatures obtained, and, if continually forced to seek new ones to take the place of withdrawals, may never be able to prepare a proper petition within the limited period which usually exists. To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable. We do not believe that this mere implied power of the signer, which is not expressly provided for in our Constitution or statutes, can be used so as to jeopardize the exercise of the constitutional right itself. The cases which limit the right of withdrawal to the period before filing seem to us to reach the proper conclusion, which gives a reasonable time for reconsideration to the signer, and also protects the petition when completed and turned over to the proper authorities.

[3, 4] The contention that those signatures which lacked dates are invalid must, however, be sustained. Here the matter is covered by an express statutory provision. Section 1083a of the Political Code (as amended by St. 1931, p. 805), provides: "Wherever, by

the constitution or laws of this state any initiative, referendum, recall or nominating petition or paper, or any other petition or paper, is required to be signed by qualified electors, only an elector who is a registered qualified elector at the time he signs such petition or paper, shall be entitled to sign the same.

* * * Such signer shall at the time so signing such petition or paper affix thereto the precinct, also the date of such signing." Petitioner contends that this section is unconstitutional, since no such provision appears in article 11, § 8. We see no conflict in this requirement, which is, under our registration laws, material to the determination of whether the signer is a registered elector at the time he signs the petition. Such a statute does not violate the constitutional provision, but rather tends to "facilitate its operation," and hence is a proper subject for legislation under article 4, § 1, of the Constitution. *Chambers v. Glenn-Colusa Irr. Dist.*, 57 Cal. App. 155, 206 P. 773; *Chester v. Hall*, 55 Cal. App. 611, 204 P. 237; *Boggs v. Jordan*, 204 Cal. 207, 267 P. 696.

The invalidity of this group of signatures being established, the initiative petitions lacked the requisite number of signatures, and it follows that the respondent properly refused to verify the same.

The alternative writ of mandate heretofore issued is discharged.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.; CURTIS, J.; PRESTON, J.

217 Cal. 787

J. L. R. MARSH, Petitioner, v. Harry W. HALL, County Clerk of the County of Sacramento, Respondent.
S. F. 14833.

Supreme Court of California.
Dec. 19, 1932.

In Bank.

Application for writ of mandate prayed to be directed to respondent as county clerk of Sacramento county to compel him to verify signatures on a certain initiative petition. Writ denied.

Ray T. Coughlin, of Sacramento, for petitioner.

PER CURIAM.

The petition for a writ of mandate in the above-entitled matter is denied on the authority of *Uhl v. Collins* (Cal. Sup.) 17 P.(2d) 99.

217 Cal. 59

WRIGHT v. STATE BAR OF CALIFORNIA.
L. A. 13808.

Supreme Court of California.

Dec. 23, 1932.

Rehearing Denied Jan. 20, 1933.

Attorney and client $\S$ 53(2), 58.

Evidence supported finding that attorney sought to mislead court by false statements that he had not assigned judgment prior to satisfaction, warranting suspension from practice for two years.

In Bank.

Petition by William R. Wright against the Stat Bar of California to review an order of the Board of Governors of the State Bar of California recommending that petitioner be suspended from the practice of law for two years.

Affirmed.

Homer C. Mills, of Long Beach, for appellant.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a petition to review an order of the board of governors of the state bar recommending that petitioner be suspended from the practice of the law in this state for a period of two years. The local administrative committee which conducted the proceedings recommended disbarment.

On September 8, 1930, petitioner, as receiver for E. C. Newton Corporation in the case of Wix. v. Newton, in the Superior Court of Los Angeles county, was awarded \$1,300 in fees, and an order of court was made directing him to recover said sum from the corporation. On January 7, 1931, petitioner caused a satisfaction of this judgment to be entered with the clerk of the said court. On July 2, 1931, G. A. Waterman gave notice of motion to set aside the satisfaction on the ground that petitioner had previously assigned the judgment to him for valuable consideration. Petitioner was present at the hearing, and denied having made the assignment. The court, Judge D. L. Edmonds, denied the motion at that time without prejudice. A further motion was made, and on November 10, 1931, was granted by consent of the attorneys for Waterman and defendant Newton.

Petitioner was charged with attempting to defraud Waterman by causing the satisfaction of the judgment to be entered after his assignment thereof; with attempting to deceive the court by the false statement that he had not made the assignment; and with a similar attempt at deception of the local administrative committee before which he tes-

tified. Whether the evidence is sufficient to sustain the charge of attempting to defraud Waterman need not be considered. Even if we accept petitioner's version of this transaction, it is still necessary for him to justify his statements concerning the alleged assignment, which, according to the testimony of Judge Edmonds, led the court to deny the first motion to set aside the satisfaction of judgment.

On this issue, namely, whether petitioner sought to mislead the court by false statements, he has failed to overcome the case against him. A written instrument was produced, purporting to contain his signature. An acknowledgment by C. L. Welch, secretary of the corporation and a notary public, appears thereon, and Welch testified that the signature was that of petitioner, with which he was familiar. Frank C. Shoemaker, a member of the bar who acted as petitioner's attorney for a period before and after the alleged assignment, testified to the circumstances under which the instrument was signed and acknowledged by petitioner. H. F. Fintel, a witness called for petitioner, first testified that the signature was not that of petitioner, and on cross-examination changed his testimony and declared that it was. The committee also had before it admittedly genuine exemplars of petitioner's signature, which showed obvious similarity. We are of the opinion that the findings are supported by the evidence.

It is therefore ordered that petitioner be, and he is hereby, suspended from the practice of the law in the state of California for the period of two years from and after December 31, 1932.

217 Cal. 5

HAMMELL v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.

L. A. 13845.

Supreme Court of California.

Dec. 20, 1932.

1. Courts $\S$ 122.

In determining whether court has jurisdiction based on amount in controversy, complaint as whole must be examined.

2. Courts $\S$ 121(4).

Action on assigned labor claims aggregate of which exceeds jurisdictional minimum amount, and where all parties to litigation were affected, held within jurisdiction of superior court.

Action by same plaintiff on assigned labor claims, aggregate of which exceeds jurisdictional minimum amount, was with-

in jurisdiction of superior court in view of rule that where separate causes of action, properly joinable, are united in a single plaintiff, and set forth in a single complaint, the superior court has jurisdiction to the exclusion of inferior courts, if the aggregate of the several claims equals or exceeds the jurisdictional minimum of the superior court although no one of the claims equals such minimum.

3. Assignments ⇨119.

Assignee for collection is legal owner of chose in action, and entitled to sue thereon.

4. Courts ⇨118.

Jurisdiction of superior court is not dependent on character of plaintiff's ownership of chose in action, it being sufficient if plaintiff has capacity to sue, and aggregate amount demanded is within jurisdiction.

In Bank.

Original application by D. C. Hammell for a writ of prohibition prayed to be directed to the Superior Court in and for Los Angeles County, and the Hon. Henry M. Willis, Judge thereof, to restrain said court from determining an action on assigned labor claims.

Alternative writ of prohibition discharged.

For prior opinion, see 12 P.(2d) 489.

Dana R. Weller and Thomas H. Hearn, both of Los Angeles, for petitioner.

Paul Overton and Nell G. Locke, both of Los Angeles, amici curiæ.

Everett W. Mattoon, County Counsel, Fred M. Cross and S. V. O. Prichard, Deputies County Counsel, all of Los Angeles, for respondents.

Charles F. Lowy, of Los Angeles, and Arthur L. Johnson, of San Francisco, amici curiæ for T. A. Reardon as Chief Division of Labor Statistics, etc.

WASTE, C. J.

Petitioner, as one of the defendants in an action pending before the respondent superior court, seeks by this proceeding to prohibit the respondent judge from signing findings of fact and entering judgment therein. The request for such relief is grounded upon the claim that the respondent court and judge are without jurisdiction to hear and determine the cause. It appears that the chief of the division of labor statistics and law enforcement commenced an action to collect certain wages, the claims for which had been duly assigned to him for that purpose, owing by the petitioner and his copartners to the plaintiff's several assignors. No question is here raised as to the legality of the assignments or as to the propriety of the joinder of the several causes of action. Those matters are not of a jurisdictional nature.

[1, 2] Considered separately, the several assigned claims are each less than the jurisdictional minimum of the superior court. Collectively, however, they exceed such minimum. We must, therefore, determine whether the superior court has jurisdiction of an action at law wherein the aggregate of the amounts demanded in the complaint equals or exceeds the amount required to confer jurisdiction upon such court, but wherein the component parts of the demand are two or more separate causes of action, properly united in one plaintiff, the amount of each of which, standing alone, is less than the jurisdictional minimum of the superior court.

While the decisions of other states are not in complete accord upon this proposition (15 Cor. Jur. 768-771, §§ 64, 65; 7 R. C. L. 1055, § 91), it has long since been settled in this state that, where separate causes of action, properly joinable, are united in a single plaintiff and set forth in a single complaint, the superior court has jurisdiction, to the exclusion of inferior courts, if the aggregate of the several claims equals or exceeds the jurisdictional minimum of the superior court, although no one of the claims equals such jurisdictional minimum (Bailey v. Sloan, 65 Cal. 387, 4 P. 349; Ventura County v. Clay, 114 Cal. 242, 46 P. 9; Galloway v. Jones, 72 Cal. xxi, 13 P. 712).

When, as here, the jurisdiction of a court depends upon the amount in controversy, the complaint, as a whole, is to be examined to determine whether or not jurisdiction exists. Consolidated Adj. Co. v. Superior Court, 189 Cal. 92, 94, 95, 207 P. 552; Calloway v. Oro Mining Co., 5 Cal. App. 191, 194, 89 P. 1070. If under the allegations of the complaint the plaintiff is entitled to an amount equal to or in excess of the superior court's jurisdictional minimum, that court has jurisdiction of the cause even though the demand be made up of several component parts. This rule, of necessity, applies only to those cases where the total demand concerns and affects all the parties to the litigation. It is without application to a suit where several complainants, acting individually and not jointly, are seeking to enforce their respective claims against a single defendant, each claim being less than the jurisdictional minimum (Winrod v. Wolters, 141 Cal. 399, 402, 403, 74 P. 1037; Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App. (Supp.) 784, 294 P. 378), or to a case where a single plaintiff is seeking to enforce separate demands against several defendants, the amount demanded of each defendant being under the jurisdictional minimum (Myers v. Sierra Valley, etc., Ass'n, 122 Cal. 669, 55 P. 689). The complaint here involved indicates that the plaintiff is seeking from each defendant an amount in excess of the jurisdictional minimum of the respondent superior court. This being so, the cause is within its jurisdiction.

[3, 4] Petitioner concedes the rule to be as above stated, but contends for a different rule where, as here, the several joined claims have been assigned to a single plaintiff solely for purposes of collection. We see no real or substantial reason for such a distinction. It is now well settled that an assignee for collection is the legal owner of the chose in action and entitled to sue thereon. *Morrison v. Veach*, 190 Cal. 507, 511, 213 P. 945; *Greig v. Riordan*, 99 Cal. 316, 33 P. 913. The distinction contended for by petitioner would tend only to confusion for it would result in one rule where the assignment was of both the legal and equitable interest and a substantially different rule where the assignment was merely of the legal interest and solely for purposes of collection. In such cases the jurisdiction of our courts should not be made to depend upon the character of the plaintiff's ownership of the chose in action. It is sufficient if plaintiff has the capacity to sue and the aggregate amount demanded falls within the jurisdictional limits of the court in which the suit is commenced.

The alternative writ of prohibition heretofore issued is, therefore, discharged.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

William J. O'Brien, of Los Angeles, for respondent.

PRESTON, J.

These petitioners, May E. Tucker and Dorothy Tucker, seek by writ of supersedeas to enjoin respondent Howe from proceeding with the trial of an action in Del Norte county pending their appeal in said cause from an order denying motion for change of venue.

The facts alleged are as follows: In September, 1928, respondent executed in favor of petitioner May E. Tucker a certain promissory note in the sum of \$10,000, secured by trust deed on property in Del Norte county, designating petitioner Dorothy Tucker as trustee, petitioner May E. Tucker as beneficiary, and respondent as trustor. On January 19, 1930, the deed of trust was recorded in Del Norte county. On August 4, 1930, petitioner May E. Tucker commenced an action in the Los Angeles county superior court, No. 306894, against respondent, seeking to recover upon said promissory note. On August 30th respondent commenced an action in Del Norte county for cancellation of the said note and deed of trust. Respondent made no motion for change of venue in the Los Angeles action but on September 27, 1930, filed therein an answer and cross-complaint setting forth the substance of his complaint in the Del Norte county action. On June 30, 1931, the Los Angeles county superior court issued an injunction restraining respondent from proceeding with the Del Norte county action until determination of the Los Angeles county action. On March 29, 1932, the latter cause came on for trial. Respondent voluntarily dismissed his cross-complaint and objected to the introduction of evidence upon the ground that the complaint failed to state a cause of action in that, although it alleged that the note was secured by deed of trust, it contained no allegation that the security had been exhausted or was valueless. *Bank of Italy v. Bentley* (Cal. App.) 4 P. (2d) 546. This objection was sustained, and on the same day respondent served an amended summons and complaint in the Del Norte cause upon petitioners. Petitioners thereupon appealed from said decision in the Los Angeles action, and on April 27, 1932, petitioner Dorothy Tucker, as trustee, upon written request of May E. Tucker, executed and recorded a full reconveyance of the deed of trust and caused same to be recorded in Del Norte county, on May 2, 1932. In June, 1932, petitioners' motion for change of venue in the Del Norte county action was denied and they perfected an appeal from such ruling. On August 25, 1932, they instituted this proceeding by filing petition for writ of supersedeas, followed on September 23, 1932, by a supplemental petition, setting forth the above facts and further alleging that petitioners are residents of Los Angeles county, which is 746

217 Cal. 23

TUCKER et al. v. HOWE.

L. A. 13866.

Supreme Court of California.

Dec. 21, 1932.

Appeal and error 6479(1).

Where issue presented in case pending before Supreme Court might have important bearing on right of defendants in another action to obtain change of venue, defendants held entitled to supersedeas to maintain status quo pending appeal from order denying motion for change of venue.

In Bank.

Application by May E. Tucker and another for writ of supersedeas to restrain George W. Howe from proceeding with the trial of an action against petitioners in Del Norte county pending an appeal from an order denying petitioners' motion for change of venue.

Writ granted.

Vinetz & Gitelson, of Los Angeles, for petitioners.

miles from Del Norte county; that they are without funds to employ counsel, take depositions, or to themselves attend a trial in the latter county; hence they pray that the trial there be stayed pending determination of their appeal from the order denying motion for change of venue. On September 1, 1932, this court [14 P.(2d) 85], reversing the former decision in *Bank of Italy v. Bentley*, supra, held that an action may be brought on a note secured by trust deed without first exhausting the security. Later this court granted a rehearing and the cause is now pending and undetermined. This issue may have an important bearing on the proper determination of the complex situation presented by the instant cause, and a supersedeas to maintain its status quo pending said appeal is justified for this and other reasons appearing from the facts above recited.

Let the writ issue as prayed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 780

BRAUNSTEIN et al. v. TITLE GUARANTEE & TRUST CO. et al.

L. A. 13923.

Supreme Court of California.

Dec. 14, 1932.

Licenses C-39.

If escrow holder, as property owners' agent and with consent of corporation commissioner, held notes secured by trust deed, that escrow holder violated instructions by selling notes to public held not to affect validity of notes and security in hands of innocent purchasers.

This was true, though escrow holder sold notes to public in violation of permit by corporation commissioner and without authority of commissioner and without knowledge or consent of property owners, since property owners presumably received total net proceeds of sale thereof, and were in no position to cause innocent purchasers to suffer.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Proceeding by Jacob Braunstein and another against the Title Guarantee & Trust Company and others, in which plaintiffs appealed from an adverse judgment. On motion to dismiss plaintiffs' appeal or to affirm

the judgment, made pursuant to Supreme Court Rules, Rule 5, subdivision 3.

Judgment affirmed.

Goldman & Lieberman and J. J. Lieberman, all of Los Angeles, for plaintiffs and appellants, respondents, etc.

Norman T. Mason, of Los Angeles, for John D. Gardner.

Holland & Holland, of Los Angeles, for Anna O. Gray.

Chase, Barnes & Chase, of Los Angeles, for respondent Mary G. Cooley.

C. J. McGovern, of Los Angeles, for Marguerite Olney.

W. Torrence Stockman and Daniel E. Farr, both of Los Angeles, for William C. Deitch.

Elliott & Aberle, of Los Angeles, for C. M. Wyth and certain other defendants.

Call & Murphey, of Los Angeles, for Roy H. Fish.

Overton, Lyman & Plumb and J. F. Moroney, all of Los Angeles, for Mary E. Zeus.

Joseph Hansen, of Los Angeles, for Joseph Hansen, etc.

Amend & Amend, of Los Angeles, for Irene M. Bowell.

Laurence W. Bellenson, Clore Warne and Pelton & Warne, all of Los Angeles, for Title Guarantee & Trust Co.

Willis I. Morrison and William F. Adams, both of Los Angeles, for Charlotte J. Fox and certain other defendants.

W. L. Baugh, Jr., of Los Angeles, for certain defendants.

PER CURIAM.

The pleadings in this case are complex and the parties numerous. No good can be accomplished by a detailed discussion of the issues presented. Appellants' own version of the question involved is as follows: "Where the permit of the Corporation Commissioner authorized the issuance and sale to the public of negotiable notes of a property owner, secured by a trust deed of said property, but required the deposit of the notes in escrow until released for such sale by the Corporation Commissioner, and the notes are sold to the public by the escrow holder in violation of the permit and without the authority of the Commissioner, and without the knowledge or consent of the property owner, are they a valid and subsisting obligation against the property owner?"

In this connection it is only necessary to say that the appellants owned the property, executed the trust deed to the Title Guarantee & Trust Company, to secure the payment of 212 promissory notes, and authorized the American Mortgage Company to sell the same to the general public. If the escrow party

was the agent of appellants, with the consent of the corporation commissioner, and violated his instructions with respect to the escrow, the result of such violation cannot be rested upon the innocent purchaser. Appellants not only issued the notes and deed of trust to secure same, but presumably received the total net proceeds of sale thereof, and they are in no position whatsoever to cause the innocent purchasers to suffer. The doctrine of *Eberhard v. Pacific Southwest L. & M. Corporation* (Cal. Sup.) 9 P.(2d) 302, is authority for this statement as would be numerous well-settled legal principles not necessary here to enumerate.

The judgment is affirmed.

days to file, in which event his claim was in time. The alleged defect in the notice is the statement made therein that Edward Davis is the owner of the property. Plaintiff points out that the property is owned in joint tenancy by Edward Davis and June Davis, his wife, and argues that as to her interest the notice is void. We are of the opinion that section 1187 of the Code of Civil Procedure, providing for such notices, does not require the arbitrary construction urged by plaintiff. The notice fully described the property, gave the owner's address, and the verification states that Edward Davis is "one of the owners." We think that as a joint tenant his interest was sufficient to justify such a description, and no prejudice has resulted to this particular lien claimant by reason of the form of the notice.

The judgment is affirmed.

217 Cal. 95

**PROGRESS LUMBER CO. v. DAVIS et al.
(SAN MATEO & BURLINGAME MERCHANTS' ASS'N, Intervener).**

S. F. 14652.

Supreme Court of California.

Dec. 27, 1932.

Rehearing Denied Jan. 26, 1933.

Mechanics' Liens ⇨ 132(4).

Materialman's notice of completion describing property, giving owner's address, with verification that named person was one of the owners, *held* sufficient, though property was owned by husband and wife in joint tenancy (Code Civ. Proc. § 1187).

In Bank.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by the Progress Lumber Company against Edward Davis and another, wherein the San Mateo & Burlingame Merchants' Association intervened. From adverse judgment, plaintiff appeals.

Affirmed.

Frederick Schneider, of Palo Alto, for appellant.

James T. O'Keefe, of Redwood City, for respondent.

J. E. McCurdy, of San Mateo, for intervenor and respondent.

PER CURIAM.

This is an action to foreclose a materialman's lien. A personal judgment was given against defendants, but a lien against the building was denied, for the reason that plaintiff did not file his claim within thirty days of the filing of notice of completion. Plaintiff contends that the notice of completion was invalid, and that therefore he had ninety

217 Cal. 9

AMERICAN BIBLE SOC. et al. v. MORTGAGE GUARANTEE CO. et al.

L. A. 12497.

Supreme Court of California.

Dec. 21, 1932.

1. Trusts ⇨ 30½(1).

Where gift is incomplete because of technicality and essential elements of trust are established, donor's manifest intention must be sustained through agency of trust (Civ. Code, §§ 2221, 2222).

2. Trusts ⇨ 25(3).

Issuance of mortgage certificate in names of decedent and educational corporation "as joint tenants," under agreement wherein decedent reserved right to receive interest and to revoke gift, created trust for donee (Civ. Code, §§ 2221, 2222).

Facts disclosed that decedent had certain first mortgage certificate registered in name of decedent and corporation as joint tenants, so that on her decease it would become property of corporation, and in letter to corporation she expressed hope that though she retained right to use interest, and principal if necessary during her lifetime, eventually corporation would receive whole sum. Thereafter, corporation indicated acceptance of agreement and certificate was delivered by mortgage company to decedent and retained by her during her lifetime. It was conceded that decedent purchased certificate for purpose of making gift thereof to donee named therein, and that she did not revoke gift nor change her intent and purpose thereafter.

3. Trusts $\hookrightarrow$ 25(3).

That donor reserved power to revoke gifts did not invalidate trust (Civ. Code, §§ 2221, 2222).

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the American Bible Society, a religious corporation, and another, against the Mortgage Guarantee Company and others. From the judgment, plaintiffs appeal.

Reversed, with directions.

J. L. Murphey, of Los Angeles, for appellants.

Hahn & Hahn, of Pasadena, for respondent Pasadena Home for Aged, etc.

O'Melveny, Tuller & Myers, and J. R. Girling, all of Los Angeles, for respondent Mortgage Guarantee Co.

PER CURIAM.

This is an appeal by the plaintiffs from a judgment partially in their favor in an action to establish their right and title in and to the whole of certain first mortgage certificates issued by the defendant Mortgage Guarantee Company.

Each of the certificates represented a face value of \$5,000, bearing interest at 6 per cent. One thereof, dated July 1, 1924, was issued to "Abbie S. Williams and Mount Holyoke College of South Hadley, Mass.," and the other, dated June 1, 1926, was issued to "Abbie S. Williams and The American Bible Society (Bible House, Astor place, New York City), as joint tenants."

At the dates hereinbefore mentioned Abbie S. Williams was a widow and a resident of Pasadena, Cal. She died on January 17, 1928, at an advanced age, leaving no issue surviving her. There is no contention in the case that she was not fully competent at all the times herein involved and up to the time of her decease. She left a will dated July 21, 1926, in which no mention was made of said certificates or of either of said plaintiffs.

On April 12, 1924, Abbie S. Williams addressed a letter to the plaintiff Mount Holyoke College, stating that it was her desire to renew a \$5,000 first mortgage certificate, which would mature on July 8, 1924, and have it registered in the name of said plaintiff and herself as joint tenants, so that at her decease it would become the property of the joint tenant. She also expressed the hope that although she retained the right to use the interest, and the principal should it become necessary, during her lifetime, eventually Mount Holyoke College would receive the whole sum. Said plaintiff on April 22, 1924, by letter to Mrs. Williams, indicated its acceptance and agreement to that plan, and on

July 1, 1924, the certificate of that date was issued by the mortgage company at the instance of Mrs. Williams. Subsequently at her request the mortgage company communicated with the plaintiff Mount Holyoke College, stating in substance that Mrs. Williams had purchased said certificate for the use and benefit of herself and said college, and requested its officers to sign certain cards enclosed. These cards were signed and returned by the college to Mrs. Williams with a letter of thanks for her gift and acknowledgment of the issuance of the certificate in their joint names. The cards returned to Mrs. Williams were later delivered by her to the mortgage company.

On May 7, 1926, Mrs. Williams wrote to the plaintiff American Bible Society that she would like to do something for the society, and requested whether the society favored the plan of making it a joint owner of a similar \$5,000 certificate. She specified that she must have the interest during her life but that at her death it would pass to the joint owner without delay or expense of probate. The Bible Society replied stating its acceptance of the plan. Accordingly, the certificate dated June 1, 1926, was issued at the instance of Mrs. Williams. On June 5, 1926, the mortgage company communicated with the American Bible Society to the effect that Mrs. Williams had purchased the certificate and that she had requested the same to be issued in the names of herself and the Bible Society as joint tenants, with full right of survivorship, in order that at her death the certificate would become the immediate property of the society without the necessity of probate, the income to be paid to Mrs. Williams during her lifetime, and requested certain cards inclosed to be signed and returned. Subsequently the society returned the signed cards to the mortgage company and requested a duplicate copy of the certificate for its files. This request was complied with by said defendant. The society also communicated its knowledge of the transaction to Mrs. Williams and its understanding that its interest in the certificate was that of survivorship.

Each of the certificates was delivered by the mortgage company to Mrs. Williams and retained by her during her lifetime. It is alleged in the complaint that the mortgage company now has possession of said certificates. As to each certificate the complaint alleges that it was the intent of said Abbie S. Williams to make a gift of the entire certificate to each of the plaintiffs respectively as a joint tenant with right of survivorship, reserving to herself the right to receive the interest during her lifetime. The interest on these certificates was paid to Mrs. Williams during her lifetime.

A written stipulation was entered into by

the plaintiffs and the defendants through their respective counsel that the letters of Mrs. Williams and the replies thereto, and the mortgage certificates, were written and received as alleged; that the certificates were duly executed and that their contents show an intent and purpose on the part of Mrs. Williams to make the gifts set out in the complaint; that the certificates were purchased by her with the intent and purpose of making a gift thereof to each of the plaintiffs, who duly accepted the same, and that Mrs. Williams did not revoke said gifts nor change her intent and purpose thereafter; and that Mrs. Williams believed that the method adopted in the transaction would give the plaintiffs sole ownership of said certificates upon her decease. The defendants contended that the acts of Mrs. Williams did not constitute a valid gift or transfer of said certificates to the plaintiffs except as to a one-half interest therein; and that they did not create a trust except as to said one-half interest.

The trial court found the facts and intent as hereinabove stated; and found further, as to each certificate, "that said Abbie S. Williams used her own will and judgment in making said gift, but was assisted in the preparation of the language used in said certificate by an employee and agent of the defendant Mortgage Guarantee Company; and that at the time she made said purchase, she believed that the plan and method which she adopted and carried out would give said plaintiff * * * the sole ownership of said certificate upon her death, and obtained no other advice on the subject." The court also found that each of said plaintiffs accepted the gift made by Mrs. Williams, and that the latter did not revoke nor change her said act or purpose in any manner up to the time of her death. It also found that the proceeds of said certificates are not necessary for the payment of the debts or expenses of administration.

The court made no finding or conclusion as to whether a trust had been declared or created by the donor for the benefit of the plaintiffs; but, as support for its judgment and decree, did conclude that "notwithstanding the intent and purpose, and acts and understanding of said decedent, such acts did not constitute a joint tenancy; but that the same had only the effect of giving to each of said donees an undivided one-half interest in said certificates; and that the other one-half interest in the same vested in the residuary legatees set forth in the will of said deceased, to-wit: the defendants Pasadena Young Women's Christian Association, a religious corporation, and the Pasadena Home for the Aged, a benevolent corporation," who, with the executor of the will, also were defendants in the action. Judgment for the plaintiffs for a one-half interest respectively in

each of said certificates was entered accordingly.

The appeal herein is submitted on the appellants' opening brief. The statement is not challenged that no one of the defendants objects to the respective plaintiff's exclusive and entire ownership of the certificate issued in its name with said Abbie S. Williams if, in law, such plaintiff be entitled thereto.

On this appeal it is urged that the court on the facts found should have concluded either (1) that each of the plaintiffs was a joint tenant with right of survivorship with said Abbie S. Williams as to the certificate issued in their joint names; or (2) that the facts and writings and circumstances surrounding the issuance of said certificates evidenced the creation of a trust by the donor for the benefit of the plaintiffs so as to entitle them to the sole ownership of said certificates respectively upon the death of Mrs. Williams; and that judgment should have been entered, pursuant to either conclusion, that the plaintiffs are the sole owners of said certificates respectively and entitled to the whole of the proceeds therefrom.

It is manifest that the trial court's conclusion resulted in part from its application of the doctrine of the common law that a corporation cannot be seized or possessed of an estate of joint tenancy, and cannot, therefore, hold real or personal property as joint tenant with a natural person. See *De Witt v. San Francisco*, 2 Cal. 289, 297. But whether this doctrine of the common law survives under, or is modified or changed by, our Civil Code which defines a joint interest as "one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy" (section 683, Civ. Code), and which includes a corporation within the definition of "person" (sections 14 and 2132b, Civ. Code), we deem it unnecessary to discuss in view of our determination of the second point.

[1] It has become the well-established law of this state that where funds have been deposited by one person with the intent to pass a present proprietary interest therein to another jointly with himself with right of survivorship, and the purpose fails, that is, the gift is incomplete by reason of some technicality in the law and where the essential elements of a trust are established, the manifest intention of the donor may be sustained through the agency of a trust. *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 P. 370; *Drinkhouse v. German S. & L. Soc.*, 17 Cal. App. 162, 118 P. 953; *Carr v. Carr*, 15 Cal. App. 480, 115 P. 261.

The salient features of the present case are not substantially different from the facts bearing on the creation of a trust in the case of a deposit of funds in a bank and constituting the bank a trustee. In each situation

funds are paid to the trustee, giving rise to a debtor relationship on the part of the latter with some one or more persons, although in the present case that relationship arises by virtue of the defendant mortgage company's guarantee, and the obligation is evidenced by a "First Mortgage Certificate" instead of a passbook. In each case the gift is prevented from being completed by the retention of the evidence of title by the donor. In each case the exercise by the donee of rights of ownership or dominion over the jointly owned property, in the one case of the joint right of withdrawal of the deposit or any part thereof and in the other of its right of sale and collection of interest, is prevented by that retention.

[2, 3] As hereinbefore stated, no dispute exists as to the donor's intent, but in fact it is conceded and it is unmistakable from the evidence that Mrs. Williams, at the time the money was paid and the certificates were issued, intended that the plaintiffs should become vested with a future interest in the property involved. Specifically, the intent existed that she was to have a life estate in the property with remainder to the respective plaintiffs, also reserving to herself the power to revoke the gift. Under the principles applied in the foregoing cited cases, nothing further is necessary to constitute, as between the donor and the beneficiaries, the declaration of a trust for the benefit of the plaintiffs as to the whole of said certificates with the exception of the life estate. Section 2221, Civ. Code. The circumstance that the donor reserved the power to revoke the gift does not invalidate the trust. *Booth v. Oakland Bank of Savings*, supra; *Drinkhouse v. German S. & L. Soc.*, supra; *Nichols v. Emery*, 109 Cal. 323, 331, 41 P. 1089, 50 Am. St. Rep. 43; *Tennant v. John Tennant* Mem. Home, 167 Cal. 570, 576, 140 P. 242; 25 Cal. Jur. 292, 293.

Under the facts of each case the person who has accepted the trust with an understanding of the subject, purpose and beneficiaries of the trust is properly constituted the trustee. Section 2222, Civ. Code. It may be said that the defendant Mortgage Guarantee Company, by its acceptance of the do-

nor's funds with full knowledge and understanding of her desire and intent, has constituted itself a trustee of the subject of the trust. The trial court found that said defendant was a trustee of the proceeds from said certificates for the benefit of the owners thereof. Under the foregoing view of the facts it may be said that the subject of the trust is the funds deposited and that the defendant Mortgage Guarantee Company is a trustee under the theory of the case of *Carr v. Carr*, supra, and similar cases. However, it may be argued by the respondents that the transaction of purchase and sale of the certificates between Mrs. Williams and said defendant should be deemed to have a different legal effect and to vest no title in said defendant as trustee. But whether the defendant mortgage company is the trustee or whether the donor has by her acts and declarations constituted herself the trustee, on the theory that a symbolical delivery of the gift to the donee had been made as to a one-half interest, and, because the law refuses to execute her intent to make the donee a joint tenant, she herself held the future interest in the other half for the benefit of the donee—that is, the question as to who is or was the trustee in this case—it is unnecessary to determine. This is so for the reason that all parties having or claiming any interest are before the court, and, the facts giving rise to the creation of the trust as to the beneficiaries being admitted, the liability on the part of the defendants having in their possession said mortgage certificates or any proceeds therefrom is conceded.

The clear intent of the donor to create an estate for the benefit of the plaintiffs respectively as survivor to the whole of said certificates having been ascertained, and the other essential elements also being present or conceded, the cases herein cited compel the conclusion that such intent must be given effect as the declaration of a trust for their benefit as to the whole of said certificates.

The judgment is therefore reversed, with directions to the trial court to amend its conclusions of law and to enter judgment for the plaintiffs in accord with the views herein expressed; neither side to have costs.

217 Cal. 72

NEEDHAM v. ABBOT KINNEY CO.

L. A. 11645.

Supreme Court of California.

Dec. 23, 1932.

Asa V. Call, R. C. Gortner, Call & Murphey, and Walter E. Bennett, all of Los Angeles (Frank M. Gunter, of Los Angeles, of counsel), for appellant.

Arthur G. Baker and Joseph Hansen, both of Los Angeles, for respondent.

1. Brokers $\hookrightarrow$ 49(1).

Letter stating, in any deal satisfactory to principal, principal would pay usual commission, authorized broker to negotiate with other parties than those mentioned in letter.

The letter from principal to broker, although stating in substance that principal would be willing to allow parties named to enter into negotiations looking toward a deal, also stated that, in "any deal" satisfactory to principal, principal would expect to pay the usual realty board commission.

2. Brokers $\hookrightarrow$ 43(3).

Letter authorizing broker to sell lands, specifically covering properties owned by principal, sufficiently described lands under statute of frauds (Civ. Code, § 1624, subs. 5, 6).

3. Brokers $\hookrightarrow$ 43(3).

Real estate broker's contract, as regards statute of frauds, need not describe land specifically, if terms of employment can otherwise be made definite (Civ. Code, § 1624, subs. 5, 6).

4. Frauds, statute of $\hookrightarrow$ 119(2).

Person is estopped to assert statute of frauds, where such assertion would amount to practicing a fraud.

5. Brokers $\hookrightarrow$ 69.

5 per cent. allowed on actual sales made under contract between principal and other brokers through plaintiff broker's efforts *held* fair and reasonable.

6. Brokers $\hookrightarrow$ 49(1).

Land sold through other brokers through plaintiff's efforts *held* within authorization granted to plaintiff contemplating any satisfactory deal with respect to any of principal's properties.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Paul A. Needham against the Abbot Kinney Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

For prior opinions, see 4 P.(2d) 622; 9 P.(2d) 209.

PER CURIAM.

A rehearing was granted in this case after decision by this court in bank. Upon further consideration we are satisfied that the former opinion delivered by Mr. Justice PRESTON, correctly disposes of the issues, and we therefore adopt it as the opinion of the court.

It reads as follows:

Appeal from judgment for plaintiff, a real estate broker, in an action to recover a reasonable compensation for services rendered to defendant corporation in connection with the disposition of some of its properties.

The trial court found that on August 19, 1925, defendant executed a writing whereby it employed and authorized plaintiff, as its broker and agent, to negotiate for and consummate any deal satisfactory to it with respect to any or all of its properties, including the premises here involved, and agreed to pay him the regular realty board commission, that is, a reasonable compensation, for his services; that plaintiff immediately commenced performance thereunder, and about September 24, 1925, presented to defendant the two real estate brokers comprising the copartnership of Oliver & Carver, who were ready, willing, and able to make a deal for said lands, and who, as a result of plaintiff's efforts, entered into a written contract with defendant about July 1, 1926, in a deal for the subdivision and sale thereof, for the gross principal selling price of \$1,182,800, said deal being satisfactory to defendant; that Oliver & Carver thereafter made sales of lots in said subdivision, aggregating the principal sum of \$420,300; that the agreed and reasonable commission and compensation to be paid by defendant to plaintiff was 5 per cent. of said \$420,300, or \$21,015, with interest at 7 per cent. figured on 5 per cent. of the amount of each respective sale as of the date thereof, said interest then amounting to \$3,309.25. Judgment was thereafter entered for plaintiff in accordance with these findings, and defendant appealed.

The above-mentioned written authorization executed by appellant to respondent reads:

"Venice, California, August 19, 1925.

"Mr. Paul A. Needham, Los Angeles, California.

"Dear Sir: The properties owned by the Abbot Kinney Company are not on the market, and are not for sale. However, in consideration of the overtures you have made and the representation that you believe Mr.

Adolph Ramish, Mr. Leo Harvey and Mr. Joshua Marks may be interested in considering the purchase of some of our holdings, we would be willing to allow them to enter into negotiations looking toward a deal.

"In any deal satisfactory to us we would expect to pay the usual Realty Board Commission.

"Yours very truly,

"Abbot Kinney Company.

"[Sgd] Thornton Kinney, President."

Respondent did not consummate any deal with Mr. Ramish and his associates, but instead introduced Oliver & Carver to appellant as prospective purchasers. After prolonged negotiations, during which the latter made various offers to purchase, ranging from about \$485,000 to \$600,000, it became apparent that satisfactory terms could not be agreed upon, and hence no sale resulted. However, on February 4, 1926, these parties did execute a contract, whereby Oliver & Carver agreed to take over the subdivision and selling agency for some of appellant's holdings. Respondent had followed the course of their negotiations, and, after the signing of said contract, he demanded his commission. Later, and on July 1, 1926, a new and satisfactory agency agreement, in place of that of February 4th, was made, pursuant to which Oliver & Carver actually took over the subdivision and made sales of lots therein aggregating approximately \$420,300, 5 per cent. of which sum was awarded by the trial court to respondent as his reasonable compensation as aforesaid.

The agreement of July 1st was withheld from record, and its contents concealed from respondent until time of trial, which necessitated the filing by him of a second amendment to his original complaint, containing allegations conforming to proof, and stating a cause of action for a reasonable compensation based upon said satisfactory consummation of the negotiations between the parties. The court found all these allegations, not inconsistent with its other findings, to be true, and permitted recovery thereunder.

[1] It is appellant's contention that the above-quoted letter authorized respondent to negotiate a deal only with the proposed purchasers therein named; that it did not employ him to render other services or to find or deal with other agents or subdividers, and that it was insufficient under the statute of frauds. We concur in the view adopted by the trial court that by the last paragraph of said writing, to wit, "In any deal satisfactory to us we would expect to pay the usual realty board commission," authority was intended to be and was conferred upon respondent to negotiate with other parties for any deal satisfactory to appellant with respect to any or all of its properties and to receive a usual or reasonable compensation for his services; also that the writing satisfied the said stat-

ute (section 1624, subs. 5 and 6, Civ. Code, as it read prior to the 1931 amendment [St. 1931, p. 2260]), which required agreements, or some note or memorandum thereof, for the "leasing," "sale," or "authorizing or employing an agent or broker to purchase or sell" real property, to be in writing and subscribed by the party to be charged or his agent.

[2, 3] Appellant claims that the authorization was insufficient under the statute because it failed to describe precisely the properties involved. However, it did specifically cover "the properties owned by the Abbot Kinney Company," and this language, together with the remainder of the letter, was sufficient to confer upon respondent a general power to negotiate a deal with respect to any or all of the holdings of said company. The rule in this respect is well stated in *Pray v. Anthony*, 96 Cal. App. 772, 274 P. 1024, 1026, as follows: " * * * The essential part of a contract to employ a real estate broker, so far as the statute of frauds is concerned, is the matter of the employment and consequently need not describe the land specifically, if the terms of the employment can be made definite without it. * * * The well-established rule is, therefore, that broker's contracts are not to be declared void merely because of a defect, uncertainty or ambiguity in the description of the property to be sold, when such defect can be cured by allegations and proof of extrinsic facts or circumstances. * * * " See, also, many cases cited in support of this holding.

A brief review of some of the evidence favorable to respondent follows: Respondent testified that Mr. Carleton, appellant's auditor and business manager, approached him in August, 1925, with respect to developing or disposing of appellant's properties; that thereafter he spent much time studying its holdings, and prepared a detailed written report thereof for Mr. Kinney, appellant's president; that he first submitted the properties to Ramish and associates; that later, to satisfy them upon the question of what financial returns could be gotten from certain lots as a subdivision, he asked Oliver & Carver to report thereon; that the latter firm became so enthusiastic about the subdivision that they wanted it for themselves, and he therefore introduced them both to Mr. Kinney and Mr. Carleton for the purpose of opening negotiations looking toward their purchase of the property instead of negotiating further with the Ramish people. Prior to this time, however, he stated he had asked Mr. Kinney for a letter of authorization, including an expression that he would receive the realty board commission in any deal that was satisfactory to appellant, whereupon Mr. Kinney had dictated said letter of August 19th. He testified that he had suggested that the understanding would be much clearer if the last clause were worded to say that, "in

this or any other deal with these or any other parties," appellant would expect to pay said usual commission, but Mr. Kinney had answered that that was rather involved, and he felt the simpler expression would be more easily understood, and that respondent could be sure that, if he made any deal, they would want to pay him his commission. Respondent further testified that during all of September he negotiated with Oliver & Carver; that later they raised their offer to \$600,000, which was the price set by appellant, but, the terms being unsatisfactory, the result of all the negotiations was the agency contract finally executed by these parties. He stated that Mr. Kinney assured him that everything was going nicely and that some memorandum of his commission would be entered in the papers by his attorneys; that later one of the attorneys asked him to call, stating that they were ready to sign up; that Mr. Kinney felt morally obligated to pay him a commission and had authorized them to offer \$500, which offer, of course, was not acceptable.

Mr. Kinney testified that prior to August 19, 1925, he discussed with respondent the sale of all appellant's properties; that they later talked of a sale of the particular property here involved, and on August 19th he gave respondent the above letter; that shortly thereafter respondent reported that he could not make a deal with the Ramish people, and would like to try some one else, mentioning Oliver & Carver, and asking for a more specific letter than that of August 19th to protect him in the matter of his compensation. Mr. Kinney further testified that he then "kind of stalled it along * * * told him he would not need any letter if he made a sale to them, we would protect him and give him a commission. * * *" He stated that, after appellant entered into the contract with Oliver & Carver, he again discussed with respondent the matter of his commission and of having another letter.

Mr. Carleton gave testimony of a like tenor. He stated: "I remember after I came back he (respondent) spoke of his commission on a basis of \$600,000 in case a sale was consummated and he asked me what it would be, and I said it would be 5% of the sale price." He further testified that Mr. Kinney was present at that conversation; that "I remember Mr. Kinney figuring that after paying \$30,000 we would have a \$570,000 note." Quoting further from the record:

"Q. Now going back to the time of the letter of August 19, the writing of that, Mr. Carleton, was anything said there limiting Mr. Needham in any way to the particular associates that were named in there, Ramish and Marks and Harvey? * * * A. No, I remember Mr. Needham saying that he had some other people * * * in the event that Mr. Marks and Mr. Ramish did not go through with the deal.

"Q. Did Mr. Needham make that remark that he had some other people besides these associates before or after the letter was written? * * * A. Why it was during the time, it must have been before the letter, because he said he was negotiating with these people and had been prior to this letter, and he also mentioned that he had other people in mind.

"Q. Besides Ramish and his associates? A. Yes, besides Ramish and his associates. * * *

Mr. Carver, of Oliver & Carver, testified that respondent first approached him relative to the subdivision, and he offered \$485,000, making a deposit thereon by a \$500 check, but that it seemed after some time that a direct purchase could not be made, and they let appellant know they would be interested in obtaining the sales agency for the property; that the subject of respondent's commission was discussed in his presence several times, appellant figuring that a sale on a basis of \$600,000 for the property would net them \$570,000; that Mr. Kinney wanted to know if any commission would be due respondent if the property should not be sold and Oliver & Carver were merely a sales agency; that they said there was no realty board ruling—they did not know, but felt that perhaps some commission would be due, whereupon Mr. Kinney said he felt also that some compensation was due respondent for the work he had done. Testimony was later adduced to the effect that the realty board recognized the right of a procuring agent to compensation where the owner had been benefited by his own choice of a change from the original deal as presented by the agent and that the percentage upon which respondent's compensation was finally figured was fair and reasonable.

[4] From the above and other evidence it is clear that appellant did not intend, by said letter, to limit respondent's authorization. Furthermore, although no mention has been made of the point, and we are not here determining it, the evidence to our mind would have opened the door for respondent to present the contention that appellant was estopped to assert the statute of frauds by reason of its assurances to him that the writing was sufficient and that his compensation would be provided for. It has long been the rule that a person will be held estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud. See a discussion of this subject in *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154; *Zellner v. Wassman*, 184 Cal. 80, 85, 193 P. 84; and *Keller v. Gerber*, 49 Cal. App. 515, 522, 193 P. 809.

[5,6] We may also add that it is clear from the above and other evidence on the subject not here reviewed that the sum awarded

respondent, based on actual sales made under said Oliver & Carver contract, was both fair and reasonable, and that the land sold through Oliver & Carver was within the subject-matter of the authorization granted to respondent, which contemplated any satisfactory deal with respect to any or all of appellant's properties, as aforesaid. That the deal made was entirely satisfactory to appellant Mr. Kinney himself admitted, saying: "The contract that we signed, sure, was satisfactory to us; otherwise we would not have signed it."

No other questions merit discussion. We are thoroughly in accord with the action of the court below in this cause, and find in the record no prejudicial error.

The judgment is affirmed.

217 Cal. 47

PECK v. STATE BAR OF CALIFORNIA.

L. A. 13707.

Supreme Court of California.

Dec. 22, 1932.

1. Attorney and client ☞53(2).

In disbarment proceeding, evidence bearing earmarks of private spite should be accepted with extreme caution.

2. Attorney and client ☞53(2).

In disbarment proceeding, evidence did not show that attorney willfully, unlawfully, and fraudulently appropriated money deposited with him by complaining witness in real estate transaction.

3. Attorney and client ☞58.

Evidence showing attorney commingled money deposited with him in real estate transaction with his own money, in violation of rules of professional conduct, warranted suspension from practice for year.

In Bank.

Proceedings by Earl Curtis Peck against the State Bar of California to review an order of the Board of Governors of the State Bar, recommending that petitioner be disbarred from the practice of law.

Petitioner suspended from practice of law for one year.

William Fleet Palmer, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This proceeding was instituted by petitioner for the purpose of reviewing an order of

the board of governors of the State Bar of California recommending that he be disbarred from the practice of law in this state. No findings were made by the board of bar governors, but by resolution of said board the findings of the local administrative committee were adopted and the recommendation of disbarment based thereon made to this court. Two separate matters were presented to the board of bar governors. The first was based upon the complaint of Charles E. Paterson, a real estate dealer, that the accused had misappropriated to his own use \$4,550, deposited as 10 per cent. of the purchase price of a certain piece of real property situated in the city of Los Angeles. This is the most serious charge and it was upon this charge that the recommendation of disbarment was based. The second matter consisted of four informal complaints. Upon two of these charges the accused was acquitted and completely exonerated. The other two charges involve comparatively small amounts of money, and their chief importance depends upon whether or not they indicate a course of conduct on the part of the accused of misappropriating money belonging to others.

We will first consider the question of the alleged misappropriation of the \$4,550. The accused, while pointing out that the findings of the local administrative committee are erroneous as to some very vital facts, concedes that certain facts upon which the recommendation was based are true, and while admitting that he is guilty of mingling a client's money with his own, declares that it was done through an error of judgment and denies that it was done with a guilty intent of appropriating the money to his own use. These facts briefly stated, are as follows: Some time in January, 1930, Charles E. Paterson, the complaining witness, at the suggestion of Francis D. Adams, an attorney, telephoned the accused with respect to the purchase of the southeast corner of Thirty-Fifth place and University avenue in Los Angeles. This property was listed in the estate of John Rey, deceased, and the accused with Mr. H. A. Decker and said Francis D. Adams were attorneys of record in that estate. They were also attorneys in the estate of John Rey, incompetent, and the estate of Mary Rey, incompetent, said Mary Rey being the wife of John Rey. After several conversations over the phone with reference to the purchase of the property, the price of \$45,500 was arrived at as the purchase price. In the meantime, Mary Rey had died and the accused, who represented Florence Brooks, the administratrix in one of said estates and the guardian in the two other estates above referred to, represented her as contestant of the will of Mary Rey, deceased. The property here involved was also listed in the inventory of the estate of Mary Rey, deceased, and on April 11, 1930, when Pater-

son turned over to the accused a certified check in the sum of \$4,550 as a 10 per cent. down payment on the purchase price, the accused gave to him a typewritten receipt in which he acknowledged receipt of the check as 10 per cent. deposit of the amount offered for the certain lots, describing them, and stating ownership of the property to be in the estate of Mary Rey, deceased. The receipt stated that he would attempt to secure confirmation of sale at the price of \$45,500 and that in the event of his inability to secure acceptance of the offer by the administrator within thirty days from date, the money derived from the check should be returned to Mr. Paterson, or order, on demand. This check was deposited by the accused in the account of Janet Barth, trustee, in the National Bank of Commerce of Los Angeles. It appears that Janet Barth was the stenographer and secretary of the accused and she drew checks upon this account at his suggestion. Admittedly no declaration of trust was ever made or signed by her with reference to this account. It is apparent from the statement of this account furnished to the administrative committee by the accused that checks were drawn against this deposit for his personal account immediately after its deposit. On June 4, 1930, there remained in the account the sum of \$2,187.14, and on that date said sum was attached by Hermine M. Keegan, a creditor of the accused, leaving the account entirely depleted. Thereafter deposits and withdrawals were made almost daily. On July 31, 1930, the escrow, opened with reference to the purchase of the property, not having been closed, Paterson demanded a return of his deposit from the accused, which accused was unable to make by reason of the fact that there was in the bank, as shown by the bank statements, only a balance of \$92.79. If these were the only facts of the case, it is obvious that the accused was guilty of a misappropriation of funds and that such conduct unquestionably merited disbarment.

Accused, however, offers an explanation of his conduct, which, if true, offers some justification for his actions. This explanation is reasonable and is supported by such strong evidence that we think there can be no question of its truth. It appears that in the three Rey estates in which accused was interested as attorney with H. A. Decker and Francis D. Adams, attorneys' fees in the total aggregate of \$27,750 had been allowed and had been made a lien upon the property in the three estates. The orders granting said fees were all made prior to April 11, 1930, the date on which the accused accepted the check of \$4,550 from Paterson and deposited it in the Janet Barth trustee account. It was accused's explanation that inasmuch as he had a lien upon this property by reason of his attorney's fees he did not deem it necessary for him to keep this deposit in a separate account

as he could, upon the confirmation of sale, give a receipt for that amount of money as payment for his attorney's fees. It also appears from the testimony of Hermine M. Keegan, who attached the bank account in the sum of \$2,187.14, that after the attachment was made by her she asked him for security for the payment of other money which he owed to her by reason of loans which she had made to him and he made over to her as security an assignment of the attorney's fees due to him, but with the understanding that if it were necessary for him to repay Paterson that she would loan to him the necessary \$4,550. On July 31, 1930, when Paterson demanded a return of the money, the accused invited Paterson to accompany him to Mrs. Keegan, and a satisfactory arrangement was made whereby Mrs. Keegan released from her assignment the sum of \$4,550 to cover this deposit, and the assignment was put in escrow to protect Paterson's deposit. Thereafter on September 3, 1930, Paterson demanded the actual repayment of the deposit, and the accused repaid him the entire deposit of \$4,550 by cashier checks, this amount having been loaned to him by Mrs. Keegan. Afterwards the sale of the property was completed upon the terms agreed upon by the accused and Paterson.

[1] On November 25, 1930, complaint was made to the president of the board of governors of the State Bar by Paterson in a five-page letter which admittedly was not written by Paterson but by Francis D. Adams, with whom the accused had had considerable trouble over the attorneys' fees allowed in the three estates. According to the testimony of Adams, the accused was working for him on a straight salary basis with the understanding that he (Adams) was entitled to all fees collected whether the business had been brought into the office by the accused or not. He testified that the accused had done "about 90% of the work" in these matters and that he had promised him a 25 per cent. percentage of the attorneys' fees allowed. We do not have the accused's side of this controversy, but it is quite evident that a great deal of ill feeling was engendered by said dispute, and the testimony of Adams at the hearing of the charge against accused is replete with insinuations and innuendos entirely irrelevant to the charge preferred. It is, of course, true that the merits of the charges made do not depend upon the motives of the instigator of the charges; but, on the other hand, it is also true that the State Bar is not to be used as an instrument for the furtherance of private grudges, and that evidence which bears the earmarks of private spite should be scrutinized most carefully and accepted with extreme caution.

[2, 3] There can be no question but that the accused is guilty of a violation of rule 9 or

Rules of Professional Conduct formulated by the board of bar governors and adopted by the Supreme Court as the rules of this court. This rule provides that: "A member of The State Bar shall not commingle the money or other property of a client with his own. * * *" This salutary rule was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money. Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him. However, inherently there is danger in such practice for frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney. It appears from the record that the accused at all times since the acceptance of the money had funds due him secured by a lien on the property of the three estates with which to reimburse the complaining witness, and also that when a demand was made upon the accused for an actual repayment of the money he immediately complied with the request. While we are of the opinion that the conduct of the accused in so commingling the funds entrusted to him with his own is to be most severely condemned and merits disciplinary action, we are not satisfied, as found by the local administrative committee, that the accused did "wilfully, unlawfully and fraudulently take and appropriate" the money deposited with him by the complaining witness. In other words, we are not of the opinion that the accused intended to misappropriate and retain said money, but are of the opinion that he intended to offset it against his attorney's fees if the deal went through. And we are of the opinion that while such conduct was extremely censurable, it does not merit disbarment.

As before indicated, however, the recommendation of disbarment was not predicated upon the above charge alone. Accused was also charged with having appropriated to his own use the sum of \$21 paid to him by his client, the plaintiff in a suit entitled *Kraemer v. La Salle*, for the purpose of paying the judgment for costs secured by the defendant in that suit. The judgment was entered on December 26, 1930, and in April or May, 1931, Kraemer turned over to the accused the sum of \$21 with which to pay the judgment for costs. The accused, however, did not pay over the money to the defendant, La Salle, until November 12, 1931, the day of the hearing of the charge before the local administrative committee. His explanation was that at the same time he represented Kraemer in

the suit against La Salle, he also represented one Peterson, plaintiff, in another suit against La Salle, in which he recovered for the plaintiff a judgment against La Salle in the sum of \$3,000. Hearing that La Salle intended to take an appeal from the judgment in the Peterson Case [see (Cal. App.) 11 P.(2d) 645], and that La Salle was short of funds, he withheld payment of the \$21 in order to embarrass La Salle as much as possible. The explanation is supported only by the word of the accused, but the money has in fact been paid over, and we are inclined to accept his explanation as true. Accused admits that such procedure was "very small business," and we thoroughly agree with him.

Accused was also charged with the unlawful appropriation of money belonging to the Balboa Marine Hardware Company in the sum of \$89. The gist of the charge is that accused, as attorney for Rodgers Bros., the assignee of some ten or more creditors of Don Saunders, came into the possession of certain money obtained through the sale of a boat belonging to Saunders and in disbursing it failed to pay over to the Balboa Marine Hardware Company the total amount of \$178 due said company and only paid over to said hardware company the sum of \$89. Mr. Storey, the complaining witness, and owner of the Balboa Marine Hardware Company, did not know the exact amount of the total claims assigned to Rodgers Bros. nor did he know the amount of money which came into the possession of the accused, stating that the debts amounted to approximately \$2,000, and that the boat sold for about \$2,000, which was enough to pay all the claims and in addition to take care of the attorney's fee of the accused. According to his understanding, the buyer of the boat was to pay 85 per cent. of the purchase price upon the delivery of the boat and 15 per cent. in subsequent installments; the claimants were to receive 85 per cent. of their claims immediately and the 15 per cent. balance as the subsequent installments were made. Mr. Storey testified that on August 31, 1929, his firm had received through Rodgers Bros. a check of the accused in the sum of \$178, which represented 85 per cent. of their claim of \$209.42, but when it was presented for payment it was mailed back with the notation across the check, "payment stopped." He, thereupon, got in touch with Rodgers Bros., who took the matter up with the accused, and in about twenty days he received another check for \$89, which was one-half of the original check. The charge against the accused was based upon the fact that no further payment was received by the hardware company either in the sum of \$89 or any lesser amount. The accused admitted stopping of payment on the check and that he had not thereafter sent to the complaining witness a check for the further sum of \$89. He testified that he felt he was justified in

stopping payment on the check by reason of the fact that within a day or two after mailing the checks the purchaser of the boat had filed his petition in bankruptcy and he was afraid that he would be called upon to pay over the money previously received by him to the receiver in bankruptcy. He also stated that he had discovered an error in his calculations and that in addition to this, Lillian Palmer, who was also to share in the division of the proceeds of the boat, insisted on receiving a larger share than had been allocated to her. He stated that at a subsequent meeting with Mr. Rodgers of Rodgers Bros. it was agreed that he should turn over all the money in his possession and the collection of any further funds to one G. C. Waterhouse, who would make distribution to all parties who were entitled thereto with the exception of Lillian Palmer and that he had thereafter turned over to Waterhouse the balance of the \$1,200 received as 85 per cent. of the purchase price of the boat. In substantiation of this latter fact, the accused presented canceled checks, together with receipts from G. C. Waterhouse (with the exception of a receipt for \$50 which he was unable to locate), which, considered in conjunction with his claim for attorney's fees of \$50, apparently evidenced the payment of the entire \$1,200 received by him in this transaction. He further stated that he had agreed to pay the \$89 claimed to be due by Mr. Storey when pressed by him for it because his accounts were mixed up and he would rather pay the amount, although he had already paid over to Mr. Waterhouse everything he owed, than have Storey take the matter up with the Bar Association as he threatened to do. The accused failed to substantiate his explanation in several important particulars, and there can be no question but that the accused either deposited the \$1,200 in his regular bank account or in another bank account in which other trust funds were intermingled, rather than in a separate trust account. There is also no question but that the Balboa Marine Hardware Company was entitled to receive more than the \$89 which it did receive on its claim against Saunders and that this loss to the hardware company was due in a measure to the fault of the accused. However, it also appears by checks and receipts offered by the accused in substantiation of his claim that he did not appropriate the \$89 to his own use, that he did pay over to Waterhouse money totaling the entire amount received by him through the sale of the boat. The record shows no at-

tempt to discredit the authenticity of these checks and receipts, and undisputed they are convincing that the accused did in fact pay over all the money which had come into his possession through this transaction. That the Balboa Marine Hardware Company did not receive all the money due it from the transaction is evident. But in this whole matter the hardware company dealt with the accused through Rodgers, or the firm of Rodgers Bros., of which Rodgers was a member, and it was, according to the testimony of the accused which is not seriously disputed, by the consent and agreement of Rodgers that accused paid all money due from him to Waterhouse, who was to distribute the same to the parties entitled thereto, of which the hardware company was one. Whether Waterhouse ever paid the money due to the hardware company to that company, or if he did not, the reason of his failure to make such payment, is not clear from the record before us. It would appear that in paying said money to Waterhouse the accused acted in good faith, and while for his own protection, he might better have reserved from the amount paid Waterhouse the money due the hardware company and paid it direct to that company, we do not regard his actions in paying it to Waterhouse under the circumstances just related particularly censurable.

It is to be regretted that the evidence on both sides with reference to this charge is as meager as it is. The charge against petitioner is predicated almost entirely upon the testimony of Mr. Storey, the owner of the Balboa Marine Hardware Company, and it is apparent from the record that he was entirely unfamiliar with any of the details of the transaction as he dealt with the accused through Mr. Rodgers of Rodgers Bros., the assignee of the creditors. Perhaps Mr. Rodgers was not available as a witness at the hearing, but his testimony would have aided greatly in clearing up the actual details of the transaction and thereby making certain either the guilt or the innocence of the accused. The testimony of Mr. Waterhouse likewise would have been most helpful.

We are not satisfied from the record before us that the accused merits the extreme punishment of disbarment. We are satisfied that his conduct was extremely censurable, and, therefore, order that he be suspended from the practice of law in this state for the period of one year from and after the date of the filing of this order.

217 Cal. 25

In re EDWARDS' ESTATE.

L. A. 13177.

Supreme Court of California.

Dec. 21, 1932.

1. Trusts ⇐ 12.

Spendthrift trusts are valid.

2. Trusts ⇐ 152.

Trustee of spendthrift trust was not entitled to offset against payments due certain beneficiaries judgments obtained against them on account of transactions with testator after execution of will creating trust.

The trust was created for benefit of testator's widow and children. One-half of income was to be paid to wife for life and one-eighth to each of four children. In no possible event were payments of income to be liable for debts of beneficiaries or any other person. After execution of will, three sons became indebted to testator on promissory notes, and testator also indorsed for one of them. Indebtedness of the three exceeded \$25,000, which trustee had reduced to judgment.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

First accounting and report of the County National Bank & Trust Company, as trustee, of trust created by will of Alfred Edwards, deceased. From an order disallowing objections to trustee's account, John B. Edwards and others appeal.

Reversed, with directions.

For prior opinion, see 11 P.(2d) 678.

Newby & Newby, of Los Angeles (Nathan Newby, of Los Angeles, of counsel), for appellants Richmond A. Edwards and John B. Edwards.

Raymond R. Halls, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellant Alfred R. Edwards.

Heaney, Price & Postel, of Santa Barbara (Norman W. Ambrose, of Santa Barbara, of counsel), for respondent County National Bank & Trust Co.

Griffith & Thornburgh, of Santa Barbara (Bruce Wallace, of Los Angeles, of counsel), for respondent Elizabeth E. Jones.

Dryer, Castle & Richards, substituted for J. E. Rodgers, all of Los Angeles, and A. F. Bray, of Martinez (Bruce Wallace, of Los

Angeles, of counsel), for respondent Mabel R. Edwards.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 2. Upon further consideration, we are satisfied that the opinion of Mr. Justice pro tem. Fricke correctly determines the issues, and we hereby adopt it as the opinion of this court. It reads as follows:

The deceased died in 1926, leaving a will providing that the residue of his entire estate should go to Commercial Trust & Savings Bank of Santa Barbara, Cal., in trust, the income to be paid as follows: "One-half part thereof to my wife, Mabel R. Edwards, for and during the term of her natural life; one-eighth part thereof to my son, Alfred R. Edwards; one-eighth part thereof to my daughter, Elizabeth Edwards Ryon; one-eighth part thereof to my son, John B. Edwards; one-eighth part thereof to my son, Richmond A. Edwards, during their respective lives. Each and all of such payments are made for the sole and separate uses of the beneficiaries, and the same are not to be deemed or held liable in any possible event for the debts, control or engagements of such beneficiaries, or any other person, and are to be free from the control of any husband, and are not to be subject to any transfer, mortgage, pledge or assignment by them or either or any of them." The will was admitted to probate February 1, 1930, and the estate distributed to Security First National Bank as trustee of the trust aforesaid. On May 16, 1930, this trustee resigned and was discharged by the court, and County National Bank & Trust Company was appointed successor trustee and received the trust estate. It further appears that, subsequent to the execution of the will, John B. Edwards became indebted to the decedent on a promissory note, which was reduced to a judgment in the amount of \$4,302.30 by the executor. Similarly the executor recovered a judgment against Richmond A. Edwards for \$4,770.25 on a note given by him to the deceased subsequent to the date of the will. Alfred R. Edwards also had given a note to the deceased subsequent to the will, and decedent had also indorsed certain notes for the benefit of Alfred R. Edwards, which were paid by the estate. The foregoing transactions were reduced to a judgment against Alfred R. Edwards in the amount of \$17,996.36, in an action by the executor.

The parties to this action agree that the above-quoted provision of the will created what is commonly known as a "spendthrift trust." The question raised on this appeal is whether the trustee had the right to withhold payments due under the trust to John B. Edwards, Richmond A. Edwards, and Alfred R. Edwards, and apply the same toward

the payment of the respective judgments. The appeal is from the order of the trial court, following a hearing of the first account and report of the County National Bank & Trust Company, as trustee, and the objections thereto, by which order such offsets or retainer are authorized and approved. The trial court also found the trust to be one for the maintenance of the widow and four children.

The cases cited in the briefs of respondents recognizing the general right of an executor or trustee to set off a debt owing by the beneficiary of an estate against the distributive share of such beneficiary are not analogous to or determinative of the case before us, which involves the additional factor that the payments under the trust "are for the sole and separate uses of the beneficiaries, and the same are not to be deemed or held liable in any possible event for the debts, control or engagements of such beneficiaries." (*Italics ours.*) As to the authorities cited to the effect that debts of the beneficiary can be offset against his distributive share even though barred by the statute of limitations, they are inapplicable, for the further reason that they are contrary to the rule laid down in this state. *Estate of Schaeffer*, 53 Cal. App. 493, 495, 200 P. 508. See, also, *Estate of Cates*, 195 Cal. 319, 232 P. 972; *In re Clary's Estate*, 71 Cal. App. 22, 234 P. 851.

[1, 2] Spendthrift trusts are recognized and held valid in this state. *Seymour v. McAvoy*, 121 Cal. 438, 442, 53 P. 946, 41 L. R. A. 544; *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 186, 155 P. 995, Ann. Cas. 1917D, 1050. There remains, therefore, only the question of interpretation of the above-quoted provision of the will. It is difficult to see how the language "each and all of such payments * * * are not to be deemed or held liable in any possible event for the debts, control or engagements of such beneficiaries" could have been made more positive or more inclusive. No room is left which will permit the reading into this provision of the words "except debts due to me" or their equivalent, and to sustain the contention of respondents the clause would have to be construed as though it contained such an exception. Furthermore, the provision is apparently one for the maintenance of decedent's wife and children, and it appears to have been the intent of the testator to provide a sum for the support of each of his children without offset or retainer in any possible event. When the testator consented to his sons becoming indebted to him he did so in the light and knowledge of his testamentary provision that their distributive shares under the trust for which he had made provision in his will would not be subject to being diminished by reason of their debts "in any possible event," and the additional fact that after the note transactions above referred to no change was made in his will further indicates the in-

tent of the testator that there be no exception to the exemption of the distributive shares from any reduction by reason of any indebtedness. The question involved in this appeal appears to have come before an appellate court in only one instance, the case of *Matter of Temple*, 36 Misc. Rep. 620, 74 N. Y. S. 479, 480. In that case the testatrix left a trust fund of \$3,000 to a beneficiary who was indebted to her in the sum of \$1,363.90, and the provision against set-off or retainer was "without being subject in any degree to the intervention or order of any creditor" of the beneficiary of the spendthrift trust created by the will, language which the court declares "not only makes her intention more unmistakable, but, in effect, it declares that the income of said \$3,000 shall be beyond and above the reach of her estate as a creditor of the beneficiary." The will before us evidences a similar intent on the part of the testator.

The order appealed from is reversed, and the trial court is directed to make new findings and a new order in accordance with the opinion herein expressed.

217 Cal. 32

In re KESSLER.

L. A. 12807.

Supreme Court of California.

Dec. 22, 1932.

Rehearing Denied Jan. 20, 1933.

1. Husband and wife ⇨266.

Taking and holding community property by spouses as joint tenants held to change character of property to joint tenancy in which interest of each spouse was separate property.

2. Husband and wife ⇨14(3).

Where community character of property was changed to joint tenancy, wife succeeded to husband's interest by right of survivorship, and, upon her death intestate, without leaving parents or lineal descendants, her collateral heirs, to exclusion of deceased husband's heirs, were entitled to share therein (Civ. Code, § 1401; § 1386, subd. 8).

This was so as against contention that property remained community property, that upon death of husband intestate it vested in surviving wife under Civ. Code, § 1401, and that upon her death, leaving no father, mother, or lineal descendants, only one-half should have gone to her heirs and other half should have gone to heirs of previously deceased husband, by virtue of section 1386, subd. 8.

3. Husband and wife **14(3).**

That spouses' undivided interests in notes were obtained by giving up other notes assigned to spouses as joint tenants and that notification to spouses set forth their interests as "jt. ten." held to sustain conclusion that interests were held in joint tenancy.

4. Husband and wife **14(3).**

That notes were held by spouses in joint tenancy sustained finding that interest paid was likewise joint tenancy property.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceeding on the application of Minnie Kessler, administratrix of the estate of Laura V. Horstman, deceased, for a decree terminating the joint tenancy interest of H. J. Horstman, deceased, in property formerly held by both decedents. From a decree granting the application, the next of kin of H. J. Horstman, deceased, appeal.

Affirmed.

O. H. Taylor, Edwin Camack, and F. A. Waters, all of Los Angeles, for petitioner.

C. A. Lindeman, of Los Angeles, for respondent.

LANGDON, J.

This is an appeal from a decree terminating a joint tenancy. H. J. Horstman and Laura V. Horstman were husband and wife. All real and personal property acquired by them prior to May 19, 1929, was through their earnings after marriage, and hence, in its origin, community property. With certain minor exceptions, however, the ownership in such property was evidenced by deeds, bank accounts, and assignments of promissory notes and certificates of stock to the parties "as joint tenants," or "as joint tenants, with full rights of survivorship." H. J. Horstman died intestate May 19, 1929, leaving no father, mother, or lineal descendants. Shortly afterwards, on June 24, 1929, Laura V. Horstman died intestate, leaving no father, mother, or lineal descendants. Petitioner is administratrix of the estate of Mrs. Horstman. She applied for and received a decree terminating the joint tenancy interest of the deceased husband, on the theory that the property vested in the wife by right of survivorship upon his death, and that upon her death her heirs (a sister and a brother) were entitled thereto. The appellants are the next of kin of the deceased husband (two sisters, a nephew, and a niece). They contend that the property was community; that upon the death of the husband intestate it vested in the surviving wife under section 1401 of the Civil Code (now section 201 of the Probate Code); but

that, upon her death, leaving no father, mother, or lineal descendants, only one-half should have gone to the heirs of the deceased wife, and the other one-half should go to the heirs of the previously deceased husband, by virtue of former section 1386, subdivision 8, of the Civil Code (now section 228 of the Probate Code).

[1, 2] The controlling question is whether the taking and holding of community property by husband and wife as joint tenants changes the character of such property. The contention of appellants that its community character is left unchanged is answered in the case of *Siberell v. Siberell* (Cal. Sup.) 7 P.(2d) 1003, wherein this court held that in such a case a true joint tenancy is created in which the interest of each spouse is separate property. See, also, *Delaney v. Delaney* (Cal. Sup.) 13 P.(2d) 513; 20 Cal. L. Rev. 546. It necessarily follows that, as to all of the property involved herein which was held by the parties as joint tenants, the wife succeeded to the husband's separate interest by right of survivorship, and, upon her death, her heirs alone were entitled to share therein.

[3, 4] Appellants raise some question as to the correctness of the court's findings with respect to certain items: First, an undivided \$2,500 interest in a \$90,000 note; second, an undivided \$7,000 interest in a \$70,000 note; and, third, \$1,179.54 which was on deposit in a bank in the name of the wife. There was, in the case of these notes, no assignment of the interests to the husband and wife as joint tenants; but the notes were payable to the order of American Mortgage Company, and said company had sent written notification setting forth their interests "to Mr. H. J. Horstman & Mrs. Laura V. Horstman, his wife, as jt. ten." Moreover, these notes had been obtained by giving up other notes which originally had been assigned to the husband and wife "as joint tenants with right of survivorship." This evidence was, we think, ample for the court to draw its conclusion that they were held, as was practically all of the property of the parties over a period of years, in joint tenancy. As to the bank account, the court found that \$579.54 was still community property, and no attack is made on this finding by petitioner. The balance, \$600, represented interest paid by the maker on one of the notes held in joint tenancy, and the court was justified in finding, as with the above-mentioned notes, that the proceeds took on the character of the property with which they were acquired, and were, consequently, held in joint tenancy. See *Estate of Harris*, 169 Cal. 725, 147 P. 967.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; COURTIS, J.; TYLER, Justice pro tem.; SEAWELL, J.; SHENK, J.

217 Cal. 83

RUESS v. BARON.

L. A. 12186.

Supreme Court of California.

Dec. 23, 1932.

Vendor and purchaser ⇨18(4).

Property owner's agreement without consideration to give exclusive option to buy or sell land at stated net price to owner *held* revocable by vendor in optionee's specific performance suit, notwithstanding expenses incurred and labor performed by optionee in endeavoring to secure purchaser.

The agreement in question purporting to give exclusive option to buy or purchase property was not enforceable by the optionee on account of want of consideration, since provision that price should be net to the owner created the relation of vendor and purchaser, and not merely that of principal and agent.

In Bank.

Appeal from Superior Court, Santa Barbara County; Wm. D. Dehy, Judge.

Action by H. J. Ruess against Pierre F. Baron. Decree for defendant, and plaintiff appeals.

Affirmed.

For prior opinion, see 10 P.(2d) 518.

Ernest C. Griffith, of Los Angeles, for appellant.

Robertson & Crawford and J. W. Smith, all of Santa Barbara, for respondent.

PRESTON, J.

Action by plaintiff, claiming to be a purchaser from defendant of certain real property owned by the latter and located in Santa Barbara county, for specific performance, with a prayer for damages if such performance be found impossible. Decree in favor of defendant was given by the court below, and plaintiff has appealed upon a full record.

On July 2, 1928, defendant signed a writing, the material portions of which are as follows: "For and in consideration of the sum of One Dollar (\$1.00) to me in hand paid by H. J. Ruess, I hereby grant to said H. J. Ruess * * * the sole and exclusive right or option to buy or sell, on or before the 1st day of October, 1928, the following described lands * * * (description). The purchase price of said land to be One Hundred Thousand Dollars, * * * terms not less than twenty per cent (20%) cash at time of transfer, and balance in 1-2-3-4 annual payments equal amounts, interest at 6% per annum payable quarterly, to be secured by a mortgage which shall be a first lien on said lands. * * * Time is of the essence of this agree-

ment. Dated at Goleta, Calif., July 2nd, 1928. Pierre F. Baron."

Prior to October 1, 1928, to wit, on September 21, 1928, defendant served a written notice upon plaintiff purporting to rescind and withdraw the so-called option. No consideration was rendered by plaintiff at the time of execution and delivery of the writing, and no consideration was thereafter rendered other than alleged expenses incurred and labor performed by plaintiff in endeavoring to secure a purchaser for the property. Following said repudiation by defendant of the writing, and on September 24, 1928, plaintiff purported to exercise the option to purchase the property himself under the terms specified, and to that end he tendered the cash payment, together with the notes and mortgage necessary to comply with the writing, if in force at that time. Defendant, however, refused the tender, and stood upon his right to rescind.

The whole appeal turns upon the interpretation to be given the document of July 2d, above quoted. If it created the relation of vendor and purchaser, as distinguished from a naked agency, then clearly it was without consideration and constituted a mere offer which could be withdrawn at any time prior to acceptance. But if it was purely an agency contract to sell, plaintiff's outlay and labor would supply a consideration sufficient to infuse life into the authorization until the full period named therein had expired.

There is somewhat of a suggestion of lack of harmony in our decisions relating to this subject. In the case of *Sill v. Ceschi*, 167 Cal. 698, 140 P. 949, the court had under consideration an authorization to sell, which read in part as follows: "I hereby authorize George W. Sill, my agent for the term of thirty days from date hereof * * * to sell and accept money for the sale, at the sum of \$15,000.00, or as much less as I may hereafter agree to take, of the following described property. * * * For his services * * * promise to pay him * * * one-half of any amount for which he may sell said property over the price herein asked by me, to wit: \$15,000.00." This document was held to be a mere agency agreement and to be supported by a consideration resting solely upon outlays and labor of the agent in finding a purchaser, the court saying (page 702, of 167 Cal., 140 P. 949, 950): "Besides, since the authorization was for 30 days, a revocation within that period would not have been effectual, if plaintiff, prior to the attempted cancellation, had expended money and effort in seeking to find a purchaser. *Blumenthal v. Goodall*, 89 Cal. 251, 26 P. 906; *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 P. 354." The cases cited in the above quotation and *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 P. 1086, are in a similar category.

But in the case of *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 28 P. 796, 797, 27 Am. St. Rep. 167, the court had under consideration an authorization, the provisions of which, so far as here material, read as follows: "We hereby authorize Easton & Eldridge for us, and within five days from date hereof, and until this authority is canceled in writing by us, to sell for the sum of \$10,000—net dollars—the following described property * * * and we will pay said Easton & Eldridge a commission of all over said sum of \$10,000, net, for which they may sell said property with our consent. * * *" In holding that this document created a relationship not of mere agency but of vendor and purchaser, the court said: "The relation of the defendant to the plaintiffs was not that of a mere agent. While its authority to sell the land was derived from the plaintiffs, yet the sale was to be made for its own account and benefit, as well as for that of the plaintiffs. Although the authority to sell was not so coupled with an interest as to create in the defendant an interest in the land, or to prevent the plaintiffs from revoking the authority, yet by the terms of the authorization the defendant acquired such a right to a portion of the proceeds of sale as to enable it to make a contract of sale upon terms of its own choosing. The plaintiffs, in effect, gave to the defendant an option for five days to endeavor to sell the block of land for * * * \$10,000, and agreed that defendant should have whatever sum it could realize therefor above that amount. The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent, and a sale by the defendant thereunder was in the capacity of a vendor upon its own account, and not for the account of the plaintiffs."

Again, in *Smith v. Blodget*, 187 Cal. 235, 240, 241, 201 P. 584, 585, the court, in construing a writing authorizing a party to "handle and sell" certain real property "for us at a net price to us of \$100.00 per acre," said: "The fact that the agreement conferred the option to 'handle and sell' the property for a certain sum, rather than to 'purchase,' does not, as defendants contend, necessitate the conclusion that the contract is merely one of agency. Whether an agreement permitting a person 'to sell' land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties. James, *Law of Option Contracts*, § 114. Where there was a revocable authorization to a firm of real estate agents to sell land for \$10,000 net to the owners, with an agreement to pay 'a commission of all over said sum * * * for which they may sell said property with our consent,' it was held * * * that a sale by the firm under this agreement was effected in the capacity of vendor on its own account, and not as agent of

the owners of the land. *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 27 Am. St. Rep. 167, 28 P. 796. The determining factor in that case was the direct interest in and right to a part of the proceeds of the sale which was granted to the persons making the sale. The written instrument in the case at bar contains no express provision that plaintiffs shall retain that portion of the purchase price which exceeds the specified selling price. However, Smith, Jr., is given the right to sell 'at a net price to us (the owners) of \$100 per acre.' Had the contract stated that Smith was authorized to sell the property for not less than \$100 per acre net to the owners, it might be held that the provision was purely one of limitation, and that the intent was fairly clear, that the person bringing about the sale should have no interest in the proceeds as such. *Allen v. Clopton* (Tex. Civ. App.) 135 S. W. 242. But the broad and unrestricted provision giving Smith the right to effect a sale at a net price to the owners of \$100 per acre is susceptible of sundry interpretations. It may mean that all net proceeds above the specified price belong to him, the owners of the property agreeing to part with all interest in the property, whatever the price may be, provided they receive the sum of \$100 per acre free from all deductions, in which case Smith would be in the position of a vendor selling on his own account; it may mean that the owners of the property are entitled to receive all of the net proceeds of the sale and that Smith cannot look to them for any compensation for services unless he obtains for them a net price in excess of \$100 per acre, and in that case he would be a mere agent. * * * The provisions of the contract are not clear in this respect. * * * The intention of the parties is imperfectly expressed and the language employed by them is ambiguous and requires interpretation. It was therefore permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned. * * * Taking into consideration the dealings previously set forth, the various assignments of the option and the manner in which the sale was conducted * * * the evidence must be held sufficient to support the finding of the trial court 'that the said instrument was acted upon and construed by the grantors thereof and all the parties to this action as an option, and not as a mere agency authorization.'

Again, in the case of *Tufts v. Mann*, 116 Cal. App. 170, 2 P.(2d) 500, the court quotes approvingly the language above quoted from the case of *Robinson v. Easton, Eldridge & Co.*, supra, and holds that a party exercising an option, which specified that the owner should receive \$50,000 net for his property, was not acting as a real estate broker but as a principal, and was therefore not required to possess a broker's license.

We think the line of cases last mentioned

are controlling here, and that the writing here in question was much more than a mere agency agreement, and we are not privileged to interfere with the court's decree to this effect. The price of defendant's property, whether purchased by plaintiff or by another, was to be a net price to defendant. Plaintiff's profit or compensation, if any, was to be what he could sell the property for over and above that amount; whether he sold it for much or little above that amount would avail the owner nothing. Plaintiff testified that he was to receive all sums in excess of the price named as a profit, and that he was quoting the property at \$125,000. Efforts to sell to others, in view of this relationship, would not be a consideration for the option to purchase. As intimated in *Smith v. Blodget*, supra, the provision that the price should be net to the owner, no more and no less, was sufficient to authorize the court to decree that the relation of vendor and purchaser was thereby created.

This makes applicable the clear doctrine stated by the court in the case of *Brown v. San Francisco Savings Union*, 134 Cal. 448, 66 P. 592, the syllabus of which reads as follows: "An option given to a real estate agent proposing to sell lands, but wishing himself to purchase the same, to buy within a time limited, upon certain terms and conditions, of which no notice of acceptance was given, and for which no consideration was paid, and which he is free to exercise or not, is a mere nudum pactum, and amounts only to a continuing proposal, which may be withdrawn by the party making it before such notice of acceptance is communicated; and after notice of such withdrawal the option cannot be exercised." This doctrine has been reannounced in numerous later cases.

Again, if this document be treated as containing a dual offer, one an option and the other an agency, we see no reason why the two provisions may not rest upon different foundations. It is clear that the option to purchase provision may be segregated from the other provision. *Mott v. Cline*, 200 Cal. 434, 253 P. 718. Upon this aspect of the case, *Jolliffe v. Steele*, 9 Cal. App. 212, 215, 98 P. 544, 545, seems to be in point; the court there having used the following language: "Moreover, in our opinion, the express covenant on the part of an agent authorized to sell real estate that he will endeavor to sell it at a fixed net price to the owner is not a sufficient consideration for the grant of an option to such agent to purchase within a given time at such fixed price. Such contract is a mere proposal to sell, unsupported by sufficient consideration, and subject to revocation by the owner at any time before the negotiation of a sale or the exercise of such option by the agent to purchase."

We see no room here for operation of the

principle that if A gives value for two or more promises from B, B cannot claim that one of such promises was not supported by consideration, though the parties have not apportioned the consideration to the separate promises. The difficulty here is that at the time of the execution and delivery of the document in question, no consideration whatever was given. The only consideration contended for is labor and expenses touching the proposition of an agency, thereby creating an estoppel in favor of plaintiff against defendant as to that particular provision, without bearing any relation to the option provision. Moreover, under no aspect of the case would plaintiff be entitled to specific performance.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; TYLER, Justice pro tem.

217 Cal. 43

DRAFFEN et ux. v. UNITED STATES FIDELITY & GUARANTY CO.

L. A. 11197.

Supreme Court of California.

Dec. 22, 1932.

Rehearing Denied Jan. 20, 1933.

1. Injunction ⇨239.

Temporary injunction restraining lessors from interfering with sublessee's possession was also available to its assignee which succeeded to sublessee's rights subsequent to injunction.

2. Injunction ⇨251.

Burden of sustaining right to injunction rests on bonded party procuring it.

3. Injunction ⇨252(4).

Damages caused by acts of assignee of sublessee which assigned lease after procuring wrongful issuance of temporary injunction restraining lessors from interfering with its possession held recoverable under bond securing lessors against damages sustained "by reason of injunction."

In Bank.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by J. A. Draffen and wife against the United States Fidelity & Guaranty Company. From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

For prior opinion, see 9 P.(2d) 332.

Anderson & Anderson, A. G. Ritter and Edward C. Mills, all of Los Angeles, for appellant.

Wood & McArthur, Doyle, Clark, Thomas & Johnson, Earl W. Wood, and Clyde Doyle, all of Long Beach, Ralph K. Pierson, of Compton, and Byron J. Walters, of Los Angeles, for respondents.

SEAWELL, J.

This is an action against the surety on an injunction bond. Judgment went for the plaintiffs and the defendant appeals.

It appears that the plaintiff and her husband, since deceased, leased oil land to one Gildner, who assigned to the Beaver State Oil Company. After the lessors had declared the lease forfeited for violation of the provisions thereof, the Beaver State Oil Company obtained a temporary injunction restraining the lessors from interfering with the possession, occupation, and use of said land and the oil well, equipment, and appurtenances by the Beaver State Oil Company. The bond here sued on was issued in support of said injunction. Pursuant to said injunction, which was served on plaintiffs on January 10, 1925, they surrendered possession on said date to the Beaver State Oil Company, and five days thereafter the lease was assigned to the Julian Petroleum Corporation. The action in which the injunction was obtained was dismissed for lack of prosecution on July 25, 1927, whereupon plaintiffs brought action on the injunction bond. Defendant's motions for a nonsuit and instructed verdict respectively being denied it rested its case without offering any testimony on its behalf. Judgment went for the plaintiffs for the principal sum of the bond.

Upon this appeal the main contention of the appellant is that any injury suffered by plaintiffs was occasioned by the acts of the Julian Petroleum Corporation and not by the acts of the Beaver State Oil Company, or its servants, agents, or employees, and therefore said damage could not have been sustained "by reason of said temporary injunction" and for which defendant may be held liable as surety on the injunction bond.

The amount of damages sustained by plaintiffs which it is claimed is the proximate result of the wrongful issuance of the temporary injunction are far in excess of the sum named in the bond.

[1] At the time the injunction was issued plaintiffs were in possession of the demised premises and the well was producing. The Julian Petroleum Corporation, assignee of the lease subsequent to the issuance of the injunction and the execution of the bond herein sued on, took the well off production to alter it and was never able to get it to produce again. By the terms of the bond sued on the surety agreed to pay such damages as plaintiffs should sustain "by reason of the said temporary injunction if the said superior court

finally decide that the said plaintiff [Beaver State Oil Company] was not entitled thereto." The express condition of the bond is that the principal and surety will pay such damages as the party enjoined sustains "by reason of the injunction." By reason of the injunction the plaintiffs in the present suit were required to and did surrender possession to the Beaver State Oil Company. Pending suit, the lease was assigned to the Julian Petroleum Corporation, and by reason of the injunction the Beaver State Oil Company was enabled to deliver possession to the Julian Petroleum Corporation. The injunction restraining plaintiffs from interfering with the possession of the Beaver State Oil Company would also be available to the Julian Petroleum Corporation which succeeded to the rights of the Beaver State Oil Company in the land by assignment made subsequent to service of the injunction. But for the injunction the plaintiffs herein would have remained in possession.

[2, 3] Appellant contends there is no evidence in the case tending to establish agency between the Julian Petroleum Corporation and its transferors. While there is no direct testimony on that point, there is evidence by way of inference which tends to establish such relationship. For instance, the procurer of the temporary injunction, as the representative of the Beaver State Oil Company, turned over the possession acquired by it to the Julian Petroleum Corporation and thereby gave the implied consent and acquiescence of the Beaver State Oil Company to such control and possession, as did its assignee the Lewis Oil Corporation. These are facts which tend to establish an inference of interlocking relationship between the several oil companies. However, we do not regard this question as conclusive of plaintiffs' right to prevail in the action. The damage suffered by respondent was the proximate result of the temporary injunction which the Beaver State Oil Company procured and which was finally dismissed for want of prosecution. The burden of sustaining the right to an injunction rests upon the bonded party procuring it. In this case there was an abandonment of the right and the injunction was discharged on respondents' motion. By virtue of the injunction which issued plaintiffs were deprived of possession, and the obligation of the Beaver State Oil Company and its surety is to pay plaintiffs such damages as they suffered by reason of being deprived of possession. Such deprivation is traceable solely to the injunction which prevented plaintiffs from taking possession as against the Beaver State Oil Company and the assignees of its rights, one of which is the Julian Petroleum Corporation. The latter corporation, as successor in interest of the rights of the Beaver State Oil Company, cannot be regarded as a stranger to the litigation.

In *Rice v. Cook*, 92 Cal. 144, 149, 28 P. 219, 220, the following from High on Injunctions, § 1673 (3d Ed.) is quoted and approved: "In determining the amount of damages to be allowed upon the dissolution of an injunction restraining one from exercising acts of ownership over his real property, the courts are not governed by arbitrary rules, but proceed upon equitable principles; the defendant being entitled to such damages as are the necessary and proximate result of such deprivation. * * * The damages actually sustained by defendants by being kept out of possession will be allowed. * * *"

The trial court did not commit error in denying appellant's motion for nonsuit or in refusing to direct a verdict in its favor.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; TYLER, Justice pro tem; LANGDON, J.

216 Cal. 764

NORCOP v. JORDAN, Secretary of State.
S. F. 14771.

Supreme Court of California.

Nov. 30, 1932.

1. Elections ☞ 126(4).

Candidate failing to receive his party's nomination *held* not entitled to be candidate of any other party at ensuing general election, notwithstanding he received highest number of votes cast on ballot of another party (St. 1913, p. 1404, § 23, as amended by St. 1917, p. 1356, § 9).

2. Elections ☞ 126(1).

Where candidate receiving highest number of votes cast on Democratic primary ballot failed to receive nomination of his own party, candidate receiving next highest number of votes cast on Democratic ballot *held* "defeated," and hence, ineligible for nomination as candidate to be named by Democratic state central committee (St. 1913, p. 1383, § 5(1), as amended by St. 1929, p. 495, § 1; § 25 [p. 1407], as amended by St. 1927, p. 1696, § 6).

[Ed. Note.—For other definitions of "Defeat," see Words and Phrases.]

3. Statutes ☞ 190.

Unambiguous statute admits of no interpretation other than that which its plain language signifies.

PRESTON, J., dissenting.

In Bank.

Mandamus proceeding by Maurice R. Norcop against Frank C. Jordan, as Secretary of State.

Peremptory writ denied, and alternative writ discharged.

J. F. T. O'Connor and W. P. Hubbard, both of Los Angeles, Francis C. Brown, of San Francisco, Isadore B. Dockweiler, of Los Angeles, and Morgan V. Spicer, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

PER CURIAM.

This is an application for a writ of mandate to compel the respondent as Secretary of State to certify and declare the petitioner to be the duly nominated candidate of the Democratic Party for the office of representative in Congress for the Fourteenth congressional district of California, and to place the name of petitioner as such candidate on the official ballot to be used at the general election to be held on November 8, 1932. In view of the necessity for an immediate decision in this matter, judgment was rendered without written opinion on the day oral argument was had; it being stated that an opinion would be filed later.

[1, 2] The petitioner was registered as a member of and was thereafter affiliated with the Democratic Party. At the primary election held on August 30, 1932, he was a candidate for the Democratic nomination for Congress in said district, and his name appeared on the Democratic ballot as such. He did not seek the nomination of any other party. George W. Rochester was affiliated with the Republican Party, and sought the nomination for Congress in said district on both the Republican and Democratic tickets. At the primary election, Rochester failed to receive the nomination of his own party, but he received the highest number of votes cast on the Democratic ballot. Since he failed to receive the nomination of his own party, he is not entitled to be the candidate of any other party at the ensuing general election. Section 23, Direct Primary Law; Stats. 1917, pp. 1341, 1357; *Heney v. Jordan*, 179 Cal. 24, 175 P. 402. On the foregoing facts and the law, the petitioner concedes, and properly so, that, by reason of the ineligibility of Rochester to receive the Democratic nomination, a vacancy now exists in the matter of the nomination of a Democratic candidate for Representative in Congress in said district. *Heney v. Jordan*, 179 Cal. 24, 175 P. 402; *Edwards v. Jordan*, 183 Cal. 791, 192 P. 856. The petitioner received the next to the highest number of votes on the Democratic ballot, and it

is alleged in the petition that the newly elected Democratic state central committee desires to appoint the petitioner to fill such vacancy. The Attorney General makes no point of the fact that the state central committee has not already acted, inasmuch as the controversy has reached the stage where the Secretary of State has notified the petitioner that he will not certify him as the Democratic nominee, nor will he place the name of the petitioner on the general election ballot, even if the state central committee should appoint him to fill the vacancy.

The respondent refuses to take action in the petitioner's favor because of the provisions of subdivision (l) of section 5 and section 25 of the Direct Primary Law (St. 1929, p. 495, § 1; St. 1927, p. 1696, § 6). Subdivision (l) of section 5 provides: "Nothing herein shall be construed as prohibiting the independent nomination of candidates as provided by section 1188 of the Political Code, as said section reads at the time of said nomination; except one whose name has appeared upon the ballot as a candidate of any political party at a primary election held under the provisions of this act, and who is defeated for such party nomination at such primary election, shall be ineligible for nomination as an independent candidate, or as a candidate named by a party central committee to fill a vacancy as provided in section 25 of this act for the same or any other office at the ensuing general election. * * *" Section 25 provides that the vacancy created on account of the ineligibility of a person to qualify as a candidate because of the inhibitions of subdivision (l) of section 5 of the act, or for any other cause, shall not be filled except in the following cases: "1. By reason of the death of a candidate occurring at least twenty-five days before the date of the next ensuing November election. 2. By reason of the disqualification of a candidate occurring on account of the failure of such candidate to secure nomination in his own party as required by section 23 of this act."

The question to be determined is whether the petitioner is a defeated candidate within the meaning of subdivision (l) of section 5. If so, he is ineligible for nomination as a candidate to be named by the party state central committee, and the latter is without power to name him under the inhibitions of section 25.

In *Narver v. Jordan*, 173 Cal. 424, 160 P. 245, 246, it appeared that Henry Stanley Benedict was a candidate for the Republican nomination for Representative in Congress from the Tenth congressional district. At the primary election he failed of that nomination. No candidate for the Progressive Party nomination for that office appeared on the ballot. Benedict's name was written in for such nomination in the blank spaces provided therefor by a sufficient number of electors to make him the Progressive Party

nominee for the office, if he was eligible as such. A proceeding in mandamus was initiated to compel the Secretary of State to omit his name from the certification of nominees. The court stated: "It must be held that he filed nomination papers as a candidate for the Republican party nomination, and he was defeated for such party nomination at the primary election. * * *" There was nothing, however, in the then state of the law, to prevent a "write in" nomination for the office by the electors of another party, and the peremptory writ was denied. The declaration by this court in 1916 that, under circumstances identical with those presented in the present proceeding, Benedict was "defeated" for his own party nomination, is persuasive that the word "defeated" was employed by the Legislature in the same sense and to the same effect as used by this court when in 1919 the term "defeated" was incorporated in an amendment to the Direct Primary Law. Section 5, subd. 9, Stats. 1919, pp. 39, 48.

It is argued that, in order that the petitioner be declared defeated, there must have been a nomination on the Democratic ticket, that Rochester was not nominated, and that therefore there was no candidate who was defeated for the Democratic nomination. There would seem to be at least two answers to the argument: First, it seems clear that a candidate who was not nominated was for all purposes defeated for such nomination. The petitioner submitted his name to the Democratic electors for nomination. Those electors assembled at the polls and rejected him by casting more votes for one of his opponents on that ticket. The petitioner concededly was not nominated. No other conclusion seems reasonable or possible than that he was defeated for that nomination. Secondly, considerable confusion has arisen by failure to distinguish between nomination and eligibility. Mr. Rochester was eligible as a candidate for the Democratic nomination. His name was lawfully on the primary ballot. He was eligible to receive the Democratic nomination conditionally. *Heney v. Jordan*, 179 Cal. 24, 30, 175 P. 402. He received that conditional nomination, and, by reason thereof, no one else received such nomination, conditional or otherwise. But the condition was not fulfilled by reason of his failure to receive the nomination of the party with which he was affiliated. Because the condition was not met, he is deprived of the right under present law to run at all for the office. If perchance his nomination had been recognized and his name were to be placed on the ballot and he should be elected, he could serve out his term as a de facto officer if his right to the office were not challenged. *Oakland Paying Co. v. Donovan*, 19 Cal. App. 488, 496, 126 P. 388; 46 C. J., p. 1056. That he may not now go forward to the general election on the Democratic ticket is because of express statutory law prohibiting it. It

is conceded that his opponent, the petitioner herein, was not nominated conditionally or otherwise, and because of that fact the petitioner must be deemed defeated for such nomination as contemplated by our statute.

Decisions from other states are cited and relied upon by the petitioner, notably *Armstrong v. Simonson*, 84 Colo. 472, 271 P. 627, 628, and *Halteman v. Grogan*, 233 Ky. 51, 24 S.W.(2d) 921. In the *Armstrong* Case, Simonson had been a candidate for nomination to the office of state senator. At the primary he was defeated by one Stephen, who shortly after his nomination died. The party committee, duly authorized in proper cases, nominated Simonson to fill the vacancy. The Colorado law (Laws 1927, p. 319, § 5) provided that "no person who has been defeated as a candidate in a primary election shall be eligible as a candidate for the same office in the next ensuing general election." It was held that, although the language of the statute taken literally would seem to exclude Simonson's name from the general election ballot, the purpose of the statute was not to permit "a person who had sought a party nomination and was defeated at the party primary election to run as the candidate of a rival party in opposition to the candidate of his own party, and have his name, as the candidate of such rival party, placed upon the general election ballot." Under the prior law he could do so, or he could run under the old law independently by petition, in which event his name would appear on the general election ballot, as such candidate, in opposition to the candidate of his own party. The court concluded that Simonson was not a defeated candidate within the meaning of the new law under the facts presented. It was directly stated by the court that Simonson was "defeated" at the primary election, and there was no direct and positive provision, such as we find in the California law, prohibiting a party committee from nominating a candidate who was defeated at the party primary. If the Colorado law had contained the same prohibition as the California law, undoubtedly the Supreme Court of that state would have given it recognition as an expression of the legislative will.

[3] In the *Halteman* Case Grogan was a candidate for the nomination for magistrate in the Fourth magisterial district in McCracken county. One Mattison was also a candidate for the same nomination, and received more votes than Grogan at the primary election. Grogan contested Mattison's right to the nomination on the ground that he was not a resident of the magisterial district and Mattison filed a counter contest against Grogan on the ground that the latter had not filed an account of his election expenditures as required by law. The trial court adjudged that Mattison was ineligible to receive the nomination because of nonresidence, and that

Grogan had forfeited his right to the nomination by reason of his failure to file his preprimary statement of expenses. No appeal appears to have been taken from said judgment. Thereafter the Democratic Party committee selected Grogan to fill the vacancy, and his name was placed on the general election ballot. Halteman announced himself as an independent "write in" candidate, and received 75 votes. Grogan received 868 votes, and was awarded a certificate of election. Halteman contested Grogan's right to the certificate of election under the Kentucky statute (Ky. St. § 1550-6) which provided that no candidate for a public office in the state "who shall have been defeated for the nomination for any office" should be permitted to run for the same office at the general election. The trial court dismissed the contest, and the judgment was affirmed by the Court of Appeals, which held that Mattison was ineligible to receive the nomination by reason of nonresidence in the district, and all votes received by him were void; that Grogan had not been defeated by Mattison in the sense that the term "defeated" was used in the statute; that, if Grogan had received a certificate of nomination it would have been valid notwithstanding his failure to file his expense account; and that, in any event, Grogan was entitled to a certificate of election. The determination that Grogan was not a defeated candidate at the primary election as contemplated by the statute, appeared to rest upon the premise that, as he was the only eligible candidate for the nomination at the primary and as he received the highest number of votes of those eligible, a certificate of nomination if issued to him, would have been valid. Such is not the law of this state. *Heney v. Jordan*, 179 Cal. 24, 30, 175 P. 402. Furthermore, Mattison was not conditionally eligible for nomination as was Rochester in the present case. The votes cast for Rochester were valid votes and would have been effective to place him in nomination by the Democratic Party, if he had also received his own party nomination. When the statutory laws in Colorado and Kentucky are scrutinized, it is at once apparent that there was no attempt to provide therein for the contingencies which have with particularity been provided for in this state. Our law is plain, certain, and unambiguous, and as such can admit of no interpretation other than that which its plain language signifies. *Heney v. Jordan*, *supra*. The obvious purpose of our law is, at least in part, to prevent a party committee, constituting as it does a small group of the members of that party, from imposing upon the electors a candidate of that party who had been rejected by the members thereof assembled at the polls at the primary election.

The peremptory writ is denied, and the alternative writ is discharged.

PRESTON, J.

I dissent. Without intending to inject Holy Writ into a political tangle, I base this dissent upon the doctrine that the "Letter killeth but the Spirit giveth life."

The word "defeated," when interpreted as in the majority opinion, corrects no evil and serves no purpose except to injure the applicant in favor of others who have in no sense been injured by him. It may curtail the prerogative of the electors of the Democratic Party by refusing them the right to select their own candidate, thus favoring the opposing party nominee when no just claim to preference can exist.

Rochester's ineligibility left no nominee for Congress of the Democratic Party. There was, of course, in no true sense, any one defeated for the nomination in that party. Why not allow the second in the running or any one other than Rochester to have the place if the committee selects him? Statutes should receive a reasonable interpretation in the light of the abuses at which they are aimed. This question was considered at length in *People v. Ventura Refining Company*, 204 Cal. 286, 268 P. 347, 349, 283 P. 60; the California cases are there collated, the old law *Bologna Case* is cited, and the court then quotes with approval the following remarks of Mr. Justice Field used in *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Two courts of last resort have made a proper interpretation of similar statutes. In the case of *In re Halteman v. Grogan*, 233 Ky. 51, 24 S.W.(2d) 921, 922, Grogan, a candidate at the August, 1929, primary election for magistrate, was defeated by Mattison, who was later declared ineligible. Grogan was appointed nominee by the Democratic county committee, but it was claimed that his defeat rendered him ineligible under a Kentucky statute providing that no candidate, having filed his application, and having been defeated for the nomination thereunder, should be eligible for the same office for which he was a candidate, at any general election held during the year his application was so filed and in which he was a candidate in any primary election under the act. The Supreme Court, however, held that Grogan was not defeated for the nomination in the sense that that term was used in said statute, stating: "This provision was primarily intended to prohibit a candidate, who had filed his ap-

plication * * * and who had received fewer votes than another candidate, from becoming a candidate at the general election against a candidate who had defeated him in the primary election. Grogan was not defeated by Mattison in the primary election, since Mattison was ineligible to become a candidate for the Democratic nomination for the office and all votes received by him were void."

Again, in the case of *In re Armstrong*, Secretary of State, v. Simonson, 84 Colo. 472, 271 P. 627, 628, one Stephen defeated Simonson for state senator at the primary election and thereafter died, whereupon the Republican Party designated Simonson for the office. Pursuant to a statute which declared that no person defeated as a candidate in a primary election should be eligible as a candidate for the same office in the next ensuing general election, the Secretary of State refused to accept the certificate of nomination from Simonson. The court said: "Standing alone, the words, taken literally, would seem to exclude Simonson's name from the printed ballot. But in construing statutes, words are not always to be given their literal meaning. In order to ascertain the legislative intent, which, when ascertained, must control, words should be considered with reference to the purpose sought to be accomplished by the statute in which they occur. * * * In order to ascertain to what situation the section in question was intended to apply, we should consider the old law, the mischief, and the remedy. A classic example of this manner of construing statutes is given by Blackstone. The Bolognian law, mentioned by Puffendorf, 'that whoever drew blood in the streets should be punished with the utmost severity,' taken literally, seems to cover the case of a surgeon who opened the vein of a person who had fallen down in the street with a fit; but it was held that the law did not apply to such a case. 1 Blackstone's Comm. 60. Coming now directly to the case before us, it is to be noted that the old law permitted a person who had sought a party nomination and was defeated at the party primary election to run as the candidate of a rival party in opposition to the candidate of his own party. * * * Where a candidate who has been nominated at a primary election dies, the filling of the vacancy by those who are authorized to represent the party, and to act for it in such matter, does not create any of the mischiefs sought to be remedied by the Act of 1927. On the contrary, such action is strictly in harmony with the purposes of that statute. Our conclusion is that the section in question does not operate to exclude Simonson's name from the general election ballot, and therefore that the trial court was right in making the writ peremptory."

It is clear to my mind that here the writ should have issued as prayed.

216 Cal. 789

Ed. F. ACKLEY, Petitioner, v. Frank C. JORDAN, as Secretary of State of the State of California, Respondent.

S. F. 14776.

Supreme Court of California.

Nov. 30, 1932.

In Bank.

Application for writ of mandate prayed to be directed to respondent as Secretary of State of California to compel him to certify petitioner to be the duly nominated candidate of the Democratic Party for assemblyman, Nineteenth assembly district, and to place petitioner's name as such candidate upon the official ballot to be used at the general election on November 8, 1932.

Writ denied.

J. F. T. O'Connor and W. P. Hubbard, both of Los Angeles, Francis C. Brown, of San Francisco, Isadore B. Dockweiler, of Los Angeles, and Morgan V. Spicer, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

PER CURIAM.

Mandate to compel the Secretary of State to certify the petitioner as the duly nominated candidate of the Democratic Party for the office of assemblyman for the Nineteenth assembly district, and to place his name on the official ballot at the ensuing general election.

The petitioner was affiliated with the Democratic Party, and was a candidate for the office of assemblyman in said district at the recent primary election. Gardiner Johnson was affiliated with the Republican Party, and was a candidate of that party for the same office. Mr. Johnson failed of nomination of his own party, but received the highest number of votes on the Democratic ticket. On September 13, the newly elected Democratic county central committee met, declared a vacancy to exist in the matter of the nomination of a Democratic candidate for said office, and selected the petitioner as such nominee. The facts bring the case squarely within the holding of this court in the case of Norcop v. Jordan, 17 P.(2d) 123, this day decided.

On the authority of that case, the peremptory writ is denied, and the alternative writ is discharged.

PRESTON, J.

I dissent.

216 Cal. 788

E. L. HUBBARD, Petitioner, v. Frank C. JORDAN, as Secretary of State of the State of California, Respondent.

S. F. 14779.

Supreme Court of California.

Nov. 30, 1932.

In Bank.

Application for writ of mandate prayed to be directed to respondent as Secretary of State of California to compel him to certify petitioner to be the duly nominated candidate of the Democratic Party for Representative in Congress for the Seventh congressional district, and to place petitioner's name as such candidate upon the official ballot to be used at the general election on November 8, 1932.

Writ denied.

J. F. T. O'Connor and W. P. Hubbard, both of Los Angeles, Francis C. Brown, of San Francisco, Isadore B. Dockweiler, of Los Angeles, and Morgan V. Spicer, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

PER CURIAM.

Mandate to compel the respondent Secretary of State to certify the petitioner as the duly nominated candidate for the office of Representative in Congress for the Seventh congressional district.

The petitioner was affiliated with the Democratic Party, and his name was on the Democratic ballot as a candidate of that party for the nomination to said office at the recent primary election. John Corgiat, Jr., was affiliated with the Republican Party, was a candidate for the nomination to said office on the Republican ticket and was also a candidate on the Democratic ticket. He lost the nomination of his own party, but received the highest number of votes cast on the Democratic ballot.

The petitioner alleges, on information and belief, that a majority of the members of the newly elected Democratic state central committee desires to nominate him as the Democratic candidate, but that the respondent has announced that he will not certify him as such nominee, even if the party committee should select him.

The pertinent facts are the same as those appearing in the case of Norcop v. Jordan, 17 P.(2d) 123, this day decided.

On the authority of that case, the peremptory writ is denied, and the alternative writ is discharged.

PRESTON, J.

I dissent.

216 Cal. 748

WOOD, State Superintendent of Banks, v. IMPERIAL IRR. DIST.

L. A. 12870.

Supreme Court of California.

Nov. 30, 1932.

Rehearing Denied Dec. 29, 1932.

1. Waters and water courses ⇨224.

Irrigation district is not, strictly speaking, "municipal corporation," nor is it "political subdivision of state or county" or "political subsidiary."

[Ed. Note.—For other definitions of "Municipal Corporation" and "Political Subdivision," see Words and Phrases.]

2. Waters and water courses ⇨228½.

Words "or other political subdivisions" following words "state or any county, city and county, city, town, municipality," in constitutional amendment authorizing bank deposits by such entities as provided by law, exclude irrigation districts under ejusdem generis doctrine (Const. art. 11, § 16½, as amended in 1924).

3. Waters and water courses ⇨228½.

Constitutional prohibition of Legislature from delegating to private corporations power to control or interfere with municipal money or property does not preclude state bank superintendent from recovering amount paid irrigation district on government bonds pledged by bank as security for district deposits (Const. art. 11, § 13).

Const. art. 11, § 13, further provides that Legislature shall have power to provide for supervision, regulation, and conduct of affairs of irrigation, reclamation, or drainage districts.

4. Waters and water courses ⇨228½.

Legislature cannot empower irrigation district to draw securities from bank's assets as protection against loss of money deposited by district (Const. art. 11, § 13, and § 16½, as amended in 1924).

5. Waters and water courses ⇨228½.

Statute providing for deposit of state moneys in banks and furnishing of security therefor is inapplicable to irrigation districts (St. 1923, p. 21).

6. Waters and water courses ⇨228½.

Act requiring deposit of municipalities' moneys in banks and furnishing of security therefor held inapplicable to irrigation districts (St. 1923, p. 25).

7. Waters and water courses ⇨228½.

Act permitting security for bank deposits of cities, towns, and other governmental or political subdivisions of state does not apply to irrigation districts (St. 1909, p. 87, § 21a, as added by St. 1913, p. 148, as amended).

8. Depositaries ⇨7.

Agreement to pledge bank's assets to irrigation district as security for deposits made before effective date of act requiring banks to furnish government bonds as security therefor held illegal (St. 1909, pp. 92, 94, §§ 21, 27, as amended by St. 1913, pp. 147, 151; St. 1897, p. 254, § 27b, as added by St. 1927, p. 188).

9. Banks and banking ⇨80(5).

One bank depositor's right may be secondary to that of another only by statutory enactment.

10. Waters and water courses ⇨228½.

Illegal agreement to pledge bank's assets as security for deposits of irrigation district's funds was not validated by subsequent adoption of act requiring banks to furnish government bonds as security for such deposits (St. 1909, pp. 92, 94, §§ 21, 27, as amended by St. 1913, pp. 147, 151; St. 1897, p. 254, § 27b, as added by St. 1927, p. 188).

11. Banks and banking ⇨80(7).

Parties to deposits of irrigation district's funds in bank checking account could do no act retroactively converting them into secured or preferred deposits (St. 1909, pp. 92, 94, §§ 21, 27, as amended by St. 1913, pp. 147, 151; St. 1897, p. 254, § 27b, as added by St. 1927, p. 188).

12. Waters and water courses ⇨228½.

Only irrigation districts making deposits and taking security therefor under express sanction of existing law may require bank to furnish government bonds as security (St. 1897, p. 254, § 27b, as added by St. 1927, p. 188).

13. Contracts ⇨134.

Contract which is void as stipulating for doing what law prohibits cannot be ratified.

14. Contracts ⇨134.

Recognition of contract to do act prohibited by law when contract was executed for long period after such act becomes legal does not constitute ratification of contract.

15. Estoppel ⇨78(1).

Contract to do what law prohibits does not create estoppel.

16. Banks and banking ⇨86.

Statutes authorizing banks to pledge their assets as security for deposits must be strictly construed and nothing left to implication or doubtful construction.

17. Banks and banking ⇨86.

General policy of law will not sanction pledge of bank's assets as security for deposits, in absence of clear statutory authorization.

18. Waters and water courses ⇨228½.

Deposit of irrigation district's funds in bank checking account held lawful, though

bank's pledge of government bonds to district as security was unlawful (Const. art. 11, § 16½, as amended in 1924; St. 1923, pp. 21, 25; St. 1909, p. 87, § 21a, as added by St. 1913, p. 148, as amended; St. 1909, pp. 92, 94, §§ 21, 27, as amended by St. 1913, pp. 147, 151; Pen. Code, § 424).

19. Banks and banking ⇨74.

Bank, soliciting deposits of irrigation district's funds, and state bank superintendent, not complaining of district's possession of government bonds, pledged by bank as security, for over two years, *held* not estopped to sue for amount paid district thereon by government, in view of other innocent depositors' rights (Const. art. 11, § 16½, as amended in 1924; St. 1909, pp. 92, 94, §§ 21, 27, as amended by St. 1913, pp. 147, 151; St. 1909, p. 87, § 21a, as added by St. 1913, p. 148, as amended).

In Bank.

Appeal from Superior Court, Imperial County; Lloyd E. Griffin, Judge.

Action by Will. C. Wood, as State Superintendent of Banks, and trustee in charge of the liquidation of the Farmers' & Merchants' Bank of Imperial, against the Imperial Irrigation District. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 213 Cal. 33, 1 P.(2d) 422.

Chas. L. Childers and D. B. Roberts, both of El Centro, for appellant.

Elbert W. Davis, J. H. Hoffman, and Albert A. Rosenshine, all of San Francisco, for respondent.

SEAWELL, J.

This appeal comes to us upon an agreed statement of facts. The Imperial Irrigation district, the powers of which were considered by this court under the act by which it was created and governed in the case of *Crawford v. Imperial Irrigation District*, 200 Cal. 318, 253 P. 726, had on deposit in the name of its treasurer with the Farmers' & Merchants' Bank of Imperial on the 19th day of June, 1925, in its checking account, the sum of \$6,993.61. On that day said district deposited with said bank an additional sum of \$40,000, the bank issuing to said district four of its certificates of deposit in the sum of \$10,000 each, as evidence of said deposit of \$40,000. On said day the total amount of money so deposited by the district amounted to approximately the sum of \$47,000. This sum was used by the bank in the purchase of bonds of the United States of the par value of \$50,000. On the same day, to wit, June 19, 1925, said bank delivered to the Imperial Irrigation district said bonds as security for the payment of the several sums of money then deposited,

or which might thereafter be so deposited. Further sums of money were deposited by the district in its checking account with said bank. On October 10, 1927, said district had on deposit in its account with the bank the sum of \$13,254.27. On said last-named day, to wit, October 10, 1927, the plaintiff, as superintendent of banks of the state, closed said bank and took possession of its business and property, including \$9,651.54 in money, in accordance with the provisions of section 136 of the Bank Act of this state (St. 1909, p. 115). At the time said property was taken over by the superintendent of banks, said four certificates of deposit issued to said district were unpaid. Subsequent to October 10, 1927, said bonds matured, and the government paid to the district the full amount of principal and accrued interest, totaling the sum of \$51,062.50.

This action was brought by plaintiff to recover from defendant district said sum of \$51,062.50. Judgment went for plaintiff for said amount, together with interest, and defendant has appealed. If the trial court's conclusions of law are sound, the judgment must be affirmed.

Said court found, first, that the deposits made by said district with said bank were legally and lawfully made, and that the relationship between said bank and district as to deposits at all times constituted the relationship of debtor and creditor; second, that the pledging of the bonds described herein as collateral security for said deposits was unlawful, and the bank exceeded its powers in attempting to do so; third, that neither said bank nor plaintiff superintendent of banks had received, or were or are holding, any money or property in trust for defendant district; fourth, that defendant district is entitled only to a general claim against the assets of the commercial department of said bank for the amount of its claims, as filed against said bank and allowed by the superintendent of banks, without preference over other depositors of the commercial department of said bank. No relief whatever was granted defendant on its theory that the giving and taking of said securities was a transaction authorized by law; nor upon the theory that, if said transaction was not authorized by law, then said funds never became a part of the bank's assets, and were from the first impressed with a trust in favor of defendant district, and neither the bank nor the superintendent of said bank in liquidation was entitled to hold them against defendant's claim.

[1] One of the principal questions presented by this appeal is, What is the status of an irrigation district under our Constitution, statutes, and decisions, as interpreted by this court? The subject has been before this

count many times, and, while no very elaborate or comprehensive definition has been given, enough has been said in our decisions to give the profession and the layman a general idea as to the powers, functions, and office of an irrigation district. In the fairly recent case of *Crawford v. Imperial Irrigation District*, 200 Cal. 318, 325, et seq., 253 P. 726, 729, the appellant district in that case and the appellant district in the instant case being the same entity, this court, in considering the character of an irrigation district, said:

"While there is language to be found in some of the decisions of this state which might be taken as holding that an irrigation district is a municipal corporation (*People v. Cardiff Irr. Dist.*, 51 Cal. App. 307, 312, 197 P. 384), we think that the great weight of authority is to the effect that an irrigation district is not strictly a municipal corporation (*Huck v. Rathjen*, 66 Cal. App. 84, 225 P. 33; *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 243, 212 P. 706; *Turlock Irr. Dist. v. White*, 186 Cal. 183, 17 A. L. R. 72, 198 P. 1060)."

The above case quotes as follows from the *Turlock Case*, supra:

"The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation, but a 'public corporation for municipal purposes.'" (Citing authorities.)

"As to swamp land, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations." (Citing authorities.)

In *Bettencourt v. Industrial Acc. Com.*, 175 Cal. 559, it was held, on page 561, 166 P. 323, 324, that: "But reclamation districts organized as was this petitioner possess no political nor governmental powers, are not organized for political or governmental purposes, and are therefore not public corporations at all. Indeed, they are not in strictness corporations, public or private, but governmental mandatories or agents vested with limited powers to accomplish limited and specific work."

While it is true that the main case quoted states that it was not necessary to decide the point presented in that case to determine the strict legal status of an irrigation district, it nevertheless repeats that under the many authorities of this state bearing directly upon the question an irrigation district is not, strictly speaking, a municipal corporation. We deem it unnecessary to cite the long list of authorities sustaining this conclusion, as numerous references thereto are to be found in the cases herein cited, and others may be added upon a most cursory investigation of the general subject. An irrigation district is not a political subdivision of the state or

county, or a political subsidiary at all. *Huck v. Rathjen*, supra; *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983.

[2] The original section of the Constitution, article 11, § 16½, adopted November 6, 1906, permitted moneys belonging to the state, or to any county or municipality within the state, to be deposited in any national bank or banks within the state in the manner provided by law, provided such banks should furnish security for such deposits of the kind, amount, and upon the terms therein prescribed. In 1912 said section was amended so as to include within the securities which might be accepted for such deposits, bonds of "any irrigation district within this state." Although the subject of irrigation districts was specifically brought to the attention of the framers of the amendment, such districts were not included in the class of governmental bodies to which securities must be given to protect the deposits. No other substantial change was made. The amendment of 1918 provided that all moneys belonging to the state or to any county or municipality within this state might be deposited in any national bank or banks in such manner and under such conditions as might be provided by any law adopted by the people under the initiative or by two-thirds vote of each house of the Legislature and approved by the Governor, and subject to the referendum.

In enumerating the entities that may make said deposits the concluding lines of the amendment added specifically "city and county, city, town." This addition, it will be noted, includes only well-recognized municipal bodies, which are organized strictly for political and governmental purposes, and does not include development or improvement districts vested with limited powers to accomplish limited and specific work for private profit, even though they be agencies of the state. In 1922 said section 16½ of the Constitution was again amended (see St. 1923, p. 1621) by adding to the specifically named entities issuing bonds which might deposit moneys in banks outside of the state for the payment of the principal or interest of such bonds at the place or places at which the same are payable, "or other political subdivision." On November 4, 1924, the section was amended into its present form. This amendment provides that "all moneys belonging to, or in the custody of, the state, or any county, city and county, city, town, municipality, or other political subdivision, within this state may be deposited in any national bank or banks within this state, or in any bank or banks organized under the laws of this state, in such manner and under such conditions as may be provided by any law adopted by the people under the initiative or by a two-thirds vote of each house of the legislature and approved by the governor and subject to the referendum. * * *"

This amendment provides, as does the 1922

amendment, that laws then existent governing said deposits shall continue in force until amended or changed or repealed, as in said amendment provided. The words "or other political subdivision," following the generically named bodies, to wit, state, county, city and county, city, town, municipality, which are governmental in their essence, makes unusually applicable the doctrine of ejusdem generis, and would exclude from consideration "irrigation districts."

[3] Appellant cites article 11, § 13, Constitution, which provides that the Legislature shall not delegate to any special commission, private corporation, company, etc., any power to control or interfere with any county, city, town, or municipal improvement, money, property, or effects, or to levy taxes or assessments, or perform any municipal function, except that the Legislature shall have power to provide for the supervision, regulation, and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts, or drainage districts, organized or existing under any law of this state. We find nothing in the language of said section which is helpful to appellant's case. It would seem, on the contrary, that a distinction was recognized to exist between a municipality, on one hand, and irrigation, reclamation, and drainage districts on the other, giving to irrigation, reclamation, and drainage districts a different classification.

Appellant's contention that irrigation districts are municipalities or political subdivisions finds no favor or aid in any provision of the Constitution to which our attention has been directed.

Neither the original amendment of 1906, nor any subsequent amendment thereto, is self-executing. All of the amendments require legislation to make the constitutional provisions effective. The original and each amendment thereof provides that all money belonging to the state, or to any county, etc., may be deposited in banks "in such manner and under such conditions as may be provided by any law." As to the 1924, 1922, and 1918 amendments, the procedure shall be under the initiative or by a two-thirds' vote of each house of the Legislature. As to the original section and the amendment of 1912, the passage and adoption of a bill affecting deposits of moneys in the ordinary manner was sufficient to make it a law.

[4] We are of the view that the language of the constitutional provisions does not permit the inclusion of an irrigation district as one of the entities which may be empowered to draw from the assets of a bank its securities as a protection against loss for the benefit of one class of depositors to the prejudice of another.

[5] We now pass to a consideration of the language of the statutes which appellant re-

lies upon as authority for its retention of said bonds. The first act is found in statutes and amendments of 1923, chapter 16, page 21, entitled, "An act to authorize and control the deposit in banks of money belonging to or in the custody of the state. * * *" This act provides that all moneys under the control of the state treasurer belonging to or in the custody of the state shall so far as possible be deposited by the state treasurer to the credit of the state in such state or national banks in the state as the treasurer, with approval of the Governor and state controller, shall select for the safe-keeping of such deposits, and any such moneys so deposited shall be deemed to be in the state treasury. Furnishing security for such deposits, and the manner in which they shall be made is specifically provided for. Surely this act has no application to the control of the funds or business of an irrigation district, or to funds which are not under the control of the state treasurer, but applies solely to state moneys.

[6] In the same volume, in numerical order, is chapter 17, p. 25, entitled "An act to authorize and control the deposit in banks of money belonging to or in the custody of any county or municipality within this state. * * *" This act provides that "all moneys belonging to or in the custody of any county or municipality within the state, shall, so far as possible, be deposited in such state or national bank or banks * * * as the treasurer of the county or municipality as the case may be, or other official having the legal custody thereof, shall select for the safe-keeping of such deposits, and any sum so deposited shall be deemed to be in the treasury of such county or municipality. * * *" The banks in which such money is deposited are required to furnish security as in said act required, and the depository banks are selected from those agreeing to pay the highest rate of interest, not less than 2 per cent. per annum, as may be determined by bids to be submitted in such manner as the treasurer may direct. It is further provided that such deposits shall not exceed the paid-up capital, exclusive of reserve and surplus, of any depository bank, and also that no treasurer of a county or of a municipality shall deposit more than 20 per cent. of the public moneys under his control in any one bank. Incidentally it may be here noted that none of the requirements governing deposits as provided by the several acts was complied with by the district in the instant case, and, had said defendant district complied with the act which is invoked in its behalf, the entire loss would not have fallen upon one bank to the detriment of its general depositors. The act in question employs language and deals with subject-matter which relates so exclusively to governmental affairs, such as counties, cities, and political subdivisions, as commonly understood, that it seems illogical to at-

tempt to apply the act to moneys which are the property of, or under the control of, irrigation districts. For example, it provides that the securities shall be approved by the treasurer and attorney of said counties and municipalities; directs the deposit of money under the control of any tax collector of any county or municipality; and is drawn in language which makes it more appropriate and better fitted to county and municipal affairs, than to irrigation districts, which may or may not have such officers as are mentioned in the act.

[7] From what has already been said it follows that the powers conferred by the Bank Act, section 21a (as amended), upon the "United States, State of California, the counties, cities and counties, cities and towns of said State of California and of any other governmental or political subdivision" permitting the securing of deposits does not, under our decisions, include irrigation districts. Appellant, however, rests its claim, in case all others fail, upon section 27b of the Irrigation Act (St. 1927, p. 188), effective July 29, 1927, approximately two months and a half before the property and assets of the bank passed into the hands of the superintendent of banks, trustee in charge of the liquidation of said bank. Said section provides:

"Any money belonging to any irrigation district organized or existing under this act may be deposited by the treasurer or any officer of such district having legal custody of such money in any state or national bank or banks in this state, and said district shall receive such rate of interest therefor, as may be agreed upon by the officer making such deposit and said bank or banks. Such treasurer or other officer shall require such bank or banks in which such money is deposited to furnish as security for such deposits, bonds of the United States, or of this state or of any county, municipality, school district, or irrigation district within this state that are legal investments for savings banks of this state, the market value of which bonds shall at all times be at least ten per cent. in excess of the amount of the deposits secured thereby; or in lieu of such bonds such treasurer or said other officers shall be entitled to take as security for such funds so deposited, depositary bonds duly executed and delivered by a surety company duly authorized to do business in the State of California, which depositary bonds shall be and remain in an amount not less than the amount of the funds so deposited and held in said bank or banks. The cost of such depositary bond or bonds may be borne by the district. Such treasurer or said other officers shall not be responsible for any loss of public moneys resulting from the deposit thereof in banks when made in accordance with the provisions of this section."

The foregoing act was not complied with even in the event it was available to appel-

lant, in this, that the treasurer of said district did not at any time require the bank in which the district's funds were deposited to furnish as security therefor bonds, the market value of which was at all times at least 10 per cent. in excess of the amount of the deposits secured thereby, or equal to the amount secured thereby.

[8-15] We are of the view that the contract or agreement to pledge the bank's assets as security for the deposit made June 19, 1925, was illegal as an original transaction, being in contravention of section 21 of the Bank Act (as amended by St. 1913, p. 147) which declares that "the capital and assets of any such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders." See, also, section 27 of the Bank Act (as amended by St. 1913, p. 151). The only manner in which the priority of one depositor may be secondary to the right of another depositor is by statutory enactment, which does not exist in favor of appellant under the law as it existed when it made its said deposits. The contract was not validated by the adoption of the act of July 29, 1927. At the time said moneys were deposited with the bank they became a part of the common fund of the commercial department of said bank, subject to the same risks as the moneys of all other persons who made deposits in said commercial department. The relationship of debtor and creditor was created. Prior to the security transaction herein appellant had actually made deposits with said bank for which no security was taken. No attempt was made to reaffirm, ratify, or bring the transaction within the purview of the act which became a law some two months and twelve days before the bank was taken over by the superintendent of banks, and no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or preferred deposits. The funds had long since been disbursed through the commercial department as other depositors' funds had been disbursed. They were not then in the bank. No deposits were made within the time in which the irrigation district was entitled to receive security for deposits, and only those bodies which made deposits and took security therefor under the express sanction of existing law were entitled to enjoy the extraordinary privilege provided by statute. A contract void because it stipulates for doing what the law prohibits is incapable of being ratified. The recognition of the contract for a long period after the act becomes legal does not constitute a ratification of the contract. *Handy v. St. Paul Globe Publishing Co.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; *Stevens v. Boyes Hot Springs Co.*, 113 Cal. App. 479, 298 P. 508; *Robinson v. Contra Costa, etc., Ass'n*, 112 Cal. App. 252, 296 P. 922; *Biggart v. Lewis*, 183

Cal. 660, 671, 192 P. 437; Colby v. Title Ins. & Tr. Co., 160 Cal. 632, 117 P. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515. Neither does such a contract create an estoppel. Hedges v. Frink, 174 Cal. 552, 555, 163 P. 884; Colby v. Title Ins. & Tr. Co., supra; Tate v. Commercial Bldg. Ass'n, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770.

[16, 17] The act which became effective July 29, 1927, and which specifically authorizes irrigation districts to receive securities for deposit of their funds made with banks, does not purport to be a curative or remedial act, or to operate under any circumstances retroactively. Even where there is no prohibitory statute, it is held that an agreement to give security for county deposits is ultra vires and unlawful. Statutes adopted with a view of authorizing banks to pledge their assets to depositors as security therefor must be strictly construed, and nothing should be left to implication or doubtful construction. In the absence of clear statutory provisions authorizing such pledging of assets, the general policy of the law will not sanction it. The reason of the rule is briefly stated by the Idaho Supreme Court in Porter v. Canyon County, etc., Ins. Co., 45 Idaho, 522, 263 P. 632, 634, as follows:

"It has been held that, even in the absence of a statute prohibiting it, a bank cannot pledge its assets to secure a depositor; such act being 'ultra vires and void.' [Citing *Divide County v. Baird*, 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296, and *Commercial Bkg. & T. Co. v. Citizens' Trust & G. Co.*, 153 Ky. 566, 156 S. W. 160, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915C, 166.] The reason underlying these two strong cases may be reduced to the proposition that a bank organized under a statute permitting it to do business on terms and conditions and subject to liabilities prescribed in the statute has no power to pledge its assets to secure a deposit where such power is not expressly awarded by law. * * *

"Under the laws of this state, the commissioner stands as a trustee to protect the rights of all claimants, particularly those of depositors and general creditors. Under the law, the right of the defendant can be only that of a general depositor as such; it can acquire no greater right than that inuring to any other general depositor as such."

Discussing the question of public policy of securing depositors where there is no express statutory warrant for doing so, the court in *Commercial Bank & Trust Co. v. Citizens' Trust & Guaranty Co.*, 153 Ky. 566, 156 S. W. 160, 163, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915C, 166, said:

"Large depositors, if secured, might absorb the greater part of the assets of the bank, and inflict loss upon unsecured depositors and financial ruin upon innocent stockholders under the double liability law. The law contemplates, and was evidently framed to in-

sure, fair and uniform dealings by the bank with all of their depositors. A secret pledge to secure one, while others are left without security, although it may be without specific intent to defraud, would nevertheless, in case of loss, justify such an inference.

"Public policy will not, therefore, tolerate a practice which might, sooner or later in the event of financial trouble with the bank, enable it to pay and protect the favored few at the expense of the equally deserving many. If the fact was known that a bank had secured some one or more of its depositors and left the others unsecured, no prudent person would deposit with it. No bank would advertise that it engaged in such a practice, because depositors, who were not provided for, would be driven away. The very fact that the transaction is one that will not stand the test of publicity is a strong argument against its legality, as well as its necessity. Banks publish statements of their assets, and individuals deposit on the faith of these published statements. It is well known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits thus induced are nevertheless cut off from sharing in these assets until some unknown favored few, who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits, when its assets were secretly pledged. * * * We are unwilling to hold that a bank, in the absence of some statutory authority, may exercise a right or power which would enable it to perpetrate a fraud upon any of its depositors."

[18] Appellant takes the alternative position that the making of the deposits and the giving of the security was either lawful or unlawful. If unlawful, it was unlawful on the part of one party as well as on the part of the other. In other words, if the district could not make the deposit without taking security for such deposit, and the bank was not authorized to give the security, then neither could the deposit be lawfully made nor the security lawfully given; that it was a single transaction, and, if unlawful, both parties are equally at fault, and a trust is immediately created earmarking the particular money which never became the assets of the bank at all, and it must be returned to appellant. We are constrained to hold with the trial court that the deposit was not forbidden by law, but that the giving over of the bonds as security for the deposit was unlawful.

The powers of appellant district, as stated earlier in this decision, were considered in the case of *Crawford v. Imperial Irrigation District*, 200 Cal. 318, 253 P. 726, 732. We there held that its powers were broad and comprehensive, even exceeding in some respects the powers of an ordinary municipal corporation. Its board of directors is author-

ized to "manage and conduct the business and affairs of the district." It would be unreasonable, difficult, and most inconvenient to conduct a business of the magnitude of appellant in this rapidly moving age if it should be denied the facilities which banks offer for the transaction of business. The general powers conferred upon said district give its officers the right to deposit its funds in a bank. Appellant's argument against the lawfulness of deposits thus made rests largely upon the pronouncements found in *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 P. 767. A provision of the city charter of the city of Los Angeles directing the city council to appoint as a depository of public funds the bank offering the highest rate of interest thereon, and further providing that the city council should direct the city treasurer to deposit with said bank all money received or collected by him, was held to be unconstitutional. The basis of that opinion was that said charter provision was contrary to certain sections of the Constitution, and sections 424 and 426, Penal Code. The sections of the Constitution—13, 16, and 17, article 11—against which the charter provisions offended, related either directly or indirectly to the deposit of public funds or the making of a profit by the officers having possession or control thereof. The *Yarnell* decision was rendered in 1891. Since that year, in 1906, the Constitution was amended by the adoption of section 16½, article 11. That section expressly legalizes the deposit of public funds by the custodian thereof in such manner and under such conditions as may be provided by law. The Legislature thereafter, in obedience to the mandate of the Constitution, enacted certain statutes prescribing the conditions under which the several public moneys enumerated in said section 16½ of the Constitution might be deposited in the banks of this state. The acts in effect at the time appellant's moneys were deposited in said bank are to be found on pages 21 and 25, Statutes of 1923, and have received sufficient attention. Suffice it to say that, since the adoption of section 16½ of article 11 of the Constitution, and the amendment of section 424, Penal Code, in 1905 (St. 1905, p. 53), neither the Constitution of the state nor any statute prohibits or makes it illegal for public funds to be deposited in the banks of the state.

[19] Appellant complains somewhat bitterly, and probably not without color of moral justification, and invokes the doctrine of estoppel against said bank based upon the stipulated fact that said bank solicited said deposits, and, had it known that the bank could not have lawfully pledged its bonds, it would not have made the deposits. It is also stipulated that the superintendent of banks was charged with knowledge that the pledged bonds were in possession of the district for more than two years, and he made no complaint as to its possession and claim. The

difficulty with this proposition is that the rights of the depositors, innocent third parties, are involved in the transaction, and their protection is one of the first concerns of the law. Their rights are surely equal with those of the district, unless the statute has given a preference to said district, which was an actor in the transaction. If it acted under a mistake of law, its position should not be better than that of other depositors who were ignorant of the bank's approaching insolvency as well as the attempt on the part of the district to secretly secure its deposits.

From our examination of the various decisions, statutes, and constitutional provisions, we are brought to the conclusion that the deposit of appellant's funds with the bank was not an unlawful or invalid act, but that its right to receive security for its deposit did not find support in law, and, this being so, it must stand upon the same level with the general depositors; its relation with the bank being that of debtor and creditor.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; TYLER, Justice pro tem.

SHENK, J., being disqualified, did not participate.

216 Cal. 790

IMPERIAL IRRIGATION DISTRICT, Plaintiff and Appellant, v. Edward RAINEY, as Superintendent of Banks of the State of California, and Trustee in Charge of Liquidation of Farmers' and Merchants' Bank of Imperial, a Banking Corporation, Defendant and Respondent.

L. A. 12869.

Supreme Court of California.

Nov. 30, 1932.

In Bank.

Appeal from Superior Court, Imperial County; Lloyd E. Griffin, Judge.

D. B. Roberts and Charles L. Childers, both of El Centro, for appellant.

Elbert W. Davis, J. H. Hoffman, and Albert A. Rosenshine, all of San Francisco, for respondent.

PER CURIAM.

Edward Rainey, as superintendent of the banks of the state of California, and trustee in charge of liquidation of Farmers' and Merchants' Bank of Imperial, was substituted in the place and stead of Albert A. Rosenshine, formerly superintendent of banks. The instant action involves precisely the same issues of fact and questions of law as are pre-

sented by its companion, Wood v. Imperial Irrigation Dist. (Cal. Sup.) 17 P.(2d) 128, this day decided. There is no question of law or issue of fact presented by this case that was not determined and decided in said companion case. This being so, the judgment of the trial court in dismissing the cause on the ground that there was pending in the Superior Court of the state of California, in and for the county of Imperial, another action, to wit, Wood v. Imperial Irrigation Dist. (Cal. Sup.) 17 P.(2d) 128, this day decided, between the same parties and upon the same issues of law and fact, must be, and is hereby, affirmed.

It is so ordered.

SHENK, J., being disqualified, did not participate.

217 Cal. 16

GRANGER v. HARPER et al.

S. F. 13639.

Supreme Court of California.

Dec. 21, 1932.

1. Principal and surety ⇨157.

Apparent principal, pleading his suretyship in action on either negotiable or nonnegotiable instrument, must aver and prove that plaintiff not only knew of suretyship, but accepted defendant as surety (Civ. Code, §§ 2832, 3110).

2. Appeal and error ⇨1008(1).

Trial court's finding that defendant signed note as principal rather than surety cannot be disturbed on appeal, unless plaintiff's conduct was plainly inconsistent with acceptance of defendant as principal.

3. Principal and surety ⇨45.

Court may look to defendant's conduct in procuring dismissal of action on note on ground that plaintiff should sue to foreclose mortgage securing it in determining whether he was surety or principal in foreclosure suit (Civ. Code, § 2832; Code Civ. Proc. § 726).

4. Principal and surety ⇨45.

Fact that note was written in first person singular was not controlling on question whether second signer was accepted by payee as surety (Civ. Code, § 2832).

5. Principal and surety ⇨45.

Evidence held to support trial court's finding that plaintiff in suit to foreclose chattel mortgage securing note did not accept defendant receiving none of consideration as surety (Civ. Code, § 2832).

In Bank.

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., Judge.

Action by Paul H. Granger against Henry Harper and H. O. Langstaff, to foreclose a chattel mortgage. From a deficiency judgment against defendant Langstaff, he appeals.

Affirmed.

For prior opinion, see 8 P.(2d) 204.

McAdoo, Neblett & Clagett and Edward H. Mitchell, all of Los Angeles, for appellant.

Fulton & Fulton and John M. Fulton, all of Los Angeles, and George W. Jean, of Hollister, for respondent.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiæ for California Bankers' Ass'n.

SHENK, J.

This is an appeal from a judgment for the plaintiff in an action to foreclose a chattel mortgage given to secure a promissory note signed by the defendants Henry Harper and H. O. Langstaff. A deficiency judgment was entered against the defendant Langstaff, who alone was personally served in the action. The defendant Langstaff appealed.

Issues were raised by the answer to the complaint based on the appellant's contentions that he signed the note as surety only, that the plaintiff knew that he signed as surety and consented to accept him as such, and that the subsequent taking by the creditor from the principal, Harper, of the chattel mortgage sought to be foreclosed served to release him from his obligation as surety.

The note is dated November 28, 1923, and is as follows: "For value received, I promise to pay Paul H. Granger, at the First National Bank of Whittier, California, sixty days after date, the sum of \$5,000 plus 7% interest per annum. Henry Harper. H. O. Langstaff."

The testimony relating to the execution and delivery of the note and subsequent events is substantially to the following effect: The defendant Harper applied to the plaintiff for a loan of \$5,000 to enable him to pursue his oil drilling operations. The plaintiff declined to make the loan without security, and Harper offered to obtain Langstaff to go on the note, to which the plaintiff agreed. The note was executed the next morning at Langstaff's residence. Langstaff was introduced to Granger. The plaintiff himself wrote the note, and it was then signed by the defendants. The plaintiff gave to Harper a check for \$5,000. It is not disputed that Granger would not have accepted the note without Langstaff's signature as comaker. Neither is it questioned that all parties knew and understood that the proceeds of the loan were received and used by Harper alone. The plaintiff admits that at

the time he may have voiced the hope that Langstaff would never have to pay the note.

Subsequent to the maturity of the note, and on May 20, 1924, Granger accepted from Harper a mortgage on certain oil drilling machinery and other personal property used in his oil drilling operations. The mortgage contained the statement that it was given to secure payment of the note hereinbefore set out; it contained a promise to pay attorney fees in event of foreclosure; and provided for payment in gold coin. Harper continued his oil drilling operations, and Granger loaned him some additional tools for the purpose. Harper's efforts, however, were not proving fruitful. In July, August, and September, 1925, Granger wrote to Langstaff inquiring about and requesting payment, to which Langstaff made no reply. In December of that year Granger brought an action on the note alone against both defendants as co-makers. Langstaff in that action defended on the grounds of lack of consideration, payment, and that the chattel mortgage which he set out in the answer had been given to secure payment of the note sued on, and that the plaintiff's remedy was an action in foreclosure. In November, 1926, a motion for a nonsuit in that case was granted on the ground that the debt of Langstaff on the note was secured by chattel mortgage, and that pursuant to the provisions of section 726 of the Code of Civil Procedure the remedy of the plaintiff was to bring an action in foreclosure. Subsequently the present action to foreclose the mortgage was commenced.

The foregoing is a statement of the facts pertinent to an inquiry into the question whether the appellant is to be held only as a surety on the note. In this respect the trial court found that it is not true that Langstaff signed the note as surety, that it is not true that the plaintiff knew that he signed the note as surety, and that it is not true that the plaintiff consented to deal with him in the capacity of surety. The immediate question for determination is whether the evidence sustains the findings on this phase of the case. If it does, the judgment is supported by the findings, and must be affirmed.

The appellant contends that, inasmuch as the note involved is nonnegotiable, the circumstance of his receiving no part of the consideration therefor, which was entirely for Harper's use and benefit, coupled with the plaintiff's knowledge of that fact, constitutes notice to the plaintiff of the surety relation, and requires recognition by the plaintiff of the rights and privileges to be accorded Langstaff in such capacity.

[1] The rule at common law that a party apparently bound on a written contract as a principal may show by evidence aliunde that he signed the contract as a surety for the principal debtor, and, if such fact is known to the creditor, such party will be bound as a

surety only (*Hubbard v. Gurney*, 64 N. Y. 457; *Smith v. Tunno*, 1 McCord, Eq. [S. C.] 443, 16 Am. Dec. 617; *Doughty v. Bacot & Seabrook*, 2 Desaus. [S. C.] 546; *Cummings v. Little*, 45 Me. 183; 1 Brandt Suretyship [3d Ed.] § 38), was in 1872 codified in the following language: "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal." Section 2832, Civ. Code.

Shriver v. Lovejoy, 32 Cal. 575, established the law prior to 1872 that the common-law rule was not adopted in this state, and, until the enactment of section 2832 of the Civil Code, one who signed a contract apparently as a principal could not show that he was in fact a surety. *Harlan v. Ely*, 55 Cal. 340, 343.

Harlan v. Ely, supra, was the first decision to interpret the provisions of section 2832 of the Civil Code. The note involved there was secured by a crop mortgage, and presumably, therefore, nonnegotiable. The facts were established that the defendant never received any part of the loan, that all of the parties knew and understood that the loan was made and intended for the sole benefit of the principal debtor, and that as between the defendant and the principal debtor the former was merely a surety. In construing and applying the language of section 2832, it was held that the circumstance of knowledge alone on the part of the creditor was not sufficient to show that as to the creditor the actual relation was different from the apparent relation, and that the trial court's conclusion that the defendant was accepted as a principal and not as a surety was not erroneous.

The next case on the interpretation of that section of the Civil Code is *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 387, involving apparently a negotiable note. The court there did not change the construction of section 2832 of the Civil Code announced in *Harlan v. Ely*, though urged by counsel for the appellant to do so. It was held that a demurrer to the defense that the defendants executed the note as sureties for the comaker, to the plaintiff's knowledge, was properly sustained, the court saying (60 Cal. 392): "The mere fact that the bank knew that the relation of sureties and principal existed between them and Stover, does not, in itself, show that the bank consented to deal with them in the capacity of sureties. According to the face of the note the bank dealt with them as principals only; for as such they apparently executed and delivered the note. If, in fact, however, the bank dealt with them in a different capacity—as sureties and not as principals—it is incumbent upon them * * * under Section 2832 of the Civil Code * * to aver and prove that the payee of the note not only knew of the fact of suretyship be-

tween them and their co-obligor, but consented to deal with them in that capacity. * * *

The courts of this state have continued to apply the provisions of section 2832 with the interpretation so announced in cases which involved negotiable notes and in cases which involved nonnegotiable notes. *Leeke v. Hancock*, 76 Cal. 127, 17 P. 937; *San Bernardino National Bank v. Colton, L. & W. Co.*, 91 Cal. 124, 128, 27 P. 538; *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 P. 38; *Casey v. Gibbons*, 136 Cal. 368, 68 P. 1032; *Farmers', etc., Bank v. De Shorb*, 137 Cal. 685, 70 P. 771; *Daneri v. Gazzola*, 139 Cal. 416, 73 P. 179; *Osborn v. Hamilton*, 16 Cal. App. 634, 636, 117 P. 786; *McCarthy v. Madison*, 190 Cal. 243, 212 P. 7.

The cases of *Montgomery v. Sayre*, 91 Cal. 206, 27 P. 648, 649; *Pimental v. Marques*, 109 Cal. 406, 42 P. 159; *O'Connor v. Morse*, 112 Cal. 31, 44 P. 305, 53 Am. St. Rep. 155, and *Eppinger v. Kendrick*, 114 Cal. 620, 46 P. 613, are relied upon by the appellant as relaxing the rigor of the rule of *Harlan v. Ely* and *Farmers' Nat. Gold Bank v. Stover* in the case of nonnegotiable instruments. In *Montgomery v. Sayre* the note sued on, executed by the defendant Sayre as maker, was given as collateral security for the payment of another's note. It was stated in the opinion that under these circumstances "Sayre was in law a surety." Similar facts were involved in the other three cases relied upon. They are therefore not in point. Neither is there anything in the case of *Figari v. Olcese*, 184 Cal. 775, 195 P. 425, 15 A. L. R. 192, inconsistent with the application of the rule. In that case the word "witness" appeared opposite the name of one of the signers, and the question presented was whether such signer could show that he had not become bound on the instrument.

The appellant urges that the adoption of section 3110 of the Civil Code as part of our Negotiable Instruments Law indicates that a different rule controls as to nonnegotiable instruments in applying the provisions of section 2832 of the Civil Code. But it is manifest from the foregoing cited cases that, in applying said section in the light of the facts in each particular case, the courts have neither noted the character of the instrument as to negotiability nor made any distinction on the basis of its negotiability or nonnegotiability. The principle appears to have been applied alike to nonnegotiable and to negotiable instruments that section 2832 of the Civil Code compels the party pleading the actual as differing from the apparent relationship to aver and prove that the plaintiff not only knew the fact of suretyship, but also that he agreed or consented to accept the surety in that capacity and not as a principal. If this were the first case on the subject, we might be constrained to accord weight to the

appellant's argument that, at least as to non-negotiable instruments, evidence of the suretyship relation and knowledge of that relation on the part of the plaintiff constitutes a prima facie case under the provisions of section 2832, Civil Code, and that the burden of going forward with evidence to show reliance on the apparent character has then shifted to the plaintiff. But the cases to the contrary are controlling.

[2-3] It is conceded that Granger knew of the relationship of Langstaff to Harper on the note, and it is also conceded that no express agreement was made by Granger to accept Langstaff as a surety. The latter, however, contends that the evidence is susceptible of no other inference or conclusion than that Granger treated and dealt with Langstaff as a surety, and therefore his consent to accept him as a surety is implied from his conduct. In most cases the intent in this respect can be read only from the circumstances and conduct of the parties. But we cannot say as a matter of law that the court's conclusion that the acts and words of the plaintiff were consistent with his accepting Langstaff as a principal was unjustified. From a review of the cases, it must be said that, unless the conduct of the plaintiff is plainly inconsistent with an acceptance of the appellant in his apparent character, a finding that the appellant signed the instrument as a principal cannot be disturbed on appeal. In a discussion of the evidence in this case it should perhaps further be noted that a large measure of the delay in arriving at a final disposal of this controversy is due to the appellant. The first action brought on the note alone he succeeded in having dismissed on the ground that the plaintiff should pursue the remedy provided by section 726 of the Code of Civil Procedure. If he considered himself a surety, he could have so pleaded and claimed exoneration in that action, which he did not do. The trial court is also entitled to look to the conduct of the appellant in arriving at its conclusion on the issue of the suretyship relation.

[4] Finally it may be pointed out that the fact that the note was written in the first person singular is not a circumstance controlling the question whether the appellant was accepted in the capacity of a surety. 3 R. C. L. 1139, § 355.

[5] We conclude that the finding of the trial court that it is not true that the plaintiff consented to deal with the appellant as a surety is supported by the evidence, and it in turn supports the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

217 Cal. 67

AMERICAN SYSTEM OF REINFORCING v. BREAKERS HOTEL CO. et al.

L. A. 12278.

Supreme Court of California.

Dec. 23, 1932.

I. Payment ⇨73(4).

Evidence sustained finding that note taken by subcontractor for materials furnished was accepted as payment.

II. Principal and agent ⇨123(3).

Finding that subcontractor's bookkeeper had authority to accept note in payment for materials furnished under subcontract expressly providing for part payment in notes held justified.

III. Estoppel ⇨90(1).

Subcontractor accepting note signed by corporation as payment, without objection that contract called for note signed by officer, held estopped to assert objection thereafter (Code Civ. Proc. § 2076).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by the American System of Reinforcing against the Breakers Hotel Company and others. From the judgment, plaintiff appeals.

Affirmed.

For prior opinion, see 11 P.(2d) 636.

O'Melveny, Millikin & Tuller, O'Melveny, Tuller & Myers, J. R. Girling, and L. M. Wright, all of Los Angeles, for appellants.

Joe Crider, Jr., John M. Martin, and Frank L. Martin, Jr., all of Los Angeles, for respondent Metropolitan Casualty Ins. Co. of New York.

Page, Nolan, Rohe & Freston, of Los Angeles, for respondents Illinois Electric Co., Sterling & Harkness, and David M. Hughes.

Swaffield & Swaffield, of Long Beach, for respondent R. J. Broxholme, doing business as Long Beach Marble & Tile Co.

William R. Gallagher, of Los Angeles, for respondent Winter & Bain.

W. E. Lady, of Los Angeles, for respondent Pacific States Electric Co.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents Breakers Hotel Co., Leah Dunn, and Fred B. Dunn.

William P. Redmond, of Los Angeles, for respondent Architectural Iron Works, Inc.

TYLER, Justice pro tem.

Action to foreclose a mechanics' lien for materials furnished in the erection of a certain building. The amount claimed was \$11,-

600.31. Defendant Metropolitan Casualty Insurance Company, as surety, confessed judgment in the sum of \$1,600.31, and set up as a defense that the balance of \$10,000 had been paid. The trial judge so found, and accordingly judgment was rendered against the surety for said sum of \$1,600.31. From this judgment plaintiff appealed, and the District Court of Appeal reversed the same, and a hearing was granted by this court.

The facts show that on September 25, 1925, the Breakers Hotel Company entered into a contract with one William G. Reed, as contractor, for the erection of a hotel building on certain property owned by it in the city of Long Beach, for the contract price of \$847,269.20. On the same date Reed, as principal, and the Metropolitan Casualty Company, as surety, executed a bond for the benefit of laborers and materialmen, and on October 2, 1925, this contract and bond were filed for record. The contract provided that the last payment of \$105,000 of the contract price was to be made by notes of the Breakers Hotel Company, secured by a second deed of trust on the hotel property. On October 12th the plaintiff herein, American System of Reinforcing, entered into a contract with Reed, the contractor, by which it agreed to furnish certain material for use in the construction of said building. The contract, among other things, provided that plaintiff was to accept as part payment upon its contract, in lieu of cash, \$10,000 in notes secured by a deed of trust given by Fred B. Dunn, the president of the Breakers Hotel, to Pacific Southwest Trust & Savings Bank, as trustor, out of the final payment of this contract. This contract also referred to the general contract between Reed and the Breakers Hotel Company. In carrying out this contract, plaintiff furnished material to the amount of \$64,420.33, of which \$52,820.02 was paid in cash, leaving a balance of \$11,600.31.

On March 6, 1926, the contractor, Reed, delivered to plaintiff as payment on this balance a \$10,000 note dated September 25, 1925, executed by the Breakers Hotel Company, due June 15, 1927, with interest and secured by a deed of trust to the Pacific Southwest Trust & Savings Bank, which was one of the notes Reed had received from the Breakers Hotel Company as part payment of his contract price for the erection of the hotel building. The note was signed by the Breakers Hotel Company, by Fred B. Dunn, as president. It was received by one D. J. Stoddard, plaintiff's bookkeeper, together with a postdated check for the sum of \$2,980. Stoddard executed a receipt for the payment, reading as follows: "Received payment on Breakers Hotel job \$12,980.00 Paid 3-6-26 D. J. S." This credit was entered upon plaintiff's books to Reed's account, and so remained up to the time of the trial, a period of many months.

The receipt received by Reed from plaintiff, together with other receipts, was then delivered by Reed, the contractor, to S. W. Straus & Co., which company was financing the construction of the hotel building. The Metropolitan Casualty Insurance Company was then notified by Straus & Co. that they had receipted bills showing that all claims for materials had been paid by the contractor Reed, so as to entitle him to his next progress payment. The surety company thereupon consented to the payment by Straus & Co. to Reed of this payment. Thereafter plaintiff, American System of Reinforcing, received a letter from Breakers Hotel Company making inquiry as to what notes were held by it, and what balance, if any, was due from Reed, the contractor, to plaintiff on the hotel job. In reply thereto, plaintiff advised the hotel company that it held a note for \$10,000, inclosed a copy of the same, and stated that in addition thereto there was a balance due from Reed amounting to the sum of \$1,600.31.

Thereafter plaintiff instituted this action, claiming \$11,600.31 was due under its contract. The surety company set up the defense that the \$10,000 note was taken by plaintiff, as it had agreed, in part payment of its claim, and, as stated above, offered to confess judgment for the balance of \$1,600.31.

[1-3] The finding of the court was that the note was taken in payment as contended by defendant. This finding is assailed upon the ground that the evidence does not support it. It is argued in this connection that the note given in part payment by Reed and accepted by Stoddard and credited on the Reed account was not the note plaintiff had agreed to accept, as it was not executed by Dunn, but rather by the hotel company. It also claims that in any event Stoddard, its bookkeeper, had no authority to accept the note in payment. There is no merit in these contentions. Under all the facts and circumstances, the only reasonable inference to be drawn from the evidence is that appellant had knowledge of the acceptance of the note, of the terms thereof, and of the crediting of the same as cash upon its books at the time the note was received. The Breakers Hotel was owned by Dunn, and plaintiff knew that the contractor was to receive part of his payment in notes executed by him, and had agreed to accept part payment in such notes. Plaintiff's contract referred to this fact. For a period of eleven months it failed to raise any objection to the payment. Stoddard had authority to receive payments, and he had full knowledge of the arrangement between Reed and his company that it was to receive the character of note tendered to and accepted by him. It is an agent's duty to communicate to his principal the knowledge that he has with respect to the

subject-matter of the transaction, and the only reasonable presumption to be drawn from the facts is that Stoddard did communicate to his officers all the facts in connection with the payment. 1 Cal. Jur. 846, 847; McKenny v. Ellsworth, 165 Cal. 326, 132 P. 75. It is true that the president of appellant company testified he had no knowledge of the matter, but the trial court was not bound by this testimony. Stoddard was expressly authorized to keep the books of the company, and to accept payments and issue receipts for the same, and it is unreasonable to presume that the officers of the company had no knowledge of the character of the payment and credit, considering its amount. Moreover, we are of the opinion that plaintiff company is estopped from making any objection to the payment. It is true that the note was not signed by Dunn for himself, but it was signed by him as president of the hotel company. Section 2076 of the Code of Civil Procedure provides that the person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.

The surety company had no knowledge of the manner of payment. It was advised by plaintiff of what had taken place, and, relying on this information, had authorized the disbursement mentioned, to the contractor by the owner. Stoddard wrote the letter advising that there was due only the sum of \$1,600.31. His authority so to do has never been questioned, challenged, or denied, and his knowledge was the knowledge of plaintiff. Assuming that the officers did not pay any attention to their books, or to the letters received, and the answers thereto, as contained in their files, but left the management of their business to their bookkeeper, they ought not to be heard to say, after an innocent party has in good faith and in reliance on information received from such manager changed his position to his prejudice, that the agent lacked authority.

The court found that the note in question was indorsed by Reed without recourse and was delivered by him to American System of Reinforcing, and by said plaintiff accepted as payment in the sum of \$10,000. It further found in consequence thereof that there was due plaintiff the sum of \$1,600.31 and no more. The evidence fully supports this finding.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

217 Cal. 35

**UNITED STATES BUILDING & LOAN
ASS'N OF LOS ANGELES v. SALIS-
BURY et al.**

L. A. 12216.

Supreme Court of California.

Dec. 22, 1932.

Rehearing Denied Jan. 20, 1933.

1. Contracts ⇨ 168.

Courts should proceed cautiously in supplying by implication provision omitted from written contract.

2. Evidence ⇨ 450(3½).

Trust deed made subordinate to new mortgage, with provision as to mortgage for building purposes and as to use of proceeds over \$20,000 for construction, should be explained by parol evidence, in view of ambiguity (Code Civ. Proc. §§ 1856, 1860; Civ. Code, § 1647).

The evidence disclosed that original second mortgage, which the trust deed replaced, was expressly subordinated to subsequent mortgage "for any amount and on any terms and conditions," and that there was a first mortgage for \$13,500. Present question arose as to priority of \$20,000 mortgage given, subsequent to the execution of the trust deed, for loan not obtained for building purposes but used in part to pay off the first mortgage of \$13,500.

3. Subrogation ⇨ 33(3).

One making mortgage loan with intention of acquiring first lien under priority provision in trust deed, should, in event of failure to establish such priority, be accorded priority over trust deed to extent loan was used to discharge first mortgage.

4. Subrogation ⇨ 23(1).

One loaning funds to mortgagor for discharge of prior mortgage upon faith of obtaining first lien will not, in absence of paramount equities, be held to have subordinated his security to intervening lien.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the United States Building & Loan Association of Los Angeles against Hazel A. Salisbury and Cal F. Hunter, in which defendant last named filed a cross-complaint. From a judgment for plaintiff, defendant Hunter appeals.

Reversed.

Prior opinion, 7 P.(2d) 760.

Rehearing denied; CURTIS, J., dissenting.

Wix, Nelson & Wix and Charles R. Nelson, all of Los Angeles, for appellant.

Victor Ford Collins and Rex Hardy, all of Los Angeles, for respondent.

PER CURIAM.

This is an action to foreclose a mortgage upon two lots in the city of Los Angeles. Defendant and cross-complainant, Cal F. Hunter, claimed title in fee to said lots as purchaser under the foreclosure of a deed of trust prior in time to plaintiff's mortgage. He appeals from a judgment for plaintiff, United States Building & Loan Association of Los Angeles, which directed foreclosure as prayed for and decreed his title to be subject to the lien of plaintiff's subsequent mortgage.

The deed of trust through which defendant and cross-complainant claims was, at the time of its execution, subordinate to the lien of a mortgage for \$13,500 held by the Bank of America. Thereafter said first mortgage for \$13,500 was discharged with funds procured upon the security of the mortgage which plaintiff herein seeks to foreclose, as will more fully appear hereafter. Plaintiff's claim to priority rests upon the following provision in the deed of trust dated June 4, 1925, and recorded July 10, 1925, through which defendant and cross-complainant claims title:

"This Deed of Trust is second and subsequent to a mortgage dated February 26, 1925, covering the above described property executed by Edgar D. Sloat and Janis Sloat, his wife, given to secure a note in favor of Bank of America for \$13,500 due three years after date with interest at the rate of 7% per annum, payable quarterly, and the parties of the first part herein named for themselves, their heirs, executors and assigns, reserve the right to pay off said prior mortgage and execute a new note and notes and mortgage to secure the same, covering said property *in any amount* or at any time, and on said terms and conditions as said parties of the first part herein named, their heirs, executors and assigns shall arrange, and such other mortgage when duly executed and recorded, shall be and remain prior and senior to the lien of this Deed of Trust, *with the provision, however, that new mortgage is placed for the purpose of constructing a building on said premises, that all funds derived from said mortgage in excess of \$20,000 be actually used in the construction of said building on said premises.*" (Italics supplied.)

The mortgage sought to be foreclosed was executed in favor of plaintiff loan association for the sum of \$20,000 on September 1, 1927, to secure payment of a loan made by plaintiff to Sloat. With the proceeds of said loan the mortgage of \$13,500, referred to above, held by the Bank of America, with interest amounting to \$362.25, was discharged, and taxes and assessment totaling \$1,876.35 were paid. The balance, amounting to \$4,262.40, was disbursed according to the order of the borrower. It was stipulated that the loan was not obtained for building purposes and that no portion of it was used

for such purposes. It is the contention of appellant that, by the terms of the deed of trust through which he claims, only a subsequent mortgage executed to secure a loan for building purposes is accorded priority over said deed of trust lien. Respondent argues that a mortgage in an amount not exceeding \$20,000 is entitled to priority regardless of the purpose for which the loan is obtained; only where the loan exceeds \$20,000 is any portion required to be used for building purposes. The trial court upheld respondent.

The facts preceding the execution of the mortgage sought to be foreclosed, as they appear from the record, are as follows: Sloat and wife, in consideration of the transfer to them of the two lots involved by one Maerz and wife, conveyed other real property to the Maerz and executed in their favor a note for \$20,000, secured by mortgage on said two lots (not to be confused with the \$20,000 mortgage sought to be foreclosed herein). By agreement with the Maerz, the transaction was so consummated that the mortgage for \$13,500 in favor of the Bank of America was placed on the property by the Sloats as a paramount lien to the \$20,000 mortgage in favor of the Maerz. The deed to Sloat and wife and the two mortgages were recorded on March 14, 1925. The Sloat-Maerz second mortgage contained a provision authorizing the Sloats, as mortgagors, to pay off the first mortgage for \$13,500 and to execute a new mortgage covering said property "for any amount and on any terms and conditions," which new mortgage should be prior and senior to the \$20,000 second mortgage. On June 4, 1925, said Sloat-Maerz second mortgage, and the note for \$20,000 which it was given to secure, were replaced by a new note, also for \$20,000, and the deed of trust executed in favor of Maerz and wife under which cross-complainant, as purchaser at the trustee's sale, claims title in the action herein. Said deed of trust contains the limited priority provision above quoted, the construction of which is the issue in the instant case. Maerz and wife, beneficiaries under said deed of trust, pledged the note and deed of trust in 1926 to Hunter, cross-complainant, who purchased the property in June, 1928, under foreclosure of said deed of trust, for \$10,281.89, the amount owing to him from the Maerz. It does not appear why or at whose request the mortgage not yet due was replaced by the deed of trust on the same property, nor was the reason for changing the terms of the priority provision to differ from those of the original mortgage provision brought out.

In September, 1927, the Sloats obtained a loan of \$20,000 from plaintiff loan association, to secure which the mortgage for \$20,000 herein sought to be foreclosed as a first lien was executed by Hazel A. Salisbury, who held record title to the property for the con-

venience of the real parties in interest. The question to be determined is whether said mortgage was entitled to priority although no portion of the loan it secured was used for building purposes.

In arguing for the priority of its \$20,000 mortgage in its opening brief, plaintiff states that it is obvious the word "if" was inadvertently omitted, and upon the insertion of this single word the whole context becomes clear. The priority provision would then read, "with the provision, however, that *if* new mortgage is placed for the purpose of constructing a building on said premises, that all funds derived from said mortgage in excess of \$20,000 be actually used in the construction of said building on said premises." As thus revised, the obligation to use all funds in excess of \$20,000 for construction is conditioned on the loan having been obtained for building purposes. If the loan were not obtained for building purposes, it would receive priority regardless of amount under the preceding portions of the provision according priority to a loan "in any amount." A condition which would permit the owner to place a superior lien on the property without limitation as to amount, and at the same time specify that he must use all funds over \$20,000 for construction purposes *if* the loan should chance to be obtained for building, would be manifestly absurd and lacking in value to the second lienholder.

In its petition for hearing in this court, respondent receded from the extreme position in which a verbatim reading of the provision with the interpolation of the word "if" would place it. It concedes that the surplus over \$20,000 must in any event be used for building to entitle the subsequent mortgagee to priority, but argues that, since the owner is required to use only the surplus over \$20,000 for building if the loan exceed that amount, he should not be required to use any portion for building if the loan is for \$20,000 or less. To arrive at this meaning, it is not enough to insert the single word "if" preceding the words "new mortgage" in the priority provision, but it is necessary to imply following the phrase, "with the provision, however, that new mortgage is placed for the purpose of constructing a building," the additional words, "if it exceeds \$20,000." With these words implied, said clause would then read, "that new mortgage is placed for purpose of constructing a building if it exceeds \$20,000." Said clause would then be superfluous, since necessarily embraced within the concluding provision "that all funds derived from said mortgage in excess of \$20,000 be actually used in the construction of said building on said premises."

[1] Courts should proceed cautiously in supplying a provision by implication which the parties have omitted from their written contract. *Foley v. Euless*, 214 Cal. 506, 6 P.(2d)

956. Words should not be added where the omission may have been intentional.

[2] The original second mortgage authorized the owner of the property to place a subsequent mortgage upon it which should be a first lien "*for any amount and on any terms and conditions.*" In the case herein no extrinsic evidence was introduced as to the circumstances surrounding the substitution of the new note and second deed of trust for the original note and second mortgage, and the inclusion in the deed of trust of the limited priority provision differing materially from the absolute provision in the original second mortgage. In our opinion the priority provision is sufficiently doubtful of meaning to admit of evidence of the circumstances surrounding the transaction, with a view to establishing the intent of the parties. Sections 1856, 1860, Code Civ. Proc.; section 1647, Civ. Code. See discussion with citation of numerous authorities, 6 Cal. Jur. 294. The difficulty in the instant case is that such evidence has not been produced. It does not even appear why or at whose request the change was made. The original second mortgage was executed by Sloat and wife; the deed of trust given in substitution therefor, by one Bonzagni and wife. However, the inference to be drawn from the proof is that Bonzagni did not have a beneficial interest, but merely held title for the convenience of Sloat.

Sloat did testify that the change was made with the understanding that the \$20,000 Sloat-Maerz second mortgage should be returned to him, but this testimony was ordered stricken out on the objection of cross-complainant's counsel. It is, however, apparent from the nature of the transaction that the effect of the change was to release Sloat from personal liability on his \$20,000 note to Maerz, which was canceled. It may be that, in consideration of relieving Sloat from personal liability on the second mortgage note, Maerz required that the restriction be placed upon the priority provision. The obvious purpose is to protect the value of the second lienholder's security. In view of the apparent intention of the parties that the owner should be permitted to "pay off" the \$13,500 first mortgage held by the Bank of America from the proceeds of the new loan, it was not required that the entire amount of the new loan be used for actual construction purposes. The parties may have anticipated that it would require approximately \$20,000 to discharge the original mortgage of \$13,500 with interest, to clear the property of the lien of taxes and assessments, and to pay expenses incident to obtaining a new loan in a larger amount, including a possible loan brokerage commission on a large loan, and discharge other incidental expenses.

On the other hand, the figure of \$20,000 may have been fixed because the holder of the sec-

ond lien deemed the land, with the then existing improvements, of sufficient value to secure his second lien, although subject to a first mortgage of \$20,000, and wished to consent to the owner borrowing an amount up to \$20,000 without restriction as to use. This, the vital point to establish plaintiff's contention, was not developed upon the trial by evidence of the circumstances surrounding the transaction. Surely the figure of \$20,000 was fixed only after discussion. To introduce evidence of the negotiations attending the change was the plainly indicated course of procedure for plaintiff's counsel. Yet counsel for each party objected to questions put by the other which seemed likely to lead to an explanation. The court also seems to have been of the view that the transaction should be determined from the provisions of the instrument alone.

The instrument is sufficiently ambiguous and doubtful in meaning to admit of extrinsic evidence. But, in the absence of evidence as to the intent of the parties, we cannot add to the instrument by implication, but must adhere to the literal terms of the priority provision. The decision of the trial court for plaintiff must be reversed. Upon a retrial, plaintiff may offer evidence of the circumstances surrounding the execution of the deed of trust and the placing of the restrictions on the priority provision, with a view to establish the intent of the parties that the restriction as to building did not apply to a loan of \$20,000 or less.

[3,4] For the reason that plaintiff may, however, be unable to establish priority to the amount of \$20,000, we will consider briefly whether, in that event, it is entitled to priority to the extent of \$13,500, the amount of the original first mortgage. This point must be decided in plaintiff's favor. The mortgage for \$13,500, and the note it secured were executed in favor of the Bank of America, and said bank was paid in full with funds loaned to the mortgagor, Sloat, by plaintiff. The mortgage was discharged of record. Plaintiff made the advance of \$20,000, relying on the priority provision contained in the junior deed of trust, with the intention that the mortgage made to it by the borrower should be a first lien. The action herein has been brought within the time when an action could be maintained to foreclose the original \$13,500 mortgage. In the event that plaintiff should fail to establish its priority to the extent of \$20,000, it should be given partial relief in equity from its mistake by according it priority to the amount of \$13,500, plus interest paid to the Bank of America on said note, and interest accruing since the date of payment at seven per cent, the rate specified on the \$13,500 note. Cross-complainant, as the successor of the second lienholder, will thus be given all rights for which the second lienholder con-

tracted, and left in the precise position where he would have been had not plaintiff, acting under mistake, caused the first mortgage to be discharged. In equity and justice he cannot ask for more. Maerz, to whose rights cross-complainant succeeded, did not stipulate for a first lien.

There is abundant authority throughout the country to the effect that, where the holder of an outstanding senior mortgage through mistake discharges it of record and contemporaneously takes a renewal mortgage, he will not in the absence of paramount equities be held to have subordinated his security to an intervening lien. An exhaustive annotation is found in 33 A. L. R. 149. The rule has recently been applied in this state in *Parker v. Tout*, 207 Cal. 590, 279 P. 431. See, also, *Shaffer v. McCloskey*, 101 Cal. 576, 36 P. 196; *Van Sandt v. Alvis*, 109 Cal. 165, 41 P. 1014, 50 Am. St. Rep. 25; *White v. Stevenson*, 144 Cal. 104, 77 P. 828; *Cherry v. Welsher*, 195 Iowa, 640, 192 N. W. 149; *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566. A similar equity exists in favor of plaintiff, who is not the original first mortgagee, but who has loaned funds to the mortgagor with which said first mortgage has been discharged of record upon the faith of obtaining a first lien. See *Emmert v. Thompson*, supra.

In conclusion, the judgment allowing plaintiff priority to the full amount of \$20,000 is erroneous upon the record before us, and must be reversed. Upon further proceedings in the trial court, plaintiff may offer additional proof, along the lines indicated above, to establish its priority to the full amount of \$20,000, or, failing that, establish its right to priority as to the \$13,500 item.

The judgment is reversed.

216 Cal. 730

LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST. v. HORNBECK et al.

GLENN-COLUSA IRR. DIST. v. WYLIE et al.

MERCED IRR. DIST. v. HENDERSON et al.
S. F. 14322-14324.

Supreme Court of California.

Nov. 30, 1932.

Rehearing Denied Dec. 29, 1932.

1. Taxation ⇨509.

In absence of statutory or constitutional provision, general taxes are awarded priority over special assessments.

2. Taxation ⇨502.

Every presumption is against legislative intent to prefer lien of special assessments to general taxes.

3. Taxation ⇨509.

In California, tax liens of counties and municipal corporations, and special assessments for public purposes, are on equality (Pol. Code, § 3787, as amended by St. 1927, p. 1666).

4. Taxation ⇨213.

Statute providing for cancellation of tax or assessment liens on property acquired by state or subdivision thereof allows cancellation only in favor of such public corporations or agencies as have caused property to be impressed with public trust (Pol. Code, § 3804a, as amended by St. 1925, p. 431; § 3787, as amended by St. 1927, p. 1666).

5. Waters and water courses ⇨231.

Irrigation districts acquiring property by deeds after sale for delinquent assessments held not entitled to cancellation of liens thereon for delinquent county taxes; tax liens not being merged in deeds to districts (Pol. Code, § 3804a, as amended by St. 1925, p. 431; § 3785; § 3787, as amended by St. 1927, p. 1666; St. 1897, p. 271, § 48, and § 47 [page 270], as amended by St. 1927, p. 190, § 2).

Irrigation districts were not entitled to cancellation of liens of county taxes and assessments, since the property in question was not impressed with a public trust, but was for resale, and since deed of land to state agency for delinquent taxes or assessments does not ipso facto destroy existing liens in favor of other state agencies or merge them into tax deed; but liens are extinguished or merged only when necessary to protect property impressed with a public use under Pol. Code, § 3785, § 3804a, as amended by St. 1925, p. 431, and § 3787, as amended by St. 1927, p. 1666.

6. Statutes ⇨233.

Interest of state agency in property is not extinguished without specific provision in statute.

In Bank.

Separate petitions for writs of mandate by the La Mesa, Lemon Grove & Spring Valley Irrigation District against E. A. Hornbeck and others, by the Glenn-Colusa Irrigation District against H. D. Wylie and others, and by the Merced Irrigation District against F. R. Henderson and others, to require the Boards of Supervisors and District Attorneys of San Diego, Glenn, and Merced Counties to make and approve orders canceling certain

described taxes, assessments, tax sales, and tax deeds.

Petitions denied.

Prior opinion, 8 P.(2d) 1031.

Albert J. Lee and Stearns, Luce & Forward, all of San Diego, for petitioner La Mesa, Lemon Grove & Spring Valley Irr. Dist.

Hankins & Hankins, of San Francisco, for petitioner Glenn-Colusa Irr. Dist.

Downey, Brand & Seymour, of Sacramento, for petitioner Merced Irr. Dist.

A. L. Cowell, of Stockton, T. C. Boone, of Modesto, C. L. Childers, of El Centro (H. J. Hankins, of San Francisco, of counsel), for Irrigation Districts Ass'n of California.

Bronson, Bronson & Slaven and Harold R. McKinnon, all of San Francisco, for California Irrigation and Reclamation Districts Bond Holders' Ass'n.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Chief Deputy Dist. Atty., and E. I. Kendall, Deputy Dist. Atty., all of San Diego, for respondent Board of Sup'rs of San Diego County.

Herbert C. Kelly, of San Diego, for respondent Thomas Whelan.

Milton M. Hogle, Dist. Atty., and Duard F. Geis, both of Willows, for respondents Board of Sup'rs of Glenn County and Milton M. Hogle.

F. M. Ostrander, Dist. Atty., and S. P. Galvin, Deputy Dist. Atty., both of Merced, and Arthur C. Shepard, Deputy Dist. Atty., of Fresno, for respondents Board of Sup'rs of Merced County and F. M. Ostrander.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, Elmer W. Heald, Dist. Atty., and S. L. McCrory, Deputy Dist. Atty., both of El Centro, Earl Redwine, Dist. Atty., and George A. French, Deputy Dist. Atty., both of Riverside, and W. H. Orrick, of San Francisco (Orrick, Palmer & Dahlquist, of San Francisco, of counsel), amici curiae.

PRESTON, J.

The following quotation from our former opinion in this cause furnishes a sufficient statement of facts for the purposes of this discussion:

"The above-named irrigation districts have severally petitioned this court for writs of mandate directing the boards of supervisors and district attorneys of San Diego, Glenn, and Merced counties to make and approve orders canceling certain described taxes, assessments, tax sales and tax deeds. It is alleged by petitioners and admitted by respondents that in each case the petitioning irrigation district has acquired certain parcels of real property, described in the respective petitions, pursuant to sales for delinquent assessments under the provisions of sections 47 and 48 of the California Irrigation District Act (St.

1897, pp. 270, 271), as amended in 1927 (St. 1927, pp. 190, 191 [§ 2]). It further appears that in each case at the time that such properties were acquired by said irrigation districts various county taxes and special assessments had been levied against said properties, and had not been paid. Petitioners contend that they are entitled to have all of these county taxes, special assessments, and the tax sales and deeds based thereon canceled under the provisions of section 3804a of the Political Code as amended in 1925. St. 1925, p. 431. Respondents contend that petitioners are not entitled to the cancellation of the county taxes and special assessments and the tax sales and deeds based thereon under the provisions of section 3804a of the Political Code, or under any other statutory or constitutional provisions.

"Inasmuch as the three petitions involve similar points of law, by stipulation of the parties the three cases have been consolidated for hearing. The various types of claims which petitioners contend they are entitled to have canceled can be briefly summarized as follows:

"In proceeding numbered S. F. 14324, the property described in the petition was transferred to the irrigation district, after a sale for delinquent assessments, by a deed dated January 20, 1931, which deed was recorded January 26, 1931. The claim of the state is based upon a tax sale at which the described parcel was sold to the state on July 3, 1929, for delinquent county taxes. No deed has issued to the state in reference to this property.

"In proceeding numbered S. F. 14323, several parcels are involved. The parcels referred to in the petition as parcels I and IV were transferred to the irrigation district, after a sale for delinquent assessments, by deeds dated September 4, 1930, which deeds were recorded September 26, 1930. Parcel I was sold to the state for delinquent county taxes on August 28, 1926. Parcel IV was sold to the state for delinquent county taxes on August 24, 1926. No deeds have issued to the state in reference to these properties. Parcels referred to in the petition as parcels II and III have not only been sold to the state for delinquent county taxes, but deeds have issued to the state as provided in section 3785 of the Political Code. Both parcels were transferred to the irrigation district, after a sale for delinquent assessments, by deeds dated September 4, 1930, which deeds were recorded September 26, 1930. The deed to the state in reference to parcel II is dated June 30, 1926, while the deed to the state in reference to parcel III is dated June 29, 1928.

"In proceeding numbered S. F. 14322, the property described in the petition was transferred to the irrigation district, after a sale for delinquent assessments, by a deed dated September 25, 1923, which deed was recorded

August 17, 1929. The claim of the state is based upon a tax sale at which the described parcel was sold to the state on June 29, 1929, for delinquent county taxes. No deed has issued to the state in reference to this property. In addition to the general county tax the parcel involved in this proceeding was likewise subject to an assessment under the Acquisition and Improvement Act of 1925 [St. 1925], p. 849, and was also subject to a further assessment levied by a fire protection district under the authority conferred by the statutes of 1923, p. 431. It appears that both of these special assessments were levied at the same time and as part of the levy for county purposes generally."

Petitioners, claiming to be the alter ego of the state by virtue of the several deeds to them, of the properties described, for delinquent assessments, invoke the provisions of section 3804a of the Political Code, supra, and seek to compel a cancellation of all liens, certificates of sale, and deeds representing delinquent county and other taxes on said properties. Said section 3804a reads, so far as here material, as follows: "Any uncollected tax, or assessment, or portion thereof, or penalty or costs thereon, heretofore or hereafter assessed, charged or levied * * * upon an assessment of property which after the time said tax or assessment became a lien was acquired and owned by the state, or by any county, city and county, municipal corporation, school district or other political subdivision and which, because of such public ownership, is not subject to sale for delinquent taxes, may, upon satisfactory proof thereof, be canceled by the officer having custody of the record thereof upon the order of the board of supervisors, or other governing board with the written consent of the district attorney, city attorney or legal advisor of said board; provided, that no cancellation shall be made of such charges on property exempt from taxation in event of failure to comply with the provisions of law, if any, relative to the manner of claiming such exemptions. If real property has been sold to the state or other subdivision for nonpayment of any tax levied as described in this section, and a certificate of sale or deed therefor has been issued to the state, or other subdivision and the state or other subdivision has not disposed of the property so sold, the order of the board shall also direct the officer having custody of the record thereof to cancel the certificate of sale or deed so issued."

Petitioners further urge in support of their claims the provisions of section 48 of the California Irrigation District Law (Deering, Gen. Laws, vol. 2, p. 1991, Act 3854), which at all times herein mentioned provided that "the deed conveys to the grantee the absolute title to the lands described therein free of all encumbrances. * * *" Petitioners also note that since 1927 (Stats. 1927, p. 190) section 47

of said Irrigation Law (Deering, Gen. Laws, vol. 2, p. 1990, Act 3854) has provided: "Where property has been sold to the district and a deed for it has been given to the district as the purchaser, such district shall have the same rights thereto, and to the rents, issues and profits thereof, as a private purchaser. The title so acquired by the district may be conveyed by deed, executed and acknowledged by the president and secretary of the board of directors; provided, that authority to so convey must be conferred by resolution of the board entered on its minutes fixing the price at which such sale may be made."

At a glance it will be seen that petitioners' position assumes precedence over all other public corporations as well as counties and municipalities, and moreover it impairs to some extent at least the functions of all these other agencies. It takes from one and gives to another. Counties and municipal corporations in particular have in charge the property, the liberty and the general welfare of the citizens, and are supported solely by taxation. The position of petitioners, if sustained, would require these functions to be waived in favor of a public agency which owes no duty as to any of them, but, on the contrary, is an organization which subsists upon assessments imposed upon the properties of the district in theoretical return for betterments or benefits received. We are not unmindful, however, of the rightful place in our system which we have freely accorded to utility, irrigation, reclamation, water storage, and various other districts which are state agencies for public purposes. We realize also the solicitude of the Legislature of the state at all times for their well-being. But we must examine with great care the construction of a statute which, it is claimed, places these institutions above the governmental and political bodies above mentioned, which are indispensable to our safety and prosperity. We think it well to refer to a few of the underlying principles that should guide us in reaching a conclusion as to the meaning of this statute.

[1] First, it is well settled that, in the absence of a statutory or constitutional provision, a distinct priority exists in favor of general taxes over special assessments of every kind. *Dougherty v. Henarie*, 47 Cal. 9; 26 R. C. L., p. 404, § 361; *State v. Board of Commissioners*, 89 Mont. 37, 296 P. 1. The reason for this rule is well stated in *Robinson v. Hanson*, 75 Utah, 30, 282 P. 782, 784, as follows: "We are not dealing with claims of intrinsic equality. The claim for the necessary support of government is a higher obligation than the demand for the costs of a local improvement, even though the latter has quasi public features. The first and paramount necessity for social order, personal liberty, and private property is the maintenance

of civil government; and government cannot exist without revenues. The necessity and importance of preferring the lien for general taxes over other claims are so impelling that the priority of the sovereign claims of the state will not be depreciated or denied without warrant from the Legislature in clear and unmistakable terms; and we find no such warrant from the Legislature. The provisions of the statute upon the subject are not inconsistent with the priority of the right of the state to its necessary revenues."

Again, in the case of *Missouri Real Estate, etc., v. Burri*, 202 Mo. App. 242, 216 S. W. 570, 571, it is said: "It must be conceded that a general tax, which has primarily for its object the support of the government, whereby the government may exist, and lives and property may be protected and the pursuit of happiness guaranteed, is of greater dignity and more importance than a tax bill issued for public improvements. It is true that a general tax is frequently levied for public improvements. But it is not feasible to levy a special tax, of the nature here involved, for what we understand to be meant by the expression, 'support of the government.' We can subsist without the special tax, but no civilized government could be organized and maintained without the general tax. So we conclude that the general tax, being first in vital importance, should be allowed first place in the means of payment."

[2] As a corollary to the above proposition, it may be stated that every presumption is against the legislative intent to prefer the lien of special assessments to those of general taxes. In *re Dancy Drainage Dist.*, 199 Wis. 85, 225 N. W. 873, at page 876, the court says: "We shall not attempt to review the authorities bearing upon this question, because in our view the lien for general taxes is of a distinctly higher order than the lien of any special assessment, and we should not construe any statute as giving precedence to the lien of any special assessment over the lien of general taxes in the absence of a plain legislative command." It may also be noted that, in the absence of clear statutory provisions to the contrary, a general tax lien is not only superior to an assessment lien, but a deed executed in the enforcement of the general tax lien will destroy the assessment lien and, conversely, a deed executed in the enforcement of an assessment lien will not extinguish a general tax lien.

[3] In the light of these propositions, we pause to ascertain whether or not the Legislature of California has spoken upon the question of the relative priority of general taxes and special assessment liens. We note that under section 3788 of the Political Code as originally enacted in 1872 there was no mention made of liens or special assessments, and a deed to the state at that time would no doubt have been construed as extinguishing

liens for special assessments. Later, however, section 3788 became section 3787, and in the year 1913 (Stats. 1913, p. 559, § 5) this section was rerafted so as to except from its operation a lien of taxes levied for municipal purposes. Later, and in 1917 (St. 1917, p. 241), this section was again amended so as to except not only a lien for municipal purposes, but for irrigation district purposes as well. Later, and in 1927 (Stats. 1927, p. 1666), the section was again amended so as to specially except a lien for reclamation, protection, flood control, public utility, and other district purposes. This section has been construed by our own appellate court and by the Supreme Court of at least one other state which has enacted it into their law, from which it is concluded that the legislative intent is to place all taxes, both for county, municipal, and other governmental agency purposes and taxes in the form of assessments in favor of special agencies of the state upon an equal footing before the law. *Bolton v. Terra Bella Irr. Dist.*, 106 Cal. App. 313, 289 P. 678; *State v. Board of Commissioners*, 89 Mont. 37, 296 P. 1, *supra*.

From the above authority and upon our construction of the section we may now safely conclude that under our system of taxation liens in favor of county and municipal corporations and special assessments, under the authority of state agencies for public purposes are all on an equality. By this is meant that in case of delinquency a deed to any one of these agencies for such taxes will not obliterate the existing liens on the property in favor of any or all of the others unless, indeed, said section 3804a compels a different conclusion.

[4-6] We shall now examine this section itself to see if it compels a disruption of said parity. To permit one state agency to compel a cancellation of all such liens existing in favor of another such agency is to declare an unequal rank between their respective positions. The party procuring the cancellation must be in the stronger position. How can this be if both parties rest their claims upon tax liens or tax deeds? There is but one answer. The property must be impressed with the public purpose committed by law to the applicant so that as a consequence it may not be sold for delinquent taxes. *Reclamation Dist. v. Superior Court*, 171 Cal. 672, 679, 154 P. 845; *Smith v. Santa Monica*, 162 Cal. 221, 222, 121 P. 920. There is no room for operation of the doctrine of merger of the liens in the tax deed. This construction would allow a public agency of the state to compel a cancellation of existing liens upon property only when impressed with the public trust committed to it. This is logical because in such case to collect the tax is to take money from one arm of the state and transfer it to another.

If this position is not sound, then the tax deed first in time would be first in right, and this is in diametrical opposition to petition-

ers' position, as they claim that a later deed destroys an earlier one. Moreover, the law recognizes a distinction between property impressed with a public purpose and property of an agency not so impressed, for in the latter instance the property may be sold for delinquent special assessments levied by other agencies or may be affected by adverse possession and other burdens of private property. *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 P. 291, 35 L. R. A. 33; *City Street Improvement Co. v. Regents*, 153 Cal. 776, 779, 96 P. 801, 18 L. R. A. (N. S.) 451; *Inglewood v. County of Los Angeles*, 207 Cal. 697, 280 P. 360; *City of Monterey v. Jacks*, 139 Cal. 542, 551, 73 P. 436; *Los Angeles v. Hunt*, 198 Cal. 753, 247 P. 897; *United Taxpayers v. San Francisco*, 202 Cal. 264, 266, 259 P. 1101; *Southlands Co. v. San Diego*, 211 Cal. 646, 668, 297 P. 521.

These and many other observations that might be made seem clearly to disclose a legislative intent to allow a cancellation in favor of only such public corporations and public agencies as have caused the property in question to be impressed with a public trust. It requires no argument to conclude that tax title property is not so impressed. Such titles are taken to secure the revenue required, and the property is for resale, not for permanent public use. If the state desires to put such property to a public use, a process for this purpose must be undergone. Pol. Code, § 3897a (as added by St. 1929, p. 1157) and § 3897b (as added by St. 1931, p. 2381, § 3).

We can accord no controlling weight to the contention in this connection that petitioners have tax titles which do not permit of redemption by the property owners and for that reason are in a superior position to the governmental arms of the state which give the property owner a right of redemption at any time before sale. Pol. Code, § 3785a. But the statute under review is not made for irrigation districts alone; it provides for a cancellation where the property is owned by the state or any of its agencies, and the ownership is of such a character that it may not be sold for delinquent taxes or assessments. Moreover, sections 47 and 48 of the Irrigation Law do not specifically declare that such title extinguishes the claim of all other agencies of the state. The rule of law that the state may not be thus precluded without specific provisions to that effect is well established. *Kubach Co. v. McGuire*, 199 Cal. 215, 248 P. 676; *Inglewood v. County of Los Angeles*, *supra*.

These citations also dispose of the claim that under section 48 of the Irrigation Law the title to the district is "free of all encumbrances," and thus the state is precluded. This position is clearly untenable. We need not pause to consider the nature of the state's title to nonoperative lands standing in the name of an irrigation district nor whether

such title is stronger or weaker than that of other state agencies, nor need we pause to examine the constitutional objections made by respondents to the construction urged by petitioners of said statute. It is sufficient for the purposes of this cause to hold that land deeded to a state agency for delinquent taxes or assessments does not ipso facto necessarily destroy existing liens in favor of other state agencies or merge them into the tax deed, and, further, to hold that such liens are extinguished or merged only when necessary to protect property impressed with a public use. This construction of said section harmonizes with other provisions of the Political Code on the same subject and also with cognate provisions in the special acts under which the varied types of public corporations existing in this state operate.

Neither is it necessary to re-examine the holding in *San Francisco v. McGovern*, 28 Cal. App. 491, 152 P. 980, or *State Land Settlement Board v. Henderson*, 197 Cal. 470, 241 P. 560, or to question the decision in *Turlock v. White*, 186 Cal. 183, 198 P. 1060, 17 A. L. R. 72. None of these cases deal with the question now before us.

Property impressed with a public use, standing in the name of an irrigation district, cannot be assessed or sold for delinquent general taxes. Whether nonoperative property or property held under a mere tax title and not devoted to the public use may be assessed is not here involved. Section 1, article 13, of the Constitution, defining what property may be assessed for taxes, speaks prospectively, and, when a cause arises where such property of an irrigation district, or other agency, is assessed for general taxes, we can then, if required, treat that specific question.

The several petitions are denied.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; TYLER, Justice pro tem; SEAWELL, J.

LANGDON, J., deeming himself disqualified, does not participate herein.

216 Cal. 740

PALO VERDE IRRIGATION DISTRICT, an Irrigation District Organized and Existing under and by Virtue of the Palo Verde Irrigation District Act, Petitioner, v. T. C. JAMISON et al., Respondents.

L. A. 13160.

Supreme Court of California.

Nov. 30, 1932.

Rehearing Denied Dec. 29, 1932.

In Bank.

Application for writ of mandate prayed to be directed to the Board of Supervisors and

District Attorney of Riverside County directing them to make and approve order canceling certain tax liens and sales.

Writ denied.

Prior opinion, 8 P.(2d) 1037.

Stewart & Shaw and Stewart, Shaw & Murphy, all of Los Angeles, for petitioner.

Earl Redwine, Dist. Atty., and George A. French, Chief Deputy Dist. Atty., both of Riverside, for respondent.

W. Coburn Cook, City Atty., of Turlock, *amicus curiæ*.

PRESTON, J.

This proceeding in mandate, to compel respondents to order the cancellation of certain tax liens and sales is a companion to cases S. F. 14322, S. F. 14323, and S. F. 14324, 17 P.(2d) 143, this day decided, and, except in so far as it differs from those cases, it has been submitted upon the briefs therein filed and upon respondents' demurrer to the petition herein.

Three parcels of land are involved. Parcels 1 and 2 were sold in 1927 by the county tax collector of Riverside county to the state for delinquent taxes for the year 1926. Parcel 1, lying within the city of Blythe, was also subject to a tax levied by that municipality, but assessed and collected by said county tax collector along with the said county taxes. Parcel 3 was sold and deeded on August 27, 1930, to the state for delinquent taxes covering the five years next prior to 1930. All three of these parcels were deeded to petitioner on July 2, 1931, pursuant to sales for delinquent assessments.

In the three companion cases above mentioned the respective petitioner irrigation districts were organized under the California Irrigation District Act (St. 1897, p. 254, as amended). This petitioner, Palo Verde Irrigation district, was organized under a special act entitled the Palo Verde Irrigation district act, Stats. 1923, p. 1067. The taxes of the district were assessed, levied, and collected with the county taxes from 1923 to the year 1927, when by amendment of the act (St. 1927, p. 972) the assessment, levy, and collection thereof were taken from the county officers and put in charge of the district officials. We find no substantial difference between the provisions of this act, subsequent to said amendment of 1927, and the said California Irrigation Act, sufficient to warrant a distinction between this case and the said three companion cases. S. F. 14322, La Mesa, etc., Irr. Dist. v. Hornbeck et al., S. F. 14323, Glenn-Colusa Irr. Dist. v. Wylie et al., and S. F. 14324, Merced Irr. Dist. v. Henderson et al. (Cal. Sup.) 17 P.(2d) 143.

Upon authority, therefore, of the decision

filed in those cases, this petition is hereby denied.

We concur: WASTE, C. J.; SHENK, J.; TYLER, Justice pro tem.; CURTIS, J.; SEAWELL, J.

LANGDON, J., deeming himself disqualified, does not participate herein.

128 Cal.App. 195

LEMONS et ux. v. FARMIN et al.

Civ. 7971.

District Court of Appeal, First District, Division 1, California.

Dec. 15, 1932.

1. Easements ⇨61(9½).

Finding as to title to land over which right of way is claimed is not necessary where title is not disputed.

2. Easements ⇨10(1).

"Private right of way" is interest in land that may be acquired by prescription.

[Ed. Note.—For other definitions of "Private Right of Way," see Words and Phrases.]

3. Easements ⇨24.

Easement as right of way is incident to land, and passes with it, unless expressly excepted by terms of conveyance.

4. Easements ⇨36(1).

Where wagon road over another's land had been used openly and continuously for more than 70 years to owner's knowledge, presumption is that there was claim of right.

5. Easements ⇨36(1).

Presumption of claim of right to use of road over another's land for some 70 years establishes prescriptive right, absent contrary evidence.

6. Easements ⇨61(7).

Purchasers who had almost completed payment for dominant tenement without default and were in possession had sufficient interest in easement in servient tenement to defend its existence (Civ. Code, § 809).

7. Easements ⇨7(3).

Where parties and predecessors used wagon road over another's premises for some seventy years under claim of right and without objection by owners of servient tenement, prescriptive right to use of road was established.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Pedro J. Lemos and Reta A. Lemos, his wife, against James Farmin and others. From judgment for defendants, plaintiffs appeal.

Affirmed.

Avery J. Howe and Kenneth R. McDougall, both of Palo Alto, for appellants.

Norman E. Malcolm, of Palo Alto, for respondents.

PER CURIAM.

Plaintiffs brought this action to quiet the title to a certain tract of land alleged to be owned by them.

The complaint alleges that defendants claim some interest in said land, but that the same is without right. Defendants by their amended answer deny that they have no interest in said land, and aver that they own an easement or right of way across it, and that they and their grantors and predecessors have owned, used, and occupied said easement and right of way continuously for the past seventy years. They allege that said easement consists of a wagon road leading from a public highway known as the Haskell Hill or Alpine road across the said land of plaintiffs to the adjoining land of defendants; that there is no other road or way by means of which ingress or egress can be had to said land of defendants, and that, if this road is closed, it will deprive defendants and all other persons of a right of way to defendants' said land. They further allege that they had their land surveyed and subdivided into lots for sale to members of the Native Sons of the Golden West for summer resorts, and that more than twenty of these lots have been sold, and that during all of this time plaintiffs had full knowledge of the sales of said lots and improvements thereon and the constant use of said road by defendants and said purchasers.

With their said amended answer defendants also filed a cross-complaint in which they allege that they are the owners of a road twenty feet wide running from the county road known as the Haskell Hill road across the land of plaintiffs, and that said road is appurtenant to defendants' land.

Plaintiffs answered same, denying the material allegations thereof. Upon the trial, judgment was rendered in favor of defendants, and from this judgment plaintiffs appeal.

Appellants contend that the findings are insufficient to support the conclusions of law and the judgment, are not supported by the evidence, and do not cover all of the material issues; and that evidence prejudicial to appellants was improperly admitted.

Respondents produced evidence substantially as follows: The land owned by them adjoins appellants' land. The only way by which respondents can get to their said land is over a wagon road that passes over plain-

tiffs' land. Respondents purchased their land from Joseph Rodriguez in 1927. The grandfather of Joseph Rodriguez went upon this land about 1860 and built a house on it, and he and his children and grandchildren have owned and occupied it until sold to respondents. About the year 1860 the grandfather constructed the wagon road in controversy, and since then it has been continuously used by them and their grantees. Until the year 1868 the land now owned by appellants and over which the said wagon road passes was government land. In 1868 J. B. Hollinsead became the owner of the land now owned by appellants and continued in said ownership until 1922. He had full knowledge of the existence of said wagon road and of its continual use by respondents' grantors, and at times assisted them in repairing it, and never, on any occasion, objected to said use by them. In 1922 Hollinsead sold said land to G. Vega, and he in turn sold to plaintiffs. Vega, while he owned said land, made no objections to its use for the said roadway. Appellants purchased their land from Vega on January 8, 1927, and subsequently, on May 4, 1927, appellant Pedro J. Lemos wrote a letter to the Native Sons of the Golden West in which he made the following statement: "In reference to the right of way which is routed through my property to the property recently purchased from Mr. Rodriguez, by members of the N. S. G. W. for park purposes, I wish to give the following information. That the right of way must be maintained on the present location only and cannot be changed to any other part of my land." Later, in October, 1927, he wrote a letter to a Mr. Cobb, in which he stated that the greater portion of the present road had been used only recently; that the former road came from the eastern end of his property; that he was informed that no legal right of way was ever made; and that the road was only allowed as an accommodation by the former owners.

There is some evidence that in the early days two gates were placed across said wagon road, but that these gates were removed, and for a period of thirty years no gates were there. Vega testified that, while he owned appellants' land, he placed two gates across said road, but that the purpose in erecting the said gates was to keep live stock in and out of the premises and not with the design or intention of preventing the use of said road to and from the land of respondents.

There is no evidence that the use of this land by respondents or their grantors was permissive. Respondents' grantor testified that he always claimed said road as his road, and this right was never denied.

The court found that the pleadings and issues made at the trial were over the right, title, and interest in and to a wagon road upon and extending over and across the land of

appellants to the land of respondents, setting forth the description of said road; that for a period of seventy years said wagon road as above described has been openly, obviously, and permanently located on the lands of appellants; that all of said period of time said respondents and their predecessors in ownership, under a claim of right and adverse to appellants, their predecessors in ownership and all the world, had held and used the continuous, uninterrupted, open, and peaceable possession of said road as a right of way over and across the land of appellants to the land of respondents for travel by wagon and team and vehicles; that for seventy years the said land of appellants and their predecessors and their title therein has been subject to said easement for a wagon road, and during all of that time respondents and their predecessors have had possession of and have acquired a title by prescription in and to said right of way for a wagon road as therein described, and during all of said period respondents and their predecessors have had no means of egress and ingress to and from their said land to said county road; and that the said wagon road is a way of necessity to enable respondents to have access to their said land from the said county road.

The conclusions of law were in substance that respondents are entitled to a decree to have and possess a perpetual easement by prescription to the right of way for a wagon road, as described therein, over and across the land of appellants and appurtenant to the land of respondents, and that respondents are entitled to a decree that said right of way for a wagon road is a way of necessity.

[1] The sole issue in this case was whether or not respondents had a right of way for a wagon road over and across the land of appellants. Respondents made no denial of appellants' title to the land sought to be quieted. They admitted appellants' ownership of said land except as to the said wagon road. There was therefore no necessity for a finding of ownership by appellants of their land, *Pinheiro v. Bettencourt*, 17 Cal. App. 111, 119, 118 P. 941.

[2, 3] It is well settled that a private right of way is an interest in the land to which such easement is annexed and may be acquired by prescription. *Rowe v. Wurster*, 50 Cal. App. 196, 194 P. 725; *Patchett v. Pacific Coast Ry. Co.*, 100 Cal. 505, 35 P. 73; *Kripp v. Curtis*, 71 Cal. 62, 11 P. 879; 9 Cal. Jur. 948. It is also well settled that an easement as a right of way is incident to the land and passes with it, unless expressly excepted by the terms of the conveyance. *Conaway v. Toogood*, 172 Cal. 706, 158 P. 200; *Rubio Canon, etc., Ass'n v. Everett*, 154 Cal. 29, 96 P. 811; *Civ. Code*, § 1084.

[4, 5] Appellants claim that there is no evidence to support the findings that the use of said wagon road by respondents and their

grantors was adverse to appellants, or that such use was at any time known to them or their predecessors, or that it was so notorious and open that it must be presumed to have been known to them. In the instant case, there is evidence that the wagon road has existed for the past seventy years, and during all of that time has been used by respondents and their predecessors openly, continuously, with the knowledge of appellants and their grantors, and without objection from any one. Under this state of facts it was held in *Wells v. Dias*, 57 Cal. App. 670, 207 P. 913, 914, that " * * * it is to be presumed that the use of the easement was under a claim of right and adverse to the owner, and such presumption, in the absence of evidence to the contrary, is sufficient to establish a prescriptive right of way. *Yuba Consolidated Goldfields v. Hilton*, 16 Cal. App. 228, 116 P. 712, 715."

[6] Appellants also contend that the respondents are not the owners of the dominant tenement, and are not entitled to a decree declaring them to be the owners of the said right of way. They base this contention upon the following facts: In 1927 Rodriguez sold to respondents the said land claimed by them, and at that time executed to them a contract of sale and delivered to them possession of said land. He also executed a deed to them, and placed the same in escrow, to be delivered upon payment in full of the purchase price. Appellants named said Rodriguez as a party defendant in this action, but caused no service to be made on him. At the beginning of the trial, and before any evidence was taken, the trial judge suggested the advisability of bringing in the said Rodriguez, and thereupon it was stipulated that, inasmuch as Rodriguez had no interest in the matter involved in this suit, he was not an interested party, and that the case should proceed against respondents alone. However, as respondents had almost completed the payments of the purchase price under the contract of sale, and there is no evidence that they had defaulted in making said payments, and they had been in the continuous possession of said land since 1927, it would seem that they had an interest in said wagon road that would justify them in interposing the same in defense of appellants' action against them to quiet title.

The law is well settled that the owner or occupant of an estate in a dominant tenement may maintain an action for the enforcement of an easement attached thereto. *Relovich v. Stuart*, 211 Cal. 422, 295 P. 819; *Connell v. McGahle*, 37 Cal. App. 439, 173 P. 1115; *Civ. Code*, § 809. Any person in the actual possession of the premises to which an easement is appurtenant may maintain an action for the disturbance of the easement. It is not necessary that seisin be established. 9 R. C. L. 817.

[7] The evidence clearly shows that appellants and their predecessors had knowledge of the use of said wagon road by respondents and their grantors, and the claim upon their part to the right to such use, for a period of more than sixty years, and that during all of that time they made no objection to such use nor disclaimed respondents' right so to do. It appears that no assessment for taxes was ever made upon said easement. The claim that the trial court improperly admitted evidence to appellants' prejudice is without merit.

We are of the opinion that respondents have a prescriptive right to the use of said wagon road, and therefore it is unnecessary to consider the question of necessity.

The judgment is affirmed.

Mr. Justice KNIGHT, deeming himself disqualified, did not participate.

128 Cal.App. 238

**CAMP v. OAKLAND MORTGAGE &
FINANCE CO.**

Civ. 8390.

District Court of Appeal, First District,
Division 2, California.

Dec. 17, 1932.

1. Bills and notes ☞17.

Instrument executed by owner requesting mortgage company to pay \$2,000 out of loan funds to plaintiff *held* not bill of exchange, but at most conditional promise to pay specified sum from designated fund on happening of certain contingencies (Civ. Code, § 3307).

The instrument addressed to the mortgage and finance company requested it to pay to plaintiff or order \$2,000 for repayment of funds advanced to contractor furnished on job, for value received, and charge amount thereof to loan made to owner, and contained further recitals that it was part of final payment, and that draft would not be honored unless receipted bill was attached, and instrument was accepted for payment by mortgage company.

2. Interpleader ☞11.

In action against mortgage company for balance of loan funds, order substituting as defendant, contractor's surety for payment of labor and materialmen *held* proper (Code Civ. Proc. §§ 386, 1183).

The order of substitution was proper where original defendant, the mortgage and finance company, paid money into court disclaiming interest therein and left the respective claimants to litigate their respective rights.

3. Assignments ☞84.

Claim against loan funds of surety on contractor's bond to secure payment of labor and materialmen *held* superior to claim of owners' assignee (Code Civ. Proc. § 1183).

The facts disclosed that though conditions attached to order sued on recited "part of final payment. This draft will not be honored unless receipted bill is attached," such condition was not met, because receipted bill was not attached to draft. Furthermore, lower court found that both owners and mortgage company, following execution of contractor's bond, had full knowledge of all terms and conditions thereof and enjoyed benefit thereof; that all labor and materialmen knew of and relied on provisions of contract and building loan as security for payment; and that plaintiff suing on the order had constructive knowledge of terms of building loan. Under such circumstances, since owners and contractor could not collect the money while unpaid liens were charge against property, plaintiff, as owners' assignee, was in no better position, and his claim was, therefore, inferior to claim of surety which paid lien claims of others.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by M. A. Camp against the Oakland Mortgage & Finance Company in which the Fidelity & Casualty Company of New York was substituted defendant and filed cross-complaint. From an adverse judgment, plaintiff appeals.

Affirmed.

J. C. Wood, of San Francisco, and Ezra Cox, of Oakland, for appellant.

Melville C. McDonough and Carter, Peterson & McDonough, all of Oakland, for respondent.

KING, Justice pro tem.

The action is to recover from the Oakland Mortgage & Finance Company the residue or balance of a loan fund remaining in the hands of the mortgage company, the loan having been theretofore arranged by one George Phillips and wife to meet progress payments on a building erected for them by one G. R. Sterne as contractor.

This instrument reads:

"Oakland, California, June 8, 1927.

"Oakland Mortgage & Finance Co.

"1432 Franklin St.

"You are hereby requested to pay to M. A. Camp or order two thousand and 00/100 dollars, \$2,000.00 for repayment of funds ad-

vanced to G. R. Sterne furnished on job at East side of Seventy Third Avenue, 100 feet South Foothill Blvd. Value received and charge same to loan of undersigned in amount of \$10,000.00.

"George Phillips
"Nora Phillips.

"Part of final payment.

"This draft will not be honored unless receipted bill is attached.

"Accepted for payment when 4th payment on Loan is due and payable 35 days after filing notice of completion and building completed.

"Oakland Mortgage & Finance Co.,
"John A. Brennan, Manager."

Several other persons made demand for the balance remaining in its hands under the loan arrangement, and, being unable to determine to whom it should pay the same, the Oakland Mortgage & Finance Company moved the court below, in accordance with the requirements of section 386 of the Code of Civil Procedure, before answer filed, for an order discharging it from liability and dismissing it from the action, upon payment into court of the sum in dispute, and substituting in its place all of the adverse claimants. This order the court granted.

Thereafter, and by and with the consent of the owners of the building, the defendant Fidelity & Casualty Company of New York, one of the substituted defendants, did pay and discharge the liens and claims of the several other substituted defendants, thus leaving itself as the only defendant in the case with whom plaintiff was to litigate his asserted right to the money deposited in court. Upon the conclusion of the trial, it was found that the claim and right of the substituted defendant was superior to and entitled to priority over plaintiff's claim.

From the judgment so entered plaintiff appeals.

[1] Appellant in his opening brief contends that the paper sued on is a bill of exchange as defined in section 3207 of the Civil Code, but the Supreme Court on a motion to dismiss the appeal (212 Cal. 434, 298 P. 974, 975), held that the instrument sued on is not a bill of exchange "but constitutes at most a conditional promise to pay a specified sum of money from a designated fund upon the happening of certain contingencies."

[2] He further insists that the court erred in granting the order of substitution, and as to this matter the Supreme Court held in the same decision that "this contention is clearly without merit."

[3] Thus, as stated in appellant's reply brief, the only question remaining to be determined is whether this assignment as accepted by the mortgage company is superior

to the claim of the surety company which has voluntarily agreed to protect the assignor from the default of the contractor and which, by reason of such default, has been compelled to pay lien claimants.

In the discussion of this matter appellant urges that "plaintiff's accepted assignment" is superior to the equitable claim of respondent for the reasons: (a) It was an executed contract which passed title as of the date of its acceptance; (b) the order being given by the owners of the fund is not subject to the claims of Sterne's (the contractor's) creditors; and (c) respondent's right of subrogation is only to the right of Sterne as against either the owners or their assignee.

Defendant the Fidelity & Casualty Company of New York, on April 13, 1927, executed a contract of suretyship as provided in section 1183, Code of Civil Procedure.

When the order to pay Camp the \$2,000, "and charge the same to loan" was given by the owners, the building was completed, but unpaid bills for labor and materials in the sum of \$6,851.27 remained.

The lower court found that both the owners and the mortgage company at all times following the execution of the builder's bond by defendant had full knowledge of each and all the terms and conditions of the bond, and enjoyed the benefit thereof; that each and all the labor and materialmen knew of and relied on the provisions contained in the building contract and the building loan and did rely thereon as security for payment. And that plaintiff at all times had constructive knowledge of each and all the terms of the building loan—and that it is true that the equitable lien of defendant upon the unpaid balance of the building loan is superior to that of plaintiff, and the defendant is subrogated to each and all the rights of the owners and the labor and materialmen with respect to the balance of said building loan. That said moneys are the undistributed balance remaining upon said building loan.

Upon consideration of all the facts and circumstances surrounding this case it appears to the court that the conditions attached to the order sued on, viz.: "Part of final payment. This draft will not be honored unless receipted bill is attached," have never been met. The draft, by its terms, was not payable until the receipted bill was attached, and this was never done. Further, the owners were not themselves entitled to collect this money while unpaid liens were a charge against the property. If they themselves could not collect it, if the contractor could not collect it, then plaintiff, the assignee, is in no better position.

The judgment should be and is affirmed.

I concur: SPENCE, J.

128 Cal.App. 355

**TRINIDAD BEAN & ELEVATOR CO. et al.
v. SUPERIOR COURT OF LOS AN-
GELES COUNTY et al.**

Civ. 8587.

District Court of Appeal, Second District,
Division 2, California.

Dec. 23, 1932.

1. Courts — 122.

One of counts being for amount within Superior Court's jurisdiction, demurrers to other counts seeking recovery of lesser amounts were properly overruled.

Demurrers to counts respectively seeking to recover amounts less than necessary to give Superior Court jurisdiction were properly overruled even though such other causes were assigned.

2. Courts — 122.

Courts scrutinize pleadings when necessary to ascertain amount actually in controversy, and such amount when determined is criterion of jurisdiction.

Application by the Trinidad Bean & Elevator Company and another, for a writ of prohibition against the Superior Court of Los Angeles County and others.

Writ denied.

Chotiner, Recht & Chotiner and Alfred Gitelson, all of Los Angeles, for petitioners.

C. E. McDowell and W. M. Greathouse, both of Los Angeles, for respondents.

CRAIG, J.

In an action commenced in the Superior Court of Los Angeles County against the petitioners herein praying judgment for an aggregate sum within the jurisdiction of said court, demurrers to four counts of the complaint which alleged demands for lesser amounts were overruled. The defendants thereupon petitioned for a writ of prohibition to restrain further proceedings in said action. It is averred by the petitioners that the complaint consisted of seven separate counts or causes of action, the first for an amount exceeding \$10,000 and each of the others for sums less than \$2,000; that the defendant corporation holds cross-demands some of which do not amount to \$2,000 and are within the jurisdiction of the municipal court; and that said Superior Court is without jurisdiction to entertain the suit upon the aggregate amount, or to permit the assertion of said defenses.

[1] It is not contended that any of the claims for less than \$2,000 are improperly joined with the one exceeding \$10,000, and since such joinder is permitted and it may be

said even encouraged to prevent a multiplicity of suits. It is obvious that this could not be accomplished if petitioners' contention were upheld, for the principal cause of action is within the exclusive jurisdiction of the Superior Court.

[2] In an action wherein a number of plaintiffs united each of their small demands, praying judgment for an amount within the jurisdiction of the Superior Court it was held that while ordinarily the ad damnum clause when stated in good faith affords the test of jurisdiction, since it is the larger demand which is litigated, yet said court had not jurisdiction because the plaintiff's claim amounted to less than that of which the justice's court took cognizance. *Miller v. Carlisle*, 127 Cal. 327, 59 P. 785. Nevertheless, the courts will scrutinize pleadings when necessary to ascertain the real amount actually in controversy, and such amount when determined must be held the criterion of jurisdiction. *California Cured Fruit Ass'n v. Ainsworth*, 134 Cal. 461, 66 P. 586; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 P. 56, 51 P. 195. The amount of the plaintiff's alleged claim against the petitioners being in excess of that which determines the election of jurisdictions, we are aware of no rule precluding the joinder of other causes though they be assigned. The amount of the defendant's cross-demand in such a case is not controlling, nor can it be said to be limited by section 442 of the Code of Civil Procedure, which affords affirmative relief.

The writ of prohibition is denied.

We concur: **WORKS, P. J.; STEPHENS,**
Justice pro tem.

128 Cal.App. 312

REID v. FOWLER et al.

Civ. 649.

District Court of Appeal, Fourth District,
California.

Dec. 21, 1932.

1. Bills and notes — 516.

Evidence sustained finding that note was not payable only from profits derived from business sold.

The note sued on was a second renewal in part of an original note given as part payment for an interest in a mercantile business, and such note and each of prior notes contained recital "With privilege of renewal."

2. Bills and notes — 516.

Finding that note sued on over five months after maturity date was due when

action was commenced *held* authorized, notwithstanding recital therein "with privilege of renewal."

Such finding was authorized, since any rights of makers to exercise privilege of renewal granted by note could be exercised only at maturity of note and reasonable time thereafter, and the renewal clause could not be construed as giving makers right to wait indefinite time before exercising privilege.

3. Bills and notes $\S$ 489(1).

In action on note received as part payment for mercantile business, excluding evidence respecting how purchase price of goods was arrived at *held* proper.

Such evidence was properly excluded, because the question had nothing to do with the issues of the case.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by E. D. Reid against Orland J. Fowler and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Burton E. Hales, of Redlands, for appellants.

Halsey W. Allen, of Redlands, for respondent.

BARNARD, P. J.

This is an action on a promissory note given by the defendants to the plaintiff as a second renewal in part of an original note given as part payment for an interest in a mercantile business. This note, as well as each of the prior notes, contained the clause, "With privilege of renewal." The note here sued on was executed on December 15, 1930, was payable March 15, 1931, and this action was commenced on August 24, 1931. In their answer the defendants admit the execution of the note and set up the defense that it does not express the real agreement between the parties, it being alleged that the note was given in part payment for an interest in a mercantile business; that through a mistake of the parties or through a mistake of one party, which mistake was known or suspected by the other, the note does not express the real agreement between the parties; that at the time of its execution it was agreed by the parties thereto that the note should be paid only from the profits derived by the defendants from the business in question; and that said profits have not been sufficient to pay the same. From a judgment in favor of the plaintiff, the defendants have appealed.

[1] At the trial and upon this appeal the principal contention of appellants was and is

that the clause, "with privilege of renewal," was intended to express an agreement by the parties to the effect that the note should be paid only from the profits derived from the business sold. This point is here raised by attacking two findings, which were to the effect that the note sued on expressed the real agreement of the parties, and that at no time was it agreed that the note should be paid only from the profits derived from the business, as not supported by the evidence. While the appellants point out certain evidence supporting their position, the record shows that the respondent testified flatly to the contrary; his testimony being to the effect that no such agreement was made either at the time the original note was given or at any subsequent time, that he had never agreed that the note should be paid from the profits of the business, and that it was not true that he had been told by the payees that they would have to have time to pay this note out of the profits of the business. He further testified that nothing was said in reference to the renewal clause here in question at the time this note was executed, and in response to a question by appellants' counsel as to what was intended by this clause in the original note, he answered: "It was intended to renew if I didn't need the money. When I made out the note I gave them—the first note was three months and fifteen days, so they could have fifteen days more to raise the money, and he said, 'If you don't get all this money at that time, will it be all right to keep it?' And I said, 'As long as I don't need the money I would as soon you had it as anybody else.'" No more appears than a conflict, and the findings complained of are sustained by the evidence.

[2] Incidentally the claim is made that under the terms of the note the appellants are now entitled to another renewal thereof. The respondent testified that nothing was said about this clause or about any renewal at the time this note was signed. He further testified that, at the time this note became due, he told the respondent Orland J. Fowler he would renew the note for three months, or until June 15, 1931. While Orland J. Fowler denied that the respondent had told him this, he admitted that the respondent's attorney had so told him. Not only could the trial court fairly infer from the evidence that the appellants accepted such an extension as the renewal provided for in the note, but this action was not brought until more than five months had elapsed after the note became due. The clause in question provides for a privilege to the payors, which they might waive or exercise at their option. Their right to claim and exercise this privilege arose when the note became due on March 15, 1931, and could be exercised only at that time or within a reasonable time thereafter. The renewal clause could not be construed as giving to the appel-

lants the right to wait an indefinite time before exercising the privilege. The trial court was justified in finding and concluding that the note was due and payable when the action was brought.

[3] The only other point raised is that the court erred in refusing to permit the appellants to go into the question of how the parties arrived at the purchase price for the stock of goods originally sold. The question asked had nothing to do with the issues of this case, and the objection thereto was properly sustained.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 221

LOSLEBEN v. CALIFORNIA STATE LIFE
INS. CO.

Civ. 687.

District Court of Appeal, Fourth District,
California.

Dec. 15, 1932.

Appeal and error ☞786.

Determination whether there was lack of evidence supporting judgment, and whether giving specified instructions was error, required examination of transcript, precluding dismissal of appeal on motion (Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Ida Losleben against the California State Life Insurance Company. From the judgment, defendant appeals. On motion to dismiss appeal and to affirm judgment of superior court.

Motion denied.

See, also, 119 Cal. App. 556, 6 P.(2d) 1012.

West & McKinney, of Santa Ana, for appellant.

Wm. J. M. Heinz and McFadden & Holden, all of Anaheim, for respondent.

JENNINGS, J.

Respondent has moved this court to dismiss the appeal herein or to affirm the judgment upon the ground that the appeal was taken for delay only and that the questions on which decision of the case depends are so unsubstantial as to require no further argument.

The motion is presented by virtue of the provisions of section 3, rule V, of the Rules of the Supreme Court and District Courts of Appeal. Examination of appellant's brief discloses that two contentions are presented therein which it is claimed warrant a reversal of the judgment. These contentions are: (1) That there was an entire lack of evidence to support the judgment, and (2) that the court erred in giving certain instructions to the jury. It is at once apparent that proper consideration of these questions can be had only after careful examination of the transcript which contains all of the evidence produced upon the trial of the case and all of the instructions given by the court to the jury. This court has recently announced the policy that in cases where it appears that an examination of the entire record is required in order to determine the questions presented by the appeal, a motion for dismissal thereof or for affirmation of the judgment under the above-mentioned rule will be denied. *City of Los Angeles v. Los Angeles Inyo Farms Co.* (Cal. App.) 14 P.(2d) 339; *Brown v. Gow* (Cal. App.) 14 P.(2d) 322.

The motion is therefore denied.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 341

NELSON v. NATIONAL GUARANTY LIFE
CO.

Civ. 820.

District Court of Appeal, Fourth District,
California.

Dec. 22, 1932.

I. Appeal and error ☞786.

That appellant's opening brief was not timely filed *held* not conclusive that appeal was taken for delay only (Supreme Court and District Courts of Appeal Rule 1, §§ 4, 5; Rule 5, § 3).

It appeared that grounds stated in notice of motion to dismiss appeal or to affirm judgment were that appeal was taken for delay only, and that questions on which decision of cause depended were so insubstantial as to require no further argument; that language of this motion followed that of rule 5, § 3, of Rules for Supreme Court and District Courts of Appeal; and that respondent made no motion to dismiss appeal on ground of appellant's delay in filing opening brief, which was filed eight days prior to filing of motion to dismiss appeal.

2. Appeal and error $\Rightarrow$ 801(5), 1127.

Motion to dismiss appeal or to affirm judgment will be denied where determination of motion requires examination of entire record on appeal.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Selma S. Nelson against the National Guaranty Life Company. From the judgment, defendant appeals. Motion to dismiss the appeal or to affirm the judgment.

Motion denied.

Feemster, Perkins & McCormick (by Leroy McCormick), all of Visalia, for appellant.

J. A. Chase, of Visalia, for respondent.

JENNINGS, J.

[1] This is a motion to dismiss an appeal or to affirm the judgment rendered by the trial court. The grounds stated in the notice of motion are that the appeal was taken for delay only, and that the questions on which decision of the cause depends are so insubstantial as to require no further argument. The language of the motion follows strictly the verbiage of section 3, rule V, of the Rules promulgated for the Supreme Court and the District Courts of Appeal and it is apparent that the motion is made pursuant to the provisions of said section. In the points and authorities submitted by respondent in support of the motion the statement is made that appellant's opening brief was not filed within the time permitted by sections 4 and 5 of rule I of said above-mentioned rules. This statement appears under the title "Appeal Taken For Delay Only." We take it that the fact that appellant's brief was not filed on time is by no means conclusive that the appeal herein was taken for delay only. Respondent has not moved to dismiss the appeal on the ground of appellant's delay in filing his opening brief. Furthermore, our records show that appellant's opening brief was filed with this court on September 21, 1932, which was eight days prior to the date on which respondent's motion to dismiss the appeal was filed. It is apparent that the real ground of the motion here presented is that the questions on which the decision depends are so insubstantial as to require no further argument. In support of his contention with respect to the insubstantiality of the questions involved respondent urges, first, that appellant's brief contains no sufficient specification of errors alleged to have been made by the trial court. We have examined the brief with reference to the provisions of rule VIII of the rules of the Supreme Court and District Courts of Appeal and, while it may be conceded that it does not comply strictly with the requirements of said rule particular-

ly in that it fails to present each point separately under an appropriate heading, we cannot conclude that there was such entire failure to comply with the spirit of the rule as to warrant dismissal of the appeal for this reason. Examination of the brief discloses at least substantial compliance with the above-mentioned provision of the rule.

[2] Respondent next urges that the points presented in appellant's brief do not relate to the issues which were tried in the superior court. In support of this contention respondent refers to certain specified pages of the clerk's transcript. Examination of that portion of the clerk's transcript to which reference is thus made discloses that it contains the findings made by the trial court and its conclusions drawn from such findings. Further examination of appellant's brief and of respondent's answering brief impels us to the conclusion that the question involved in the appeal is, in the final analysis, whether certain findings of the trial court are supported by the evidence which was produced at the trial. Proper determination of this question necessarily requires an examination of the entire record. This court has heretofore announced the policy that when it appears that an examination of the entire record on appeal is required in order to determine properly a motion to dismiss or to affirm a judgment in accordance with the provisions of section 3 of rule V of the Rules of the Supreme Court and District Courts of Appeal such motion will be denied. *City of Los Angeles v. Los Angeles-Inyo Farms Co.* (Cal. App.) 14 P.(2d) 339; *Brown v. Gow* (Cal. App.) 14 P.(2d) 322.

Respondent's motion to dismiss the appeal or to affirm the judgment is therefore denied.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 319

WESTERN OIL & REFINING CO. v.

SULLIVAN.

Civ. 7255.

District Court of Appeal, Second District,
Division 2, California.

Dec. 22, 1932.

1. Replevin $\Rightarrow$ 72.

Evidence in claim and delivery for boilers furnished defendant under written contract held not to establish his right of possession under subsequent oral agreement.

There was evidence that one acting for plaintiff told defendant's representative to forget about boilers until higher officer of plaintiff mentioned it and that another

told same witness that boilers would be left with defendant until money he expected from East to pay therefor arrived, whereupon he would take up proposition of extending time by contract.

2. Contracts ⇨247.

Conversation between plaintiff's and defendant's representatives respecting extension of time to return boilers furnished defendant was insufficient to alter previous written contract.

3. Replevin ⇨72.

Trial ⇨396(3).

Allegations of complaint and evidence in claim and delivery for boilers furnished defendant held to justify court's finding that defendant agreed to pay stated interest on stipulated value thereof (Code Civ. Proc. § 627).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Western Oil & Refining Company against E. M. Sullivan. Judgment for plaintiff, and defendant appeals.

Affirmed.

Frank L. Borden, of Los Angeles, for appellant.

Arthur G. Baker and Joseph Hansen, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This is an appeal from a judgment rendered in favor of the plaintiff corporation in a claim and delivery action. The facts essential to an understanding of the case are briefly as follows: On November 27, 1928, the appellant owned certain land, together with all the oil and 80 per cent. of natural gas that might be produced therefrom. Being desirous of drilling for the oil and gas, he entered into a contract with respondent on that date whereby respondent agreed, in consideration of the contemporaneous execution of a gas contract in its favor, to place at the disposal of appellant for a period of seven months two boilers to be used in the drilling of a well. There was included in the contract a provision that, when the well should be placed on production, respondent should retain sufficient of the royalty gasoline belonging to appellant to pay for the boilers in the sum of \$4,850, plus interest at 7 per cent. from the date of the agreement. Respondent furnished the equipment as agreed, but the seven months passed without any funds being raised or made available by the appellant for the work of drilling. On June 22, 1929, upon the statement of appellant's representative to a Mr. Esselstyn, acting for respondent, that appellant expected some money from the east, the latter said to forget about the boilers "until some higher officer would mention it

to him, and he figured that it could be fixed to our satisfaction." Again about the middle of July of the same year a Mr. Taylor told the same witness, the manager for appellant: "that the boilers would be left there until the time that the money came, and that I would see them—at that time they would take up the proposition of extending the time by contract." Finally on September 25, 1929, the hope of securing funds which was springing in appellant's breast had completely waned so far as respondent was concerned, and it demanded the return of the boilers. Upon refusal of the appellant to deliver them up this action was brought resulting in a judgment for their recovery together with interest upon their value from the date of the contract at 7 per cent. per annum.

There are two reasons advanced why we should reverse the judgment, the first being that the right of possession of the machinery was in appellant by virtue of the oral agreement and the other that the court was not authorized either by the evidence or the pleadings to award plaintiff a judgment for the interest.

[1, 2] Appellant's contentions cannot be sustained. In the first place there is nothing in the conversations which evidences a new agreement for the possession of the boilers. The most that can be said for them is that they evidence a willingness on the part of the respondent to defer demand for possession for a further short period to ascertain whether the money would come, at which time a new agreement would be discussed. Furthermore, it is obvious that the conversation of June 22, 1929, could not be sufficient to alter the written contract even though its purport were as contended for by appellant. The case of Jamison v. Hobbs Battery Co. (Cal. App.) 10 P.(2d) 779, completely concludes appellant's first argument.

[3] Turning to the other contention we note that the court found "that the plaintiff and the defendant E. M. Sullivan, entered into an agreement under date of November 27, 1928, wherein and by virtue of which, among other things, the said defendant agreed to pay to plaintiff interest at the rate of seven per cent per annum on the sum of forty-eight hundred and fifty dollars (\$4,850.00), the value of the boilers specifically described in paragraphs III and IV of plaintiff's complaint, until the plaintiff shall have received the full amount of said \$4,850.00 in the event said boilers should not be redelivered to the plaintiff, or interest at the same rate on the same amount of money until said boilers should be redelivered to the plaintiff." It is said by the appellant that this finding is not responsive to any allegation of the complaint nor supported by the evidence. The appellant is mistaken in both of these assertions. The complaint alleges that plaintiff has been damaged by the de-

tention of the property in the sum of \$4,850, this being in addition to the allegation of value of the property. Section 627 of the Code of Civil Procedure provides that in an action for the recovery of specific personal property the jury, if finding for the plaintiff, shall not only find the value of the property, but also "may at the same time assess the damages, if any are claimed in the complaint." In *Nahas v. Browning*, 181 Cal. 55, 183 P. 442, 443, 6 A. L. R. 476, it is said: "Ordinarily, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party in a replevin suit to recover interest on the value of the property from the time of the taking. There is no good reason, however, for holding that he is confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeds the interest." See, also, exhaustive note to the above case in 6 A. L. R., at page 478. In the instant case the contract of the parties established the value and also the damage to which the respondents were put by the withholding of the property.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

128 Cal.App. 344

ALBERTSON v. SCHMIDT.

Civ. 8568.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1932.

Hearing Denied by Supreme Court Feb. 20, 1933.

1. Appeal and error ⇨1011(1).

Trial court's findings, based on conflicting evidence, are conclusive.

2. Evidence ⇨63.

Every person is presumed to be sane until contrary is proved.

3. Evidence ⇨601(1).

In civil actions, one alleging insanity has burden of proving it by preponderance of evidence.

4. Deeds ⇨211(1).

Adjudication of grantor's insanity four months after conveyance held insufficient to establish grantor's insanity at time of conveyance so as to entitle grantor to accounting for rents against grantee's estate.

5. Deeds ⇨211(1).

Testimony of doctor who examined grantor four months after conveyance that grantor's slight "depressions" began several

months before conveyance held not conclusive as to grantor's mental capacity at time of conveyance.

6. Deeds ⇨78.

In grantor's action predicated on his alleged insanity at time of conveyance, question of insanity at such time held for trial court.

Appeal from Superior Court, Alameda County; Stanley Murray, Judge.

Action by Rasmus H. Albertson against George Schmidt, now deceased, in which Nellie M. Schmidt, executrix of the estate of George Schmidt, was substituted as party defendant. From the judgment against plaintiff, he appeals.

Affirmed.

Frank Sawyer, of San Francisco, for appellant.

Luther Elkins, of San Francisco, for respondent.

GANS, Justice pro tem.

Appellant brought this action against George Schmidt (now deceased) to have him declared trustee of certain real property theretofore conveyed to him by appellant, to compel a reconveyance of said property to appellant, and for an accounting for the rents, issues, and profits thereof. The complaint was filed in July, 1918, and twelve years thereafter, in August, 1930, the action was brought to trial on the issues raised by the fourth amended complaint and the answer thereto; Schmidt in the meantime having died and the executrix of his will having been substituted as party defendant. The grounds upon which it was sought to maintain the action were that appellant was mentally incompetent at the time he conveyed the property to Schmidt and that there was no consideration for the conveyance. The trial court found against appellant on both issues, and, from the judgment entered in conformity with the findings, this appeal was taken, the sole ground urged for reversal being the insufficiency of the evidence to sustain the trial court's findings.

The facts leading up to the commencement of the action were as follows: In May, 1913, appellant conveyed said property to Schmidt by a grant deed reciting the payment of \$10 as consideration. At that time the property was incumbered with a deed of trust to secure the payment of the sum of \$3,000. In June, 1913, appellant made a second deed identical in form with the first conveying the property to Schmidt; it being recited therein that the same was given "to correct the errors" in the first deed. Some four months later, to wit, in October, 1913, pursu-

ant to proceedings taken under section 2163 of the Political Code, appellant was adjudged insane by the Superior Court and committed to a state hospital, where he remained until January, 1914, at which time he was discharged by the medical superintendent as "recovered"; and in March, 1916, he was restored to mental capacity by the decree of court in a proceeding instituted for such purpose. In April, 1915, which was more than a year after his discharge from the state hospital, and about a year prior to the rendition of the court decree restoring him to mental capacity, he made a quitclaim deed of the property to Schmidt; and some time during 1918, and prior to the commencement of the present action (the exact date not appearing in the record), the property was sold at trustee's sale pursuant to proceedings taken under the terms of said trust deed to a purchaser named Spear.

[1] It affirmatively appears without conflict, therefore, that at the time of the commencement of the action in 1918 Schmidt, who was then living, had no interest whatever in the property. Assuming, however, that appellant was entitled to maintain the action against Schmidt, and following his death against his estate, for an accounting of the rents, issues, and profits of the property during Schmidt's ownership thereof, the judgment must nevertheless be affirmed because, as will hereinafter appear, the evidence introduced by appellant to establish mental incapacity and want of consideration did no more than to raise a conflict on those issues, in which case, under the well-settled rule, the findings of the trial court are conclusive on appeal.

[2-6] As stated in California Jurisprudence, every person is presumed to be sane until the contrary is proved; and in civil actions one alleging insanity has the burden of proving it by a preponderance of evidence. 14 Cal. Jur. 362. In the present case the only evidence introduced by appellant to overthrow said presumption consisted of the testimony of appellant himself and the so-called judgment roll in the proceeding which took place four months subsequent to the execution of the second deed, adjudging him insane. It is evident, however, that the testimony given by appellant was of little value, because, in their brief, counsel for appellant frankly state that some of the answers appellant gave "conclusively establish that he is still hopelessly insane." And, since the adjudication of insanity relied on was made some four months after the execution of the second deed, it did not, of itself, of course, establish conclusively or at all that appellant was insane at the time said deeds were executed. Attention is called, however, to certain statements contained in the medical report at-

tached to said adjudication wherein the examining doctors stated in effect that previous to the date of their examination appellant had suffered three "slight attacks of depression," which occurred in 1894, 1904, and 1911, and that the present attack began in February, 1913, and in its nature was "gradual." But obviously there is nothing in said statements which can be taken as conclusive evidence of the fact that appellant was without mental understanding four months prior to the date of said examination. At best, said statements can be considered only as circumstances tending to show mental disorder at the times mentioned. Therefore the question of whether or not the presumption of sanity was overcome was still one of fact for the trial court to determine.

The same state of the record is shown with respect to the finding upon the issue of consideration. By virtue of subdivision 39 of section 1963 of the Code of Civil Procedure, a good and sufficient consideration for the execution of said deeds was presumed; and the only testimony tending to prove otherwise was that given by the appellant, which, for the reasons above stated, at most raised only a conflict on that issue.

In further support of the trial court's judgment respondent urges the point of the insufficiency of the fourth amended complaint; but, in view of the conclusions we have reached on the merits of the appeal, it is unnecessary to inquire into that phase of the case.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 191
SKIPITAREY et al. v. FITTS et al.

Civ. 7222.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1932.

Appeal and error ☞ 766.

Appeal held dismissed where brief violated rule requiring each point to be presented separately under heading showing nature of question (Rules of Supreme Court and District Courts of Appeal, rule 8).

Rule 8 of Rules of Supreme Court and District Courts of Appeal requires each point to be presented separately under appropriate heading, showing nature of question to be presented or point to be made.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Louis A. Skipitarey and another against Buff Fitts and another. From the judgment, plaintiffs appeal. Motion to dismiss the appeal.

Appeal dismissed.

Louis F. D'Elia, Jr., and U. W. Breeden, both of Los Angeles, for appellants.

Vinetz & Gitelson, of Los Angeles, for respondent Fitts.

IRA F. THOMPSON, J.

The respondents have made a motion to dismiss the appeal herein on the ground that appellants' opening brief violates that portion of rule VIII of the Rules of Supreme Court and District Courts of Appeal requiring each point to be presented separately "under an appropriate heading, showing the nature of the question to be presented or the point to be made." There are but two headings or titles in the brief, the one "Statement of the Case" and the other "Argument." It is manifest that respondents' motion is well founded. See *Barnes v. Cocke*, 99 Cal. App. 700, 279 P. 190; *Hawkins v. Doolittle*, 113 Cal. App. 619, 298 P. 862; *Withers v. Southern Pacific Co.*, 101 Cal. App. 373, 281 P. 518; and *People v. Yaroslowsky*, 110 Cal. App. 175, 293 P. 815.

The appeal is dismissed

We concur: WORKS, P. J.; CRAIG, J.

128 Cal.App. 298

McKINLEY et ux. v. DALTON.

Civ. 614.

District Court of Appeal, Fourth District, California.

Dec. 20, 1932.

1. Automobiles ⇨244(35).

Where motorist, notwithstanding guests' warnings, drove through deep drain at speed exceeding 45 or 50 miles an hour, evidence sustained finding of gross negligence (St. 1923, p. 553, § 113, as amended).

There was testimony that, notwithstanding guests' warnings that automobile was approaching intersection and that there were dangerous dips or drains across road which could not be driven through at high speed, driver, who admitted speed of between 45 and 50 miles an hour, drove at speed of 50 or more miles an hour through deep drain at intersection, which, within

California Vehicle Act (St. 1923, p. 553). § 113, as amended, was obstructed intersection where speed limit was 15 miles an hour.

2. Automobiles ⇨244(56).

Respecting guest's contributory negligence, testimony that motorist drove "fast" or "too fast" held insufficient to support finding that motorist drove in rapid and careless manner; such expressions being merely relative.

[Ed. Note.—For other definitions of "Fast," see Words and Phrases.]

3. Automobiles ⇨244(56).

It appearing that motorist, although sometimes driving at speed of 50 or more miles an hour, reduced speed at guest's request, finding that guest knew that motorist generally drove in rapid and careless manner held unsupported.

Proof that a driver operated his automobile at a speed of 50 miles an hour during portion of particular trip does not prove that he generally drove at such a speed.

4. Evidence ⇨10(3, 4).

Court may judicially notice state's political subdivisions, principal and well-known streets, and other matters of common and general knowledge (Code Civ. Proc. § 1875).

5. Carriers ⇨280(1).

Driver of vehicle for hire must take utmost care for passengers' safety.

6. Automobiles ⇨181(1).

On February 19, 1931, driver of automobile not for hire was required to use slight care for guests' safety.

7. Automobiles ⇨224(1).

Carriers ⇨325.

Passenger in vehicle for hire, or guest in automobile not for hire, must take ordinary care for their own safety.

8. Negligence ⇨136(26).

Whether plaintiff is guilty of negligence contributing to injury is usually question for trial court or jury.

9. Automobiles ⇨245(87).

Whether or not guests were contributorily negligent held for trial court or jury.

10. Automobiles ⇨224(8).

That motorist on one or two occasions on trip drove at excessive speed would not necessarily warn guests that motorist, notwithstanding guests' warning, would so drive through deep drain (St. 1923, p. 553, § 113, as amended).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by H. G. McKinley and wife against Frank Dalton. Judgment for defendant, and plaintiffs appeal.

Reversed.

McFadden & Holden, of Anaheim, for appellants.

Charles X. Arnold, of Los Angeles, and Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

MARKS, J.

This is an action instituted to recover damages resulting from injuries to Marie L. McKinley, wife of H. G. McKinley, while Mr. and Mrs. McKinley were riding in an automobile as guests of defendant. The trial court found that defendant was guilty of gross negligence which was the proximate cause of the injury, and that H. G. McKinley was guilty of negligence which proximately contributed to the injury of his wife, which negligence was imputed to her and barred recovery for both. Plaintiffs have appealed from the judgment.

Appellants urge as the sole ground upon which they rely for a reversal of the judgment that the finding that H. G. McKinley was guilty of contributory negligence is not supported by the evidence and is contrary to it. Respondent has made no appearance in this court.

[1] There is practically no conflict in the evidence; the stories of the parties varying in but one minor particular. Respondent, with appellants as his guests, left the Rex Arms Apartments in the city of Los Angeles at about 4:15 o'clock in the afternoon of February 19, 1931, to drive to the city of Fullerton. Mr. McKinley rode in the front seat beside the driver, with Mrs. McKinley occupying the rear seat. The journey was made over what is commonly known as the "Telegraph Road," which passes through the town of Buena Park over Grand avenue. Just after turning into Grand avenue, respondent speeded up his automobile to between 55 and 60 miles per hour. Appellants both warned him that he was approaching a small town where roads intersected Grand avenue, and that there were dangerous dips or drains across the road that could not be driven through at a high rate of speed. They both asked him to reduce his speed, which he failed to do. He drove through a deep drain at the intersection of Grand avenue and Artesia boulevard at 50 or more miles per hour. Mrs. McKinley was thrown against the top and fell back into the bottom of the car, causing a compressionary fracture of the first lumbar vertebra of her spine.

Under section 113 of the California Vehicle Act (as amended), in effect at the time of the accident, the intersection of Grand avenue and Artesia boulevard was an obstructed intersection where the speed limit was 15 miles per hour. According to the testimony of re-

spondent, he drove across the dip at between 45 and 50 miles per hour. This is the only conflict in the evidence. The trial court found that his speed at that time was in excess of 50 miles per hour. This evidence amply sustained the finding that respondent was guilty of gross negligence.

The finding that H. G. McKinley was guilty of contributory negligence was based entirely upon his own testimony, from which it appears that all the parties had lived in the same city in Montana for a number of years, and during their residence there respondent had taken Mr. McKinley on several trips. Concerning these trips he testified as follows:

"Q. And you often went out for a ride with him? A. Well, I wouldn't say often—occasionally.

"Q. And Mrs. McKinley also went for a ride occasionally? A. I think she has been with him very few times. She never rode with him very much.

"Q. And during that time you have found him to be a pretty fast driver, haven't you? A. At times he drives fast, yes, sir.

"Q. And you have cautioned him repeatedly about his fast driving before you came to California, haven't you? A. Well, I don't know what you would call repeatedly. If I go out with him and he drives too fast I would caution him to slow up.

"Q. You have had occasion to caution him a number of times when you have been riding with him? A. Yes, sir; I believe I have during that period. There might have been times I would only go out with him twice a year and there have been times I wouldn't be with him at all because we haven't had no business interests whatever and just merely friends the last ten years.

"Q. When you have gone with him you have had occasion to caution him about his fast driving? A. If he drove what I thought was faster than I wanted to drive I would caution him.

"Q. And you did caution him, did you? A. Well, I suppose I have; yes, sir, I might say that I have."

The evidence shows that respondent came to California three days before the accident. The day after he arrived he took Mr. McKinley for a drive on Wilshire boulevard in the city of Los Angeles. On the second day he took him to the city of Santa Ana. Earlier on the day of the accident he drove appellants to a funeral in Los Angeles. On none of these occasions did he drive "fast" nor was he warned as to the speed at which he was traveling.

Mr. McKinley testified concerning the trip to Fullerton, prior to reaching the place of the accident, as follows: "We left Los Angeles I should say about between four and four-fifteen, left the Rex Arms for Fullerton, and after we got out at the edge of town Mr. Dal-

ton speeded up his car there until the speedometer would show from 50 to 60 miles an hour, and I cautioned him two or three times on the way out that he hadn't better drive so fast as he had done heretofore when I had ridden with him also." It was stipulated that Mrs. McKinley's testimony, if given, would be to the same effect.

Expressions similar to those used by Mr. McKinley that respondent "drives fast," "drives too fast," "drove what I thought was faster than I wanted to drive," were considered by the Supreme Court in the case of *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 P. 38, 39, where it was said: "Nor, looking to the specific averment of violation of the ordinance, did the evidence sustain the charge that the automobile was being propelled at an unlawful or otherwise excessive rate of speed. The plaintiff testified that the machine was coming 'very fast'; another witness, that its speed was decreasing before it reached the milk wagon, but that it was still going 'at a good speed.' The only other witness who testified for plaintiff on the subject said that it looked to him as if the automobile 'was going pretty fast.' These statements are entirely too uncertain to serve as a basis for a finding that the speed was over 20 miles an hour, or that it was in excess of the maximum rate which would be dictated by the demands of ordinary prudence. Such expressions as 'very fast,' 'pretty fast,' and the like are merely relative, and their meaning and effect must depend upon the unknown factor of the witness' personal views regarding standards of speed."

The same conclusion was reached in *Rosander v. Market Street R. Co.*, 89 Cal. App. 710, 265 P. 536, 538, where the court said: "We need not cite further authority. Sufficient appears to indicate that the language of our own court in *Diamond v. Weyerhaeuser* was not the expression of a strange doctrine, nor was it an attempt to set up any new rule in this jurisdiction. Everyday experience demonstrates the lack of definite meaning in such general phrases as are under discussion. One person going at 30 miles an hour would describe his speed as a snail's pace 'crawling along'; another would describe the same speed as 'lightning fast.' From the mere descriptive words any clear conception of the speed would be unobtainable, nor would such terms even serve as the basis for intelligent speculation."

[2] On the question of contributory negligence, the trial court found: "That the said plaintiff, H. G. McKinley, had knowledge of the rapid and careless manner in which the defendant generally operated his said automobile and had often protested against such operation, which protest had been disregarded by the said defendant, that despite said knowledge on the part of the said plaintiff, the plaintiff and his wife continued to go as

guests in the defendant's car, which the Court finds was negligence on the part of the said plaintiffs, and which negligence the Court finds contributed proximately to the injuries suffered by the plaintiff Marie L. McKinley."

From the authorities cited, it is evident that this finding cannot be supported by the testimony that respondent drove his automobile "fast" or "too fast" in Montana. The finding must derive all of its support from the testimony of appellants, already quoted, concerning the particular ride in which Mrs. McKinley received her injury.

[3] There is a total lack of evidentiary support of that portion of the finding to the effect that Mr. McKinley had knowledge that respondent *generally* operated his automobile in a rapid and *careless* manner. Proof that a driver operated his car at a speed of 50 miles per hour during a portion of a particular trip does not prove that he *generally* drove at such a speed.

[4] An analysis of the record has satisfied us that respondent did not drive any material portion of the distance between the Rex Arms Apartments in Los Angeles and the scene of the accident at a speed of 50 or more miles an hour. We are entitled to take judicial notice of the political subdivisions of the state (section 1875, Code Civ. Proc.), of principal and well-known streets and thoroughfares (*Varcoe v. Lee*, 180 Cal. 338, 181 P. 223) and other matters of common and general knowledge (10 Cal. Jur. pp. 693 to 696, and cases cited, and 707 to 712, and cases cited). Drawing on our own knowledge, supplemented by the testimony in the record, we find that the length of the entire trip which resulted in the injury to Mrs. McKinley was about 22 miles. The evidence in the record indicates that the minimum time consumed by the trip was one hour, making an average speed for the trip of about 22 miles per hour. It would follow that very little of the distance could have been traveled at 50 or more miles per hour. It is also evident that each time, excepting the last, that Mr. McKinley requested respondent to reduce the speed of the automobile he must have done so, and that the greater part of the distance must have been traveled at a speed considerably less than the lawful limit of 45 miles per hour prevailing at that time.

Mr. McKinley testified that two or three times he requested respondent to reduce his speed during the trip. He made such a request just before the accident, and we presume that this was the last of the two or three times mentioned in other parts of his testimony. We have reached the conclusion that this evidence fails to support the finding "that the said plaintiff, H. G. McKinley, had knowledge of the rapid and careless manner in which the defendant generally operated his said automobile," upon which the trial court based its conclusion that the appellants were

guilty of contributory negligence. There was no evidence that respondent *generally* drove his automobile in such a manner.

[5-7] The reasonable precautions which a passenger in an automobile for hire is required to use for his own safety when placed in a position of danger by his driver are fully discussed in the following cases: Dowd v. Atlas Taxicab Co., 187 Cal. 523, 202 P. 870; Dowd v. Atlas Taxicab Co., 69 Cal. App. 9, 230 P. 958; Horney v. Dillingham, 81 Cal. App. 443, 253 P. 970. The same question is discussed when the passenger is a guest in an automobile not for hire, in the following cases: Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; and Curran v. Earle O. Anthony, Inc., 77 Cal. App. 462, 247 P. 236. While the driver of a vehicle for hire is required to take the utmost care for the safety of his passengers (Bosqui v. Sutro Railroad Co., 131 Cal. 390, 63 P. 682; Bezera v. Associated Oil Co., 117 Cal. App. 139, 3 P.(2d) 622), and the driver of an automobile not for hire was, at the time of the accident, required to use slight care for the safety of his guests, the duty of the passenger and guest to take ordinary care for his own safety is the same in each instance. This being so, what was said by the Supreme Court on this subject in the case of Dowd v. Atlas Taxicab Co., *supra*, is applicable to the facts of the instant case.

[8, 9] The question of whether or not a plaintiff is guilty of negligence, and whether or not such negligence contributed to his injury is usually one for the trial court or the jury. Shields v. King, 207 Cal. 275, 277 P. 1043; Queirolo v. Pacific G. & E. Co., 114 Cal. App. 610, 300 P. 487. Under this rule we could not hold the appellants free from contributory negligence as a matter of law, and we most certainly could not hold them *guilty* of such contributory negligence as a matter of law.

[10] In retrying the case, the trial court should bear in mind that from the evidence now in the record the only warning of danger to themselves that appellants had until just before the accident was that respondent drove his car at an excessive and unlawful rate of speed on one or two occasions earlier on the trip. This might not necessarily convey to them a warning that he would suddenly change from a speedster to a grossly reckless driver, and, after having been warned of a danger he was approaching, wantonly drive his car at a speed of 50 or more miles an hour through an obstructed intersection and through a dangerous dip in the pavement and thus break the back of Mrs. McKinley.

Because a material portion of the finding upon which the trial court based its conclusion that appellants were guilty of contribu-

tory negligence is not supported by any evidence, the judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App. 315
SCHUMAN et al. v. REILY.
Civ. 994.

District Court of Appeal, Fourth District,
California.
Dec. 21, 1932.

1. Partnership $\S$ 54.

Persons associated in theater business with whom lessor dealt as partners *held* partnership, so that both were bound by lease signed by only one.

2. Set-off and counterclaim $\S$ 33(1).

In lessees' action for specific performance and damages, lessor *held* not entitled to offset architect's fees against lessees' deposit where plans upon which fees were based were completed before lease.

3. Landlord and tenant $\S$ 184(2).

Interest recoverable on lessees' deposit ran from execution of lease only to lessees' refusal to accept lessor's offered return of deposit (Civ. Code, $\S$ 1504).

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by J. Schuman and I. Cohen against A. G. Reily, in which defendant cross-complained. From the judgment for plaintiffs, defendant appeals.

Reversed, with instructions.

A. C. Routte and A. G. Reily, in pro. per., both of Los Angeles, for appellant.

William P. Redmond, of Los Angeles, for respondents.

MORTON, Justice pro tem.

Plaintiffs brought this action against defendant for specific performance of a remodeling contract embodied in a lease for ten years on a certain building at 3812 Brooklyn avenue, Los Angeles, Cal., and for damages of \$21,440. The alterations were to be completed within four months from the date of the execution of the lease, December 15, 1928. In accordance with the terms of the lease when executed, plaintiffs, who claimed to be partners, deposited \$1,500 with defendant, but only one of the partners, J. Schuman, signed the lease at that time. Misunderstanding occurred and defendant gave notice

of rescission April 29, 1929, and offered to return the \$1,500, addressing the notice to the plaintiffs jointly. Plaintiffs refused to accept the rescission and cancellation of the proposed lease, demanded that it be performed, and when defendant refused, filed this action.

Defendant answered and in his cross-complaint alleged damages of \$900 incurred for architect fees and \$1,000 attorney fees, stating that although he was an attorney this action for damages, etc., had made it necessary to secure additional counsel for his protection.

It appears that when the hearing reached a certain point the trial court held that no recovery could be had on the allegations for damages. By stipulation of the parties the court was authorized to consider and dispose of the \$1,500 deposit money in its judgment, plaintiffs amending their complaint to conform to the proof. Judgment was rendered in favor of plaintiffs for the \$1,500 in rescission of the transaction with interest from December 15, 1928, and costs. From this judgment defendant appeals.

[1] Appellant contends that the court erred in holding that the respondents were partners in such a way as to bind themselves or the appellant. From the evidence it appears appellant dealt with them as partners, received their money as a deposit by both parties and in all matters addressed them jointly. Apparently the respondents had associated themselves for the purpose of carrying on this contemplated theater business and that is sufficient to constitute a partnership. Therefore both sides were dealing with partnership matter. *Behrenfeld v. Breedlove*, 27 Cal. App. 419, 150 P. 71. In addition, we have the payment of rent by the partners as the \$1,500 was to be applied to current monthly rent less the deposit of \$450 for the rent of the last two months of the lease. Consequently, although Cohen had not signed the lease, he was bound. *Munford v. Humphreys*, 68 Cal. App. 530, 229 P. 860.

Appellant questions certain findings made and argues that by reason of the failure of one of the respondents to sign the lease here involved, he was unable to secure the necessary loans to finance the building in question. However, the record shows that after a dispute had arisen between the parties and the respondents had placed the matter in the

hands of their attorney, the appellant wrote a letter in which no mention is made of these matters and stating that he had found the project "a good deal bigger job than I had ever anticipated," but in which he stated he was prepared to go ahead with the building. The evidence supports the findings referred to.

[2] Another point raised is that the court erred in refusing to allow the appellant to offset a certain architect's fee in the sum of \$900 against the \$1,500 deposit, the return of which is provided for in the judgment. The record contains the testimony of this architect that the plans upon which this fee was based were completed more than a month before the agreement here in question was entered into.

[3] The appellant especially attacks that portion of the judgment which allows interest on the \$1,500 ordered returned from December 15, 1928, the date of the execution of the lease, to the date of the entry of the judgment. We think this portion of the judgment is erroneous. The record shows that under date of May 1, 1929, the appellant mailed to the respondents a written notice of rescission in which he offered to return the \$1,500 and "everything of value received by him in connection therewith" and "to do on his part all that is equitable." And on May 2, 1929, both respondents signed a letter which was sent to the appellant flatly refusing to accept or consider the offer of a rescission or to accept the return of the money, making no objection to the form of the offer and inserting an intention to rely on a suit for damages. It fully appears that the respondents believed at the time that they could recover a large sum in damages, that they relied on this belief, and that they refused to entertain any proffer of the money deposited. The court ruled against them on their claim for such damages, from which ruling they have not appealed. Under the circumstances, we think the respondents can recover no interest after May 2, 1929, the date of their refusal to accept the offer made. Civ. Code, § 1504.

The judgment is reversed, with instructions to the trial court to enter judgment in favor of the plaintiffs in the sum of \$1,500, with interest thereon from December 15, 1928, to May 2, 1929.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 348

BLACKFIELD et ux. v. THOMAS ALLEC CORPORATION.

Civ. 8569.

District Court of Appeal, First District,
Division 1, California.

Dec. 23, 1932.

Rehearing Denied Jan. 21, 1933.

1. Injunction ☞50.

Refusal of mandatory injunction to require property owner to remove overhanging wall held justified, where extent of encroachment was trivial, cost of removal was disproportionate to plaintiffs' injury, and injury could be compensated by damages.

The trial court found that the amount of the encroachment on plaintiffs' property did not exceed 3½ inches; that the wall was erected by defendant's predecessor; that the encroachment was the result of excusable mistake; that plaintiffs had no special use for the property encroached on; that \$200 was full compensation for damages; and that cost of removing wall to true boundary line would be approximately \$6,875.

2. Injunction ☞5.

Granting of mandatory injunction is largely discretionary with court.

3. Injunction ☞5.

Mandatory injunction will not be granted when it will operate inequitably or oppressively.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Bernard Blackfield and wife against the Thomas Allec Corporation for an injunction. From a judgment awarding damages but denying injunctive relief, plaintiffs appeal.

Affirmed.

Thomas P. O'Brien, Paul E. Madden, Chas. A. Christin and Knight, Boland & Christin, all of San Francisco, for appellants.

I. I. Brown and L. Seidenberg, both of San Francisco, for respondent.

GANS, Justice pro tem.

The action is one for injunction to compel removal of an overhanging wall. The trial court denied the injunctive relief sought, but awarded plaintiffs damages in the sum of \$200; and plaintiffs have taken an appeal which is presented on the judgment roll alone. The sole question to be determined is whether the trial court abused its discretion in awarding damages instead of granting the injunctive relief.

The facts as found by the court are as follows: Appellants and respondent own adjoining lots in San Francisco. Upon the lot of appellants is a two-story dwelling, completed in 1917. Upon the lot of respondent is a two-story reinforced concrete building, the north wall of which is 122 feet 6 inches long, 8 inches thick, and 40 feet high exclusive of footings. This building was erected in 1912, and rises about 8 feet higher than appellants' dwelling, which extends to within about an inch or two of said overhanging wall. Thus the two do not touch, and the overhanging wall does not in fact interfere with the residence.

This north wall of the concrete building, so the court found, "encroached and does now encroach upon the property of plaintiffs to the extent of ¾ of an inch at the bottom of the westerly end of said wall; that said encroachment gradually diminished until, at the easterly end thereof said wall was and is now entirely clear of plaintiffs' land by ⅞ of an inch, and the top of said wall at the westerly end thereof encroached and overhung and does now encroach and overhang the property of plaintiffs to the extent of 3⅞ inches."

The court also found that the said wall was erected, not by respondent, but by its immediate predecessor in interest, and that the said encroachment was the result of excusable mistake, and without knowledge or intent on the part of the builder; that appellants had and have no particular nor special use for their property thus encroached upon; that \$200 is full compensation for all damages of appellants and is adequate remedy; that the expense and cost of removing said wall and the encroachment thereof, to the true boundary line of appellants' lot, would be approximately \$6,875 and entirely disproportionate to any actual benefit that would accrue to appellants; that to grant an injunction would be inequitable.

Thus it will be seen that the question before the trial court was: Should it compel respondent to remove a part of the surface of an overhanging wall not exceeding 3½ inches at a cost of about \$6,875 which was not actually interfering with the use of the property it encroached upon, when such injury as occurred could be readily compensated by payment of \$200. We conclude on the authority of McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134, and Rothaermel v. Amerige, 55 Cal. App. 273, 203 P. 833, that the conclusions reached by the trial court should be sustained.

[1-3] Numerous cases have been cited by counsel and deductions pro and con therefrom have been made; but it seems unnecessary to refer to, discuss, and differentiate them one by one, because in our opinion the

present case falls within the general rule laid down in 32 Corpus Juris, at page 147, which is as follows: " * * * The granting of a mandatory injunction is largely a matter of discretion with the court, and depends on a consideration of all the equities between the parties. An injunction will not be granted when it will operate inequitably or oppressively; * * * or where the encroachment is trifling and the result of an innocent mistake and the damage caused to defendant by removal would be greatly disproportionate to the interest which plaintiff claims. * * * "

We think, further, that the language of the Supreme Court in *McKean v. Alliance Land Co.*, supra, at page 399 of 200 Cal., 253 P. 134, expresses perfectly the situation in the present case. Upon these authorities we consider that the judgment should be affirmed and it is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

MOREY v. BOVEE et ux. *
Civ. 593.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1932.

Hearing Granted by Supreme Court Feb. 17,
1933.

1. Evidence ⇨434(11).

In action for fraud, evidence of defendants' oral misrepresentations as to land held admissible, though contract to exchange property had been reduced to writing.

2. Fraud ⇨20.

In general, parties must rely on their own judgment and investigate before making contract.

Consequently, where there is no relation of especial trust, and where means of knowledge are at hand and equally available to both parties, and subject-matter alike open to their inspection, and one of them does not avail itself of these means and opportunities when he might readily ascertain truth by ordinary care, he will not be heard to say he was deceived by the other's misrepresentations.

3. Fraud ⇨50.

In action for fraud, intelligent business man must be presumed to have knowledge of contents of instrument which he signed.

This is especially true when such instrument was one through which he acquired title to property.

4. Fraud ⇨20.

Purchaser having actual notice of reservations from land he was acquiring cannot predicate action for damages on failure to disclose such reservations to him.

5. Appeal and error ⇨1178(6).

Where trial court's theory as to measure of damages was erroneous, case will be remanded for retrial as to damages.

6. Fraud ⇨20.

False representation must actually mislead and deceive to be actionable.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action for damages for fraud by B. J. Morey against Thaddeus F. Bovee and wife, in which defendants filed a cross-complaint. From an adverse judgment, named defendant appeals.

Affirmed in part, and reversed in part, with directions.

Drumm, Tucker & Drumm, of Santa Ana, for appellant.

L. F. Coburn, of Orange, for respondent.

MARKS, J.

This is an action for damages resulting from an alleged fraud of appellant in an exchange of properties belonging to the parties. Respondent recovered judgment against appellant in the sum of \$11,403.01, from which this appeal is taken. The trial court found that, because of the misrepresentations and fraud of appellant, respondent was damaged in the sum of \$12,600, but that appellant was entitled to an offset, under the allegations of a cross-complaint, in the sum of \$1,196.99, which was deducted from respondent's damages, leaving the balance for which judgment was entered. The trial court found that the defendant Mabel H. Bovee was guilty of no fraud or misrepresentation, and no judgment was rendered against her.

L. L. Mennes and H. R. Blair were licensed realtors with offices in the city of Fullerton in Orange county. Prior to the 16th day of July, 1930, respondent requested them to attempt to negotiate an exchange of two apartment houses in the city of Los Angeles for property in the county of Orange. The realtors learned that Mr. and Mrs. Bovee owned property in the city of Orange, in Orange county, which they might be induced to exchange for Los Angeles property. They communicated with appellant over the telephone, and arranged for a meeting between appellant, respondent, and themselves for the 16th or 17th of July, 1930, at the home of appellant, so that respondent might inspect the property with a view to effecting the ex-

change. The realtors were not then acquainted with appellant and had no listing of his property. On July 16th or 17th, respondent, with his son and the realtors, went to the residence of appellant and walked over the major portion of his property. They returned to the house and had an extended conversation concerning the exchange with appellant on the lawn in front of the residence. The evidence is in sharp conflict as to what was said by the various parties participating in this conversation. As the court found in accordance with the testimony of respondent and his son, which supports the findings on this particular question, we need concern ourselves only with their testimony as being that most favorable to and supporting the findings made on this disputed question.

Respondent testified that he asked appellant "regarding the acreage of this tract of land." Appellant informed him there were thirty acres in the tract, with three acres of walnuts, four acres of lemons, and twenty-three acres of Valencia oranges. This testimony furnishes the foundation for the finding of misrepresentation and fraud on the part of appellant.

A short time after this conversation, appellant and his wife went to Hollywood and inspected the property which respondent desired them to accept in exchange for their property. The negotiations resulted in the parties entering into a written agreement of exchange on the 23d day of July, 1930, in the form of escrow instructions to the Fullerton Branch of the Security-First National Bank of Los Angeles. These written instructions described the property of appellant and his wife as follows: "In the City of Orange, County of Orange, State of California, viz: * * * The South one-half (S½) of Lot Two (2) in block 'G' of the 'A. B. Chapman Tract' containing twenty acres, as surveyed by Frank Lecouvreur in December, 1870. Reserving therefrom a strip of land 20 feet wide off the East side and a strip 30 feet wide off the West side for road purposes. The Northeast quarter (N E ¼) of Lot Three (3) in Block 'G' of the 'A. B. Chapman Tract,' as surveyed by Frank Lecouvreur in December, 1870, containing 10 acres, more or less. Reserving therefrom a strip of land 20 feet wide off the East side and a strip 20 feet wide off the South side for road purposes. Reserving from all of the above described property that portion of said land conveyed to the Riverside, Santa Ana, and Los Angeles Railway Company by deed recorded in Book 239, page 39 of Deeds, and the land conveyed to the California Central Railway Company by deeds recorded in Book 407, Page 140, and Book 528, Page 164 of Deeds, records of Los Angeles County, Calif., reserving also necessary water ditches. Subject to reservations, restrictions, rights of way, rights, and easements of record."

Deeds to the respective parties were prepared and executed the same day and delivered to the bank as escrow holder. Respondent paid into the bank the sum of \$12,500 which was to be paid to appellant and his wife. In the instructions, appellant and his wife agreed to pay the realtors \$2,500 and respondent agreed to pay them \$100 for their services in consummating the exchange.

The parties exchanged the actual possession of their properties on the 7th day of August, 1930. A few days thereafter, on a date not exactly determined by the record, appellant and respondent were called to the bank to examine the guaranties of title of the respective properties. Attached to the guaranty of title to the property in the city of Orange was a map. Respondent testified that when he saw this map he became aware for the first time that there was something wrong with his idea of the boundary lines of the Bovee property. The map showed the railroad right of way across a portion of this property with a small tract of land on the southerly side of this right of way. Appellant and respondent, with one of the realtors, went over the property on the same or the next day, and respondent for the first time ascertained that there was included within the description a tract of land on the southerly side of the right of way on which neither oranges, lemons, nor walnuts were planted. There was some discussion between the parties about a rescission of the contract and an abandonment of the exchange. Respondent had already paid a \$5,000 mortgage upon a portion of the acreage property which was then overdue, and informed appellant that the transaction had progressed to a point where he believed it would be to his serious injury to withdraw from it. The \$12,500 was at that time in the possession of the escrow holder. It was paid to appellant less his portion of the commissions, and the exchange was finally consummated on or about August 14, 1930.

During the latter part of August, 1930, respondent employed a civil engineer to survey the property and, according to his testimony, he then ascertained for the first time that the acreages of walnuts, lemons, and oranges were not in accordance with the representations made to him by appellant in July. The results of the survey were given by the engineer employed by respondent as follows: "Planted to Valencia oranges—18.2 acres; to lemons—4.17 acres; to walnuts—3.68 acres; occupied by the railroad right of way and the vacant land—3.46 acres." The areas of the various tracts as just given were found to be incorrect, and other surveys were made by witnesses for both parties, and considerable testimony was introduced to attempt to determine the exact acreage in this property. Upon supporting competent evi-

dence the trial court found upon this question as follows:

"But in truth and in fact there were:

Valencias	17.899 acres
Lemons	4.02 acres
Walnuts	3.507 acres
Railway right of way.....	1.18 acres
South 20 feet of N. E. $\frac{1}{4}$ of Lot 3.....	.32 acres
East 20 feet of N. E. $\frac{1}{4}$ of Lot 3.....	.29 acres
Vacant land	1.67 acres
House	.238 acres
10 feet on West side of N. E. $\frac{1}{4}$ of Lot 3.,	.12 acres
East 20 feet of S. $\frac{1}{2}$ of Lot 2.....	.303 acres
West 30 feet of S. $\frac{1}{2}$ of Lot 2.....	.455 acres
	30.002

standing upon said land and no more."

It is evident from the record that there was a blackboard map of the property in question used by many of the witnesses in illustrating their testimony upon the trial in the court below. No photographic reproduction of this map is to be found in the record. This has made it extremely difficult for us to follow the testimony of some of the witnesses. Any uncertainties in the evidence created by the lack of a reproduction of this map must be resolved against appellant, as it is his duty to present a complete record so that the testimony of the witnesses may be understood on appeal.

The finding of the court to the effect that Mrs. Bovee made no fraudulent representations to respondent is amply supported by the evidence, and is not attacked on this appeal. Therefore the portion of the judgment in her favor must be affirmed.

That portion of the findings upon which the trial court based its conclusion that appellant was entitled to affirmative relief in the sum of \$1,196.99 against respondent is amply supported by the record, and is not questioned by either party before this court. These findings will not be disturbed by us.

The finding of fraud and misrepresentation by appellant in not disclosing to respondent that there were 1.67 acres of vacant land not planted to either walnuts, lemons, or oranges, as well as the vacant strip containing .12 acres, is supported by the evidence, and will not be disturbed by us.

The remaining portions of the findings as to fraud and misrepresentations of appellant supporting a portion of the affirmative judgment against him have received careful consideration by this court.

Appellant presents many grounds upon which he relies for a reversal of the judgment. From the view we take of the case, there are several of these which it will be unnecessary for us to consider.

[1] He maintains that, since the contract of exchange was reduced to writing and all prior oral agreements were considered merged in the written instrument, the trial court erred in admitting evidence of his parol

representations as to the acreage planted in walnuts, lemons, and oranges. In *Mooney v. Cyriacks*, 185 Cal. 70, 195 P. 922, it was held that there was no merit in such a contention, as the very foundation of the action is that the parol misrepresentations induced the execution of the written instrument.

[2] In measuring the duty of respondent to protect himself against the result of careless or willful misrepresentations of appellant, we must bear in mind that ordinary business prudence required him to see that which was plainly within his vision, and to read what he signed. The general rule is set forth in 12 California Jurisprudence, 756, as follows: "In general, parties must rely upon their own judgment and investigate before making contracts. Consequently, where there is no relation of especial trust or confidence and where the means of knowledge are at hand and are equally available to both parties, and the subject matter is alike open to their inspection, if one of them does not avail himself of those means and opportunities when he might readily ascertain the truth by ordinary care and attention, his failure to do so is the result of his own negligence, and he will not be heard to say that he was deceived by the other's misrepresentations. The law affords to everyone reasonable protection against fraud in dealing, but, as has been well said, it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or of careless indifference to the ordinary and accessible means of information; nor does the law prevent one from availing himself of his superior knowledge in dealing with another. Hence where the party making the statements gives to the other party all the information he has, and informs him as to its source, and invites him to investigate, there can be no claim that investigation is excused."

Respondent admits that at no time did he think he was acquiring more than 30 acres of land. The escrow instructions, which served as the contract of exchange, described the property in two parcels, the first of which the contract described as "containing 20 acres," and the second as "containing 10 acres, more or less," both being subject to certain reservations clearly set forth in the writing. The evidence discloses that the first parcel contained exactly 20 acres, and the second, 10.002 acres, without making any deductions for the reservations.

Where, in a description of real property, a statement of a definite acreage is followed by the words "more or less," the language has been held to refute the idea of a representation of a fixed area. In *Watson v. Sutoro*, 86 Cal. 500, at page 521, 24 P. 172, 178, 25 P. 64, it was said: "The description of quantity expressed in acres, qualified by the words 'more or less,' has always been regarded indefinite and general. A purchaser by such

description can get no relief on that feature only unless the disparity is so great between the generally declared number of acres, and the actual number, as to be evidence of intentional fraud. That general words in a deed may be restrained by the particularity of recital is an established canon of construction. [Citing cases.] And the effect of general words confined where the intention to confine it can be collected from the context."

[3] The trial court found that the house and grounds contained .238 of an acre of land. This was not planted to oranges, lemons, or walnuts. Respondent went to this house on July 16th or 17th and stood on the lawn in front of it while he discussed the property with appellant. He must be charged with seeing those things plainly within his vision and knowing that which he saw. He must therefore be considered as being well aware that this particular part of the property was not planted to orange, lemon, or walnut trees. The larger parcel of land contained exactly 20 acres. The only other misrepresentations that could have been made concerning this parcel were by not then informing him of the two reservations for roads. These reservations were clearly set forth in the escrow instructions signed by respondent on July 23, 1930. Respondent was a business man of intelligence and in the possession of his faculties. He must be presumed to have knowledge of the contents of an instrument which he signed especially when it is one of the instruments through which he acquired his title. As was said in *Watson v. Sutro*, supra, at page 522 of 86 Cal., 24 P. 172, 178, 25 P. 64: "A purchaser must be held to have notice of everything which appears on the face of the deeds under which he buys. He has constructive notice of what is contained in them, or which is a necessary inference from what is contained in them. [*Le Neve v. Le Neve*], 2 Lead. Cas. Eq. pt. 1, p. 125. It cannot be limited to the recorded deeds and instruments for notice is equivalent to registration. [*Basset v. Nosworthy*], 2 Lead. Cas. Eq. pt. 1, pp. 37, 98, 149, 213, 299. Surely no such limit can exist where the deeds and documents relating to the title are shown him. The recitals in a deed, however, to bind the conscience of a purchaser, must be sufficiently clear and certain to convey the requisite information or put him on his guard. A vague, general statement will not operate as notice, whether in a deed or elsewhere. As said by Walworth, Ch.: 'The recital must be such as to explain itself by its own terms, without reference to some deed or circumstance which explains it, or leads to its explanation.' * * * This deed was produced to Sutro's attorney. He testifies that he had it in his hands, and read it. He had notice of what was in it; and, though it was constructive notice to Sutro, it bound him. As stated above, notice to an agent in course

of a transaction is constructive notice to the principal, and it will not avail the latter to show that the agent failed to communicate to him what he was told. *Williamson v. Brown*, 15 N. Y. 359. This constructive notice, when it exists, is irrebuttable. It is not merely prima facie evidence, for then it could be rebutted."

The same rule was expressed in *Sisk v. Caswell*, 14 Cal. App. 377, 112 P. 185, 190, where it was said: "It is, as declared, not only true that 'the presumption is in favor of the validity of every grant issued in the forms prescribed by law, and that it is incumbent on him who controverts, to support his objections' (*Patterson v. Jenks*, 2 Pet. [U. S.] 216, 7 L. Ed. 402; *Payne v. Treadwell*, 16 Cal. 228; *Latham v. City of Los Angeles*, 87 Cal. 518, 25 P. 673), but 'every person is presumed to read the deed under which he holds, and a failure to read certain recitals contained in the deed cannot avail him as a defense, when it is sought to charge him with notice.' *Devlin on Deeds*, § 1002; *Weisenberg v. Truman*, 58 Cal. 63; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Dargin v. Beeker*, 10 Iowa, 571; *Hamilton v. Nutt*, 34 Conn. 501. It is said in the last of the cited cases: 'Men of ordinary prudence will use all reasonable means to ascertain the state and condition of their own titles. Hence, we may lay it down as a rule, founded upon the experience of mankind, that one who has knowledge of the existence of a deed, to which he has access, and which affects the title to property in which he is interested, will, in equity, be presumed to have knowledge of the contents of the deed.' * * * And it is said in *Wailles v. Cooper*, 24 Miss. 228, that 'it is in consonance with reason, that if the title deeds under which a purchaser derives title recite an incumbrance, he will be bound by that recital, and presumed to have had notice of it, whether he has read it or not. For the law will not permit him to deny notice by insisting that he has not read the deed.'"

The smaller parcel of land is described as "containing 10 acres, more or less." It actually contained 10.002 acres, less the reservations. These reservations were clearly set forth in the escrow instructions, and respondent must be charged with notice of them under the authorities just cited.

[4] Where a purchaser had actual notice of reservations from the land which he was acquiring, prior to or at the time when he actually signed the agreement under which he acquired the property, he cannot predicate an action for damages upon the failure to disclose such reservations to him.

We cannot determine from the record whether or not respondent had actual notice of the vacant strip which the trial court described as "10 feet on the west side of N E

¼ of Lot 3, .12 acres." Therefore we cannot disturb the finding that there was misrepresentation and fraud as to this strip, as well as to the 1.67 acres of vacant land southerly from the railroad right of way.

[5] It was the theory of respondent and the trial court that the measure of damages was the market value of the entire 30 acres fully planted, without deduction for reservations and the house and grounds, less the market value of the property in its actual condition at the time the representations were made. This was error, as the misrepresentations could only have been made and *relied upon* as to the vacant strip of .12 of an acre, and the 1.67 acres of vacant land, a total of 1.79 acres. It was assumed by the trial judge in his finding that the misrepresentations had been made and *relied upon* as to 5.568 acres. This will require a retrial of the case on the one question of the amount of damages to be awarded respondent.

[6] It is evident that respondent actually received all he could expect under the oral representations of appellant and the reservations in the written instruments, with the exception of a variance in the planted acreage, caused by the 1.79 acres of unplanted land, and the .02 on an acre overage in the acreage of lemons, and .507 of an acre overage in the acreage of walnuts. No point is made by respondent of these overages, and it does not appear from the record that this slight variance was considered material by respondent or that appellant either knew or should have known the exact acreage planted to these varieties of trees. In *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509, 137 P. 240, 241, it was said: "To entitle a person to relief or redress because of a false representation, it is well settled that it is not enough to show merely that it was material, that it was known to be false, and that it was made with intent to deceive, but it must also be shown that it actually did mislead and deceive; or, in other words, it was relied upon by the party complaining."

The judgment in favor of Mabel H. Bovee is affirmed.

Findings Nos. 7, 8, and 9, concerning the falsity of the representations made by appellant, the reliance thereon by respondent, and his discovery of their untruth on or about August 30, 1930, are stricken from the record.

All of finding No. 16, except the words, "The court finds that plaintiff is indebted to the defendants as heretofore found in the sum of \$1,196.99. The court finds that no misrepresentations were made by the defendant, Mabel H. Bovee," is stricken from the record. The stricken portion of the finding relates to the damages suffered by respondent.

All the conclusions of law are stricken from the record, except the following: "That the plaintiff is not entitled to a judgment against the defendant, Mabel H. Bovee."

That portion of the judgment wherein respondent is given judgment against appellant is reversed, with directions to the trial court to retry the case on the question of damages to respondent only and enter appropriate additional findings thereon and additional conclusions of law; judgment to be entered in accordance with such evidence and findings and the views herein expressed. If the damages suffered by respondent should be less than the sum of \$1,196.99, then the defendants would be entitled to an affirmative judgment against the plaintiff.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App. 246

YOUNG et al. v. LIAL

Civ. 4652.

District Court of Appeal, Third District,
California.

Dec. 17, 1932.

Rehearing Denied Jan. 16, 1933.

1. Action $\hookrightarrow$ 36.

In action on contract for money judgment for agreed purchase price of cattle, court could not direct return of cattle or direct defendant to pay any portion of sheriff's costs of attachment (Code Civ. Proc. § 537).

The action was not a possessory action for the recovery of the cattle and was not an equitable suit, and therefore the court was without jurisdiction or authority to convert it into a possessory action after determining that the contract on which plaintiffs relied was void.

2. Appeal and error $\hookrightarrow$ 863.

Appeal from order refusing to vacate judgment *held* to be determined solely on application of findings of court to issues presented by pleadings.

3. Judgment $\hookrightarrow$ 251(1).

Neither ownership nor right of possession of cattle being in issue in action for purchase price, findings and provisions of judgment directing return of cattle to plaintiffs and enforcing payment of sheriff's costs on attachment might be disregarded as surplusage.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action on contract to enforce payment for certain personal property sold and delivered

by Paul T. Young and another, copartnership, doing business under the firm name and title of the Merced Credit Adjustment Association, against Joao Lial, also known as Joao Leal, and also known as John Leal. From an order denying a motion to vacate a judgment, defendant appeals.

Reversed, with directions.

C. Ray Robinson, of Merced, and Thomas F. Lopez, of Fresno, for appellant.

G. P. Ross, of Merced, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order denying defendant's motion to vacate a judgment which was rendered against him. The motion was duly made pursuant to the provisions of section 663 of the Code of Civil Procedure. The appeal is presented on a bill of exceptions. The evidence which was adduced at the trial is not before this court.

The plaintiffs, as the assignees of the California Breeders' Service Company, brought suit upon a written contract to enforce payment of the agreed purchase price of seventeen Holstein cows and twenty-three heifers, alleged to have been sold and delivered to the defendant. The complaint avers that "plaintiffs rely wholly on (the) written contract." The prayer demands judgment for \$1,807.50, together with interest, costs, and stipulated counsel fees. Incident to the suit the cattle were taken and held by the sheriff under a writ of attachment.

The answer denies that the defendant entered into the contract with the California Breeders' Service Company; denies the execution of the alleged contract; denies the consideration therefor; and denies all of the other material allegations of the complaint. As a separate defense the answer alleges that at the time of the purported execution of the contract to purchase cattle, the defendant was a paroled prisoner under sentence to the California state prison for a term less than life, and that he was therefore legally incapable of entering into a contract to purchase property. The prayer of the answer asked that the written document set out in the complaint be canceled, and that the plaintiffs take nothing by their suit.

The court found that the alleged contract is illegal and void because "the terms and conditions of said alleged contract when it was signed, were not understood by defendant and agreed upon, and the minds of the parties did not meet." As conclusions of law the court decreed that "Said live stock mentioned in said complaint be delivered to the plaintiffs; that the defendant pay to the sheriff * * * for plaintiffs or other parties expending said money, four-fifths of one-half of the costs for keeping the said live

stock while under attachment; * * * that any income from cream or sale of milk from said cattle while under attachment shall be divided between plaintiffs and defendant," in proportion to the number of cows which are owned by the respective parties. The findings then decreed that the payment by the defendant of the sums of money above required shall become a condition precedent to his right of possession of his cows. For failure to make these payments within five days, the sheriff was authorized to sell defendant's cows in the manner provided for an execution sale. Judgment was entered accordingly. The defendant moved under the provisions of section 663 of the Code of Civil Procedure to vacate the judgment. This motion was denied, and the defendant has appealed.

[1-3] This is a simple action upon a contract for a money judgment for the agreed purchase price of cattle alleged to have been purchased. It is not a possessory action for the recovery of the cattle. It is not an equitable suit. The court was without jurisdiction or authority to convert the suit into a possessory action and direct the return of the cattle, or to direct the defendant to pay any portion of the sheriff's costs of attachment. The attachment was made pursuant to section 537 of the Code of Civil Procedure to secure the payment of any judgment which might be lawfully rendered against the defendant in the suit upon contract to recover a money judgment for the alleged purchase price of cattle. No such judgment was rendered against the defendant. The court determined that the contract upon which the plaintiffs relied is void for lack of mutual understanding of the terms and conditions thereof.

This appeal from the order refusing to vacate the judgment must be determined solely upon the application of the findings of court to the issues which were presented by the pleadings. *Dahlberg v. Girsch*, 157 Cal. 324, 107 P. 616, 619; *Stanton v. Superior Court*, 202 Cal. 478, 487, 261 P. 1001. In the *Dahlberg Case*, supra, it is said: "In the determination of this appeal [from an order refusing to vacate a judgment pursuant to sec. 663, Code Civ. Proc.] we are restricted, of course, to the case made by the findings of fact in the trial court, taken in the light of the pleadings and the issues made thereby."

Since neither the ownership nor the right of possession of the cattle was an issue in the case, the court was without authority to direct their return to the plaintiffs or enforce the payment of sheriff's costs on attachment. Such findings and provisions of the judgment are unwarranted and surplusage. They may be disregarded.

Since the court specifically found that the contract was void for lack of mutuality, it is unnecessary to determine whether a paroled

prisoner of a state prison is qualified because of section 673 of the Penal Code to make a contract to purchase property, or is estopped from denying the validity of such an agreement. The application of that section is immaterial, since the contract was found to be invalid for other reasons.

The order denying defendant's motion to vacate the judgment is reversed, and the court is directed to enter judgment that the plaintiffs take nothing by their action.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 186

In re GRIVEL'S ESTATE.

GRIVEL v. WARDLAW.

Civ. 8460.

District Court of Appeal, Second District,
Division 1, California.

Dec. 14, 1932.

Hearing Denied by Supreme Court Feb. 10,
1933.

1. Appeal and error ⇨938(4).

Bill of exceptions regularly settled and certified by court presumptively contains all material evidence.

2. Appeal and error ⇨544(1).

Regular settlement and certification of bill of exceptions makes record sufficient to test sufficiency of evidence to sustain findings.

3. Executors and administrators ⇨510(11).

Evidence held not to justify reversal of order approving administrator's supplemental account on theory that administrator had failed to collect and recover property belonging to testator's estate.

Appeal from Superior Court, Imperial County; Lacy D. Jennings, Judge.

Supplemental and amended accounting of John R. Wardlaw, administrator with will annexed of the estate of Charles T. Wardlaw, deceased, to which Leon R. Grivel, administrator with will annexed of the estate of Rene Grivel, deceased, filed objections. From an order settling the supplemental and amended account, the objector appeals.

Affirmed.

Edgar T. Fee and Franklin J. Cole, both of Los Angeles, for appellant.

Sherman Anderson and Guy Richards Crump, both of Los Angeles (Philbrick McCoy, of Los Angeles, of counsel), for respondent.

YORK, J.

The present appeal is from the "decision and order rendered in the above entitled estate on the 2nd day of September, 1930, and filed in the office of the Clerk of the Superior Court of the County of Imperial on the 2nd day of September, 1930, and from the whole thereof wherein said decision and order settles and approves the account of John R. Wardlaw, as the administrator of the estate of Charlie T. Wardlaw, deceased." It is called to our attention that the account so settled was in fact an account filed as a "supplemental and amended account," after the death of C. T. Wardlaw, by respondent John R. Wardlaw as his personal representative. This account was settled and approved with the exception of one item.

Because of the divergent statements made by counsel in their briefs and at the time of the oral argument before this court, we will quote in full the order of the court from which this appeal is made:

"In the matter of the filing of the Supplementary and Amended Account of John R. Wardlaw, Administrator of the Estate of Charles T. Wardlaw, deceased, and the objections filed thereto by Leon R. Grivel, present Administrator of the Estate of Rene Grivel, deceased:

"It is the opinion of the Court that the said Supplementary and Amended Account and Report of John R. Wardlaw, Administrator of the Estate of Charles T. Wardlaw, deceased, should be settled and approved and the same is hereby ordered settled and approved in its entirety, with the exception of that portion of the account which relates to 271 bales of cotton, which it is the opinion of the court were received by Charles T. Wardlaw during his lifetime and during the time that he was acting as Administrator with the Will Annexed of the Estate of Rene Grivel, deceased. It is the opinion of the court that the accounting with respect to this item of property is not sufficient, and that further evidence should be adduced with respect to it, particularly as to the amount received from the sale of cotton, and what, if any, disbursements were made by said Charles T. Wardlaw from such amount."

About thirteen years ago Rene Grivel died testate in Imperial county, Cal., leaving at the time of his death, a widow, to whom he had been recently married, and five minor children by a former marriage. His widow was named executrix of his estate. She immediately relinquished her right to appointment and nominated C. T. Wardlaw, now deceased, as administrator with the will annexed, and his appointment immediately followed. During his lifetime Rene Grivel, the deceased, had been engaged in business both in Imperial county and in the republic of Mexico, and C. T. Wardlaw took charge of

such business both in Imperial county and in the republic of Mexico. Although the widow was appointed and recognized as the administratrix by the court of first instance in Mexicali, Mex., the apparent authority of C. T. Wardlaw in Mexico was an appointment by her, as administratrix, of said C. T. Wardlaw and Dayton L. Ault, as her attorneys in fact in Mexico. She appointed them to represent her jointly or separately as administratrix and as heiress of the estate of Rene Grivel. At the time of the administration of the estate in Mexico, one J. M. Hernandez and one B. E. Zuazua were appointed "tutors" for the minor children of the decedent by a former wife. A "tutor" under the laws of Mexico is the representative of the minor heirs appointed by the court. It was their duty "to approve on behalf of minors expenditures made from estate funds." In 1921 or 1922, the courthouse in Mexicali burned, and the court records were destroyed, and as result very little documentary evidence appears in the bill of exceptions, upon which this appeal is made, as to the administration of the estate in Mexico. C. T. Wardlaw entered upon the performance of his duties in the state of California and in Mexico and performed those duties until his death ten years later, when the respondent herein, John R. Wardlaw, was appointed the administrator of the estate of Charles T. Wardlaw, and as such filed an account in the above-entitled estate for the said deceased, C. T. Wardlaw, as the representative of said C. T. Wardlaw, deceased, in California.

Twice matters connected with this estate have been before the Supreme Court of this state: Estate of Grivel, 199 Cal. 351, 249 P. 184, and Estate of Grivel, 208 Cal. 77, 280 P. 122. In Estate of Grivel, 199 Cal. 351, 249 P. 184, 185, there was an appeal from a former order of settlement of account of the administrator Charles T. Wardlaw. At that time it was the insistent claim of appellant administrator that he was acting in two separate and distinct capacities in handling the funds and property of an estate of which he was the domiciliary administrator, to wit, as agent or attorney in fact of the ancillary administratrix of all property which had its situs in Mexico at the time of decedent's death, and as administrator only of such property as had its situs in the state of California at the time of decedent's death, and to no further extent. Referring to that claim the Supreme Court said: "We question the soundness of this contention. Appellant was the administrator of the entire estate and of all the funds and property which came into his hands which was admittedly property and moneys belonging to the estate, and it was clearly his duty as such officer to report and account to the court which had appointed him for all moneys and property belonging to the estate which he received into his possession, and it does not matter what the

source may have been. We think as a general proposition that the court has inherent power to compel a report of the property which has passed into the hands of the domiciliary administrator, even though he claims to have remitted it to the ancillary administrator. Undoubtedly the court would not be justified in charging him with such property in cases where he has accounted for it in the proper forum, but it may require him to account for it. In *re Ortiz' Estate*, 86 Cal. 306, 21 Am. St. Rep. 44, 24 P. 1034, and a number of text-book writers sustain our conclusion in this respect. To hold that an administrator may collect and hold the funds and property of the estate which he is commissioned to administer in any capacity other than as administrator would be to weaken the salutary safeguards which have been wisely established for the protection of persons whose property is held in trust." But the court further said that it had adverted to this important question with some reluctance, for the reason that the issue was not squarely presented by the record. At that time it appeared that no competent evidence had been adduced at the hearing below to show that Mrs. Grivel had been appointed ancillary administratrix, or that ancillary proceedings were at any time initiated in Mexico, or that appellant was the duly authorized agent or attorney in fact of said administratrix, if such a power may by the laws of Mexico be delegated to another.

On the present appeal the same claim is insisted upon by appellant, and at this time the record does show that Mrs. Grivel was appointed an administratrix in Mexico, and that Charles T. Wardlaw was her attorney in fact.

The principal subjects of controversy emphasized in the argument for appellant relate to a large sum of money which the contestant claims that the administrator Charles T. Wardlaw received as proceeds of the sale of cattle in Mexico; and to the failure of said administrator to collect and recover upon a \$75,000 note which is claimed to have been partnership property of the decedent Grivel and one Barnes. The record contains evidence from which it may well be that the court would have been justified in finding that the administrator had properly accounted for said property or as much thereof as came into his possession, and that he was not chargeable with negligence for failing to recover any part of said property which he did not recover and take into his possession. The evidence in favor of contestant includes testimony given by the former administrator, Charles T. Wardlaw, on a former hearing of his account, and of objections made thereto. From that evidence, including particularly his testimony, it seems to us that the court would be justified in making findings in his favor.

[1-3] Some of the facts stated in the briefs do not appear in the bill of exceptions. If there was such evidence introduced, as stated in the briefs, or if the bill of exceptions is incomplete, we have to face the presumption that the material evidence is all there, as the bill was regularly settled and certified under a statement that "the following proceedings were had." 2 Cal. Jur. 545; *Ritter v. Ritter*, 103 Cal. App. 583, 589, 284 P. 950. This makes a record sufficient to test the merits of any specifications shown in the record, of insufficiency of the evidence to sustain the findings of fact. At the most, the evidence set forth in the bill of exceptions shows a very peculiar way of handling the accounts in Mexico, as well as in the United States, but nothing is shown on the face of the record before us to justify a reversal of the part of the order approving said account.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

128 Cal.App. 201

FALES v. NEW YORK LIFE INS. CO.

Civ. 4434.

District Court of Appeal, Third District,
California.

Dec. 15, 1932.

Rehearing Denied Jan. 14, 1932.

Hearing Denied by Supreme Court Feb. 10,
1933.

1. Insurance $\S$ 256(1), 261.

False representation or concealment of material fact by insured may entitle insurer to rescind life policy.

2. Evidence $\S$ 584(3).

Trial court is not bound to decide in conformity with declaration of any number of witnesses who do not induce conviction contrary to presumption or other satisfactory evidence.

3. Appeal and error $\S$ 1010(1).

Trial court's decision on question of fact is conclusive on appellate court if supported by substantial evidence.

4. Insurance $\S$ 665(3).

Evidence in action on life policy held to sustain trial court's finding that, as stated in application, insured had never raised nor spat blood.

Appeal from Superior Court, Mendocino County; Benjamin C. Jones, Judge.

Action by Cora E. Fales against the New York Life Insurance Company. From judgment for plaintiff, defendant appeals.

Affirmed.

McCutchen, Olney, Mannon & Greene, of San Francisco, and Mannon & Brazier, of Ukiah, for appellant.

Robert E. Hatch, of San Francisco, and A. L. Wessels, of Ukiah, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant appeals from a judgment of \$3,000 on a life insurance contract payable to respondent herein as beneficiary. The defendant claims that Byron E. Fales, the insured, had made false representations in his application for the policy. The application wherein the alleged false representation was contained was dated March 14, 1929, and the policy issued March 21, 1929. The insured died January 19, 1930, the cause of death being pulmonary tuberculosis. In the application for the policy and upon which the policy was issued appeared a question:

"7. E. Have you ever raised or spat blood?" To which the applicant answered "No."

Appellant contends the finding of the trial court "that said Byron E. Fales before the said date of March 14, 1929, had never raised and/or spat blood * * *" was not supported by the evidence and on that issue relies for reversal. Most of the testimony at the trial centered upon the condition of health of the insured within the year preceding March 14, 1929, the date of the application and the ten months intervening between that date and his death. At the time of the application for the policy Byron Fales was about twenty-four years of age and from the medical examiner's report attached to the application, which was received in evidence, the pulse rate was found to be 74, height 5 feet 10 inches, exact weight 150 pounds, girth of chest at fourth rib 36 inches, and in response to the question "Is applicant's general appearance healthy?" the answer by the medical examiner was "Yes." He was unmarried and lived on his parents' ranch near the town of Dos Rios in Mendocino county practically all of the time up to his death except for intervals of a few weeks from time to time when he was away on short trips.

There is a decided conflict in the testimony of the witnesses for the insured on the one hand and for the company on the other, and it becomes the duty of this court to say where the truth lies between the two.

The defendant called four witnesses who testified directly and positively as to the spitting of blood.

Mrs. Clara Vinton, a witness called by the defendant, testified she was well acquainted with the insured and his family for many years. During the Christmas season of 1928 he visited the Vintons, remaining about five

days. The witness testified that during that time he, together with three other young men, Brian and John Vinton, her sons, and a young man named Reel, slept in a cabin near the family home. Upon the occasion of that visit Mrs. Vinton testified that the deceased was sick all of the first day he was there, December 26, 1928; she told how he sat around the fire, and starting to cough, went out of the kitchen and to the back of the house and there sat upon a box and coughed blood and pus from his lungs. She helped him back into the house and to the fire, where he had a chill and was very sick. She testified also that on the day following he was very sick and was brought from the cabin up to the house by the boys, where he had another spell of coughing, but not quite so bad and that she again observed him spitting blood. She described his cough as a "hacking cough." The witness stated that at that time she observed that he had tuberculosis, although that was three months before he was passed on his medical examination by Dr. Hogshead, the examining physician for appellant, and approximately six months before he was examined by Dr. Bennett, who in his examination used a stethoscope and took his temperature and sounded his chest and Dr. Bennett stated he thought he was only then beginning tuberculosis.

Brian Vinton, a son of Mrs. Vinton, testified that at the time of Byron Fales' visit to their place during Christmas, 1928, he had a bad cough "sounded like away down in his lungs, coughed hard and his voice seemed to change, he had a coarser voice." He also testified that during the visit in December, 1928, he and Byron slept in the same bed. He did not notice that deceased had any trouble holding food in his stomach although his mother testified that he "had a good appetite * * * but couldn't keep it on his stomach; when he ate in a few minutes it would come up; I don't think he retained anything more than a half hour while at my place."

Luke Vinton, another son of Mr. and Mrs. Vinton, testified that he had spent a portion of the time at the home of his parents during the Christmas holidays of 1928 and had observed the physical condition of Byron Fales, although he was not asked about any spitting of blood. He testified the health of Byron was very bad, that "he saw him coughing like he always did and he was taking some kind of medicine," and also:

"Q. Now, did he have spasms of coughing this Christmas? A. Yes.

"Q. What were those like? A. They were so hard—we had an old wagon in the yard and he would rest himself on this wagon and cough.

"Q. Did you see that? A. I did.

"Q. Would he throw up anything? A. He would spit.

"Q. What would he bring up? A. I never did investigate that."

John Vinton and a young man named Reel who also occupied the cabin with Byron Fales during Christmas, 1928, were not called as witnesses.

John M. Vinton, the husband of Mrs. Clara Vinton, testified he was home during the Christmas season of 1928 while deceased was visiting them. He did not testify that he saw deceased vomit his food or have any hemorrhages, although he said his wife told him she had disposed of evidence of a hemorrhage. Neither did he testify that deceased went to bed during the day on account of his illness. He testified that "Byron and my boys slept in the other house and the family in another house; so they spent most of the time in the other house," and further: "Did you notice any spells of coughing that he had at Christmas time? A. I don't know I noticed any more than he was coughing and seemed to have some disease. Q. You didn't see the hemorrhages at Christmas time, did you? A. No, I never did."

L. C. Barnes was one of the witnesses called by defendant, who testified that he had seen Byron Fales spit blood.

It appeared from the record that a hog had strayed or been stolen and the witness, together with Martin Hanke, Eugene Provost, and the deceased, had been delegated to search for the missing animal throughout the surrounding country. Mr. Barnes was riding a horse; Provost, Hanke, and deceased were walking. As they were climbing up an incline out of a creek bed the witness testified that deceased became weak and had to stop upon two occasions on account of his coughing. When asked to describe the cough the witness answered: "Well, at that time his cough was in the nature of a hemorrhage * * * lasted say half a minute." He observed the witness at that time raised "a kind of bluish substance and I noticed a slight trace of blood in it." This instance occurred between January 27 and February 4, 1929.

On cross-examination it appeared that the witness Barnes was a defendant in an action by William Fales, the husband of respondent herein, to evict him as a squatter from certain farm lands claimed by Fales, which action was still pending at the time of the trial of this action. It also appeared that Barnes had written the insurance company after the death of Byron Fales, but the contents of the letter were not disclosed. During the cross-examination he was asked if he had not told certain persons that he was going to throw a monkey wrench into the machinery that would prevent a recovery from the insurance company, to which

Barnes made the rather unconvincing answer "I do not think so." It also appeared that several witnesses called by the insurance company in this case who testified against the respondent herein were witnesses for Barnes in the case of Fales v. Barnes, above referred to. These witnesses were John Vinton, Luke Vinton, Eugene Provost, Mrs. Vinton, L. C. Barnes, and Mrs. L. C. Barnes. As to Mrs. Vinton, respondent points out that she testified to a conversation had between decedent and his mother, respondent herein, in her presence some time during the latter part of June, 1929, wherein she testified that decedent said he had just returned from a visit to Dr. Bennett, who told him "he was rotten with consumption." When Dr. Bennett was called he denied he told Byron Fales that he had tuberculosis.

Eugene Provost, who was one of the members of the expedition above mentioned, testified that Byron Fales had to stop on account of a coughing spell and observed that he raised sort of a yellowish mucus, but he did not testify as to the spitting or raising of any blood.

Martin Hanke was also on this trip and he testified that deceased was compelled to stop while climbing up the hills on account of shortness of breath and that he observed two coughing spells but did not see what was spit up.

Renne Provost testified that he knew Byron Fales and during 1928 and 1929 saw him on an average of twice a week and testified that in the fall and winter of 1928 "that he had a sort of cough and that sometimes it was a dry cough and at other times he spit up blood and phlegm."

Another witness called by the applicant was Gwendolyn Edwards, who testified that they were friends and occasionally were together attending social affairs. That some time prior to April, 1928, she noticed that he coughed a great deal and on one occasion saw him spit blood. When asked what it looked like she said "some mucus and a little blood. I did not pay much attention to it—he called my attention to it is what made me notice it. Q. What did he say? A. He said that was from his lungs."

The foregoing constitutes all of the direct testimony in regard to the spitting of blood by the deceased.

The respondent called thirteen witnesses who testified as to the physical condition of the deceased during the time under observation.

The respondent herein, the mother of deceased, testified that the premiums were paid by her and testified that she never saw him, prior to the time of taking out the insurance, cough or spitting up blood.

Mr. William Fales, the father of deceased, testified that, prior to the taking out of the

policy of insurance, he never saw any indication of weakness on the part of the son nor did he ever see him have any coughing spells.

Vernon Fales, a brother, testified that he never saw deceased, prior to March 21, 1929, ever spit blood or ever have any coughing spasms, and that in the spring of 1929, prior to taking out the policy of insurance, deceased had worked with the witness on the ranch cutting wood, plowing and carrying on general ranch work, during which time he also, together with two other men, engaged in the loading of at least two cars of wood a month, and that during that time he and the deceased engaged in wrestling and boxing with the young men of the community.

Mr. E. M. Calmer testified for the plaintiff that he was the athletic director of the Olympic Club in San Francisco and knew and worked with the deceased in about September and October, 1928. He testified that Byron Fales was in excellent condition at that time and a very fine type of athlete and that during a part of that time the witness was engaged in unloading grain cars in the town of Dos Rios. He also saw him loading wood into the cars and they were together often in going over their trap lines during the winter months 1928-1929 and that during all of the time that he knew deceased he never saw him spit up any blood or have any violent coughing spells or show any physical weakness.

Dr. E. C. Bennett, a physician and surgeon of Ukiah, was called and denied that he had ever told Byron Fales that he was "rotten with tuberculosis" as was testified to by Mrs. Vinton. He did say that he examined him in June, 1929, at which time he took his temperature and examined his chest and lungs and concluded he probably had incipient tuberculosis.

Carl Johnson testified that he knew Byron Fales and that he had seen him on frequent occasions in the fall of 1928. That he and the deceased were both members of the athletic club of Dos Rios and that he had boxed with him and indulged in other athletic exercises and had not noticed any particular shortness of breath or any violent coughing spell.

Tony Bernott was a farmer living near Dos Rios and saw him in 1928 and 1929. He also had observed the deceased about the athletic club and had there seen him boxing; when asked about his physical condition in the spring of 1929 he said "the boys in the bunch couldn't beat him out; sometimes it was an even match of boxing"—some of the boys were larger than he—I never saw any sign of weakness on his part—nor shortness of breath—nor saw him vomit or cough violently. That he had employed him to load

a car of wood and that he was physically able to do the work.

Harvey Goddard testified that he knew the deceased and had seen him in and about the athletic club of which he was the president. He testified that the deceased was the athletic director of the club and that he had seen him box and had boxed with him and he had never seen him have any coughing spells and never saw him spit blood or saw any other signs of weakness or shortness of breath. Also that they had been on fishing and hunting trips together. The period of time covered by the witness was January, February, and March, 1929.

Fred Crabtree testified that he saw Byron Fales in the spring of 1929 and that he spent about a week at his place in the early part of April, 1929. They were hunting wild cats together about every day, going over rough country on foot following the dogs and that during that time he never saw him spit up any blood or have any coughing spells.

Orville Johnson was a member of the athletic club and boxed with the deceased on various occasions and testified that he never saw him spit up any blood or evidence any sign of weakness.

Lloyd Fish was the agent who wrote the policy of insurance in question. He testified that he was not personally acquainted with Byron Fales and that when he first saw him he called upon him at his home at which time he was engaged in digging a ditch with a hoe and that he talked with him perhaps one hour and a half before he obtained his signature to the application, and that from his appearance he considered him in good health and that he looked physically in good condition.

George Fales, a brother of deceased, testified as to a trip that the two boys took in Oregon in April of 1928, and that at that time they weighed in San Francisco and the deceased weighed 145 pounds and that they were together continuously in Oregon until about the 22d day of September, 1928, when the deceased returned to California. Just prior to his leaving he was again weighed at the mill store and he weighed 140 pounds. They were doing heavy work, eight or nine hours a day every day of the week, including Sundays. At that time he never saw him spit up any blood and did not see or hear him cough.

Henry Courtney knew the deceased before his trip to Oregon and at that time he described his physical condition as being very good and upon his return from Oregon noticed but little if any difference in his condition. He testified he saw him cough a little but never saw him spit blood at any time. He also saw him cutting and hauling wood on the ranch and in the latter part of 1929

saw him taking part in the unloading of a car of grain.

The foregoing constitutes a summary of the testimony of the witnesses called by the plaintiff with direct reference to the physical condition of the deceased and particularly as to the spitting of blood.

[1] It is an elementary principle of law that a false representation or concealment of a material fact may, in connection with the issuance of a policy of insurance, entitle the party relying thereon to rescind on ascertaining the truth. *Boyer v. United States Fidelity & Guaranty Company*, 206 Cal. 273, 274 P. 57; *Whitney v. West Coast Life Insurance Company*, 177 Cal. 74, 169 P. 997; *Iverson v. Metropolitan Life Insurance Company*, 151 Cal. 746, 91 P. 609, 13 L. R. A. (N. S.) 866; *Layton v. New York Life Insurance Company*, 55 Cal. App. 202, 202 P. 958.

It is also evident that, if the deceased had raised or spat blood as related by the witnesses, he must have been aware of that fact and there can be no doubt that the spitting or raising of blood is regarded by medical men as a serious symptom of internal disorder and that the insurance company was entitled to a full and truthful answer by the applicant.

We have set forth the testimony of appellant somewhat fully because it stresses the fact that the spitting of blood was adduced by them by eyewitnesses, whereas the testimony of respondent was negative as to the actual spitting of blood.

Respondent, however, emphasizes the fact that the testimony she introduced shows that during the time in question the deceased was engaged in trapping in the mountains during the dead of winter, walking and climbing over the mountains in the vicinity of Dos Rios, loading of cars of grain and wood, acting as boxing instructor in the local athletic club and boxing and wrestling with the members thereof, hunting and fishing, engaged in general farm work and working in the lumber mills in Oregon, and that therefore it negated and was wholly irreconcilable with the testimony of the defendant.

The trial court was presided over by a capable and impartial jurist who, after listening to all of the testimony adduced and after observing the manner of the witnesses on the stand, analyzing their motives and considering the conflicting and contradictory evidence, found that the deceased had not raised or spat blood.

[2] Although a witness is presumed to speak the truth, and it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, nevertheless a trial court is not bound

to decide in conformity with the declaration of any number of witnesses who do not produce conviction in its mind against a presumption or other evidence satisfying its mind. *Morris v. Morris*, 84 Cal. App. 599, 258 P. 616.

"Nekther court nor jury is bound by the mere declaration of a witness—no matter how improbable, incredible, or impossible, that declaration may be. It is a principle recognized in all cases. * * * 'It is a wild conceit that any court of justice is bound by the mere swearing. It is swearing credibly that is to conclude its judgment.'" *Zibbell v. Southern Pacific Company*, 160 Cal. 237, 116 P. 513, 515.

[3] Mr. Justice Sloss, in the case of *Bancroft-Whitney Company v. McHugh*, 166 Cal. 140, 134 P. 1157, 1158, says, in regard to the sufficiency of evidence to support findings: " * * * It must be borne in mind that, in examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding. In our further statement of facts, we shall not, therefore, undertake to recite the testimony, abundant as it may be, which would have supported a finding in favor of appellant's allegation of a conversion. All that is required is to point out testimony which, if given credence by the trial court, would logically lead to the conclusion that there had been no conversion by the defendant. That much of this testimony was contradicted is, in this inquiry, an entirely unimportant consideration."

"The decision of the trial court upon questions of fact is conclusive upon us [the appellate court], in so far as there is any substantial evidence tending fairly, with such inferences as may reasonably be drawn therefrom, to support such decision." *Clopton v. Clopton*, 162 Cal. 27, 121 P. 720, 721.

"The determination reached by the trial court upon all matters of fact is binding upon an appellate court, except only in the single instance where there is no substantial evidence * * * to support the findings of the trial court, and, if such evidence is found in the record, then the findings must stand, notwithstanding the satisfactory character of appellant's evidence." *King v. Cal. Bank*, 73 Cal. App. 136, 238 P. 108, 109.

[4] After carefully reading and analyzing the entire record we cannot say that there

is not evidence which, if given credence by the trial court, would not logically lead to the conclusion found, and for that reason the judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

ROBBIANO et al. v. BOVET, and three other cases. *

Civ. 8489.

District Court of Appeal, First District,
Division 2, California.

Dec. 20, 1932.

Hearing Granted by Supreme Court Jan. 19,
1933.

1. Automobiles ⇨244(42).

Motorist suddenly turning into middle traffic lane to pass parked car and colliding head-on with automobile approaching from opposite direction *held* contributorily negligent (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50).

2. Automobiles ⇨244(12).

Evidence failed to establish that motorist's failure to signal when suddenly turning into middle traffic lane to pass parked automobile caused motorist following to swerve into his extreme left lane and collide with automobile approaching from opposite direction (Code Civ. Proc. § 1960).

Facts disclosed that motorist turning into middle lane had not been observed to signal on passing the parked automobile, but that he was at all times ahead of the motorist following him, and that he at no time slowed down his automobile until motorist following him had collided with the automobile approaching from the opposite direction.

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Josephine Robbiano and others against Louis A. Bovet, Jr., in which defendant filed a cross-complaint against John Ragno and another and against John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, and wherein John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, filed a cross-complaint against defendant; and action by Mabel Morgan against John Ragno and another. From adverse judgments, defendant Bovet and plaintiff Morgan appeal.

Judgment for Josephine Robbiano and others against defendant Bovet reversed. Judgment for defendant Ragno affirmed.

For prior opinions, see 15 P.(2d) 207, 16 P.(2d) 181.

John Ralph Wilson, Aylett R. Cotton, and Bianchi & Hyman, all of San Francisco, for appellants.

Clifton Hildebrand, of San Francisco, for respondents Robbiano and others.

Crosby & Crosby, of Oakland, for cross-defendants and respondents Robbiano, Ragno, and others.

Donahue, Hynes & Hamlin, of Oakland, for defendant and respondent Ragno.

PER CURIAM.

The petitions for rehearing are denied. The opinions in the above-entitled actions, filed November 21, 1932, are changed to read as follows:

These are appeals from judgments in personal injury cases. All of the appeals arose out of litigation involving the same accident. The actions were consolidated for trial, and the appellants have brought up the judgment roll and a bill of exceptions.

The accident occurred on the San Mateo-Hayward bridge about 6:25 p. m. on the evening of November 13, 1930. The bridge runs in a general easterly and westerly direction and has a railing 4 or 5 feet high on each side. It is 27 feet wide, and is divided into three lanes of equal width, the lines being indicated by 6-inch markers. The bridge was lighted at the time of the accident with lights 210 feet apart staggered on opposite sides of the bridge. At the time of the accident, a car occupied by the Joos family headed east was stalled in the southerly traffic lane. Although it was dark, it was light enough that the car was seen by the witnesses at a considerable distance.

On the evening of the accident, Sylvester Robbiano and his brother-in-law, John Ragno, had been visiting in Redwood City, and were returning to their homes in Oakland. Each had his separate car. Robbiano was driving a Buick; Ragno was driving a Nash. As they proceeded easterly across the bridge, Ragno was in front, and Robbiano was following. They were in the south lane, and were traveling at a speed variously estimated at from 35 to 60 miles an hour. As they approached the Joos car, Ragno turned out into the middle lane, passed the parked car, and then returned to the south lane. Robbiano turned out to pass the Joos car, and as he did so another car was approaching from the east. The latter car was occupied by the defendant Louis A. Bovet and Miss Mabel Morgan. They were traveling 35 to 40 miles per hour in a Ford car. A head-on collision occurred between the Buick and the Ford cars.

Whether the collision took place in the middle lane or the north lane, and the exact distance of the point of the collision from the Joos car, were controverted facts. The collision was so violent that Robbiano suffered injuries from which he died. His widow and children commenced an action against Bovet. The latter answered and filed a cross-complaint against John Ragno, as administrator of the estate of Robbiano, and against John Ragno and Josephine Robbiano personally. John Ragno, as administrator of the estate of Sylvester Robbiano, filed a cross-complaint against the defendant. Mabel Morgan commenced a separate action against John Ragno and Josephine Robbiano. As above stated, the actions were consolidated for the purposes of the trial. The jury returned a verdict against the defendant Bovet, and in favor of John Ragno as administrator of the estate of Sylvester Robbiano. From the judgments entered on the verdicts, the defendant Bovet has appealed. He also appealed from the order made by the trial court granting a nonsuit against him on his cross-complaint. But the latter appeal he abandoned in his opening brief. The trial court granted a nonsuit against Mabel Morgan in favor of Josephine Robbiano. It directed a verdict in favor of Ragno as against Mabel Morgan, and, from the judgment entered thereon, she has appealed.

Robbiano v. Bovet.

[1] The first point made by the defendant is that the deceased was guilty of contributory negligence. He says: "There is therefore only one matter to be determined, namely, was Robbiano exercising ordinary care in suddenly turning into the middle lane at a speed approximately 40 miles an hour without first ascertaining whether the lane was free of approaching vehicles." At the time of the trial, Robbiano was dead. What he did or omitted to do at the time of the accident was never stated by him. The witness Ragno testified that he approached the Joos car, turned to the left, and passed it. He further testified that, when he started to turn to the left to pass the Joos car, Robbiano was practically a block behind him. Continuing, Ragno testified that, after he had passed the Joos car, he turned to his right into the right-hand lane and then continued two blocks and stopped. He also testified that about 150 feet beyond the Joos car Bovet passed him, and that Bovet was in the middle lane. The witness Lyons testified that he was driving a truck from east to west. When he was about five blocks from the scene of the accident, Bovet passed him. At that time Bovet was in the middle lane. Lyons prepared to swing out into the middle lane to pass a lumber truck that was ahead of him. Looking forward to see the conditions, he saw Ragno's car pass the Joos car, and that Ragno's car was being followed by another car about one

block further away. When the latter car attempted to turn around the Joos car, it entered the middle lane. In the meantime the Ford car had continued down the middle lane, and the head-on collision occurred. Each car was greatly jammed and broken. The Ford car passed to the west of the Joos car 5 or 6 feet and turned over on its side. The Buick passed to the east and stopped with its nose in the north lane 80 feet from the Ford car. In the testimony given by plaintiff's witnesses, there is no evidence that, from the time the Ford car passed Lyons, five blocks to the east, that it got out of the middle lane prior to the moment of the impact. As stated above, the bridge was lighted. There was no evidence to the effect that at the time Robbiano started to turn around the Joos car the Ford car was not clearly visible or that the middle lane was free of on-coming traffic. Section 122 of the California Vehicle Act (as amended by St. 1929, p. 540, § 50) provides: "Sec. 122. * * * The driver of a vehicle shall drive the same upon the right half of the highway and close to the right hand edge or curb of such highway * * * except when overtaking and passing other vehicles, in which event the overtaking vehicle may be driven on the left side of the highway, if such left side is clearly visible and is free of on-coming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety; and providing that such overtaking vehicle shall return to the right hand side of the highway before coming within one hundred feet of any vehicle approaching from the opposite direction. * * *"

Taking the evidence most favorable to the plaintiff, Ragno and Robbiano were traveling one block apart (300 feet as one witness estimated the length of a block). Ragno passed Bovet 150 feet east of the Joos car. While Ragno was coming to that point, one-half block east of the Joos car, Robbiano had approached to a point one-half block west of it. At that moment the distance between Bovet and Robbiano was about 300 feet and was decreasing at approximately 100 feet per second as they were approaching each other in the same lane. They were equidistant from, but on opposite ends of, the Joos car. If each car continued without reducing its speed, the two cars would meet practically abreast of the Joos car and not over 100 feet distant therefrom as limited by the statute. It is immaterial under the circumstances whether the left side of the highway was in fact clearly visible to Robbiano. The statute required that he remain upon the right half of the highway unless the left side was both "clearly visible" and "free of oncoming traffic" for the required distance. Under any view of the evidence it is clear that Robbiano left the right side of the highway when the left side thereof was not "free from oncoming traffic for a sufficient distance ahead" to permit him to pass in safety and when it was

not possible for him to "return to the right hand side of the highway before coming within one hundred feet" of the Bovet car. It is equally clear that his violation of the statute was a proximate cause of the collision, if not the sole cause thereof. Under these circumstances, Robbiano was guilty of contributory negligence as a matter of law.

The witnesses Bovet and Morgan, the only other eyewitnesses called on the trial, testified that the Ford car was traveling in, and that the collision occurred in, the north lane. The other facts remain as stated above. If we adopt that theory, the conduct of Robbiano was even more reprehensible. No fact proved by the evidence excused him for swerving over into the north lane.

Other points are presented in the briefs; but, in view of the conclusions we have reached on the first point, it is unnecessary to discuss the other points.

The judgment is reversed.

Ragno, as Administrator, etc., v. Bovet.

In his cross-complaint, Ragno, as administrator of the estate of Sylvester Robbiano, sued to recover the property damage suffered by the decedent in the collision. It was the theory of the cross-complainant that the collision occurred by reason of the negligence of Bovet and without negligence on the part of Sylvester Robbiano. As shown above, we think it is clear as a matter of law that the decedent, Sylvester Robbiano, was guilty of contributory negligence which proximately caused the accident. It follows that his administrator was not entitled to a judgment for property damage arising out of the collision.

The judgment is reversed.

Morgan v. Ragno.

The plaintiff asserts that the action of Mabel Morgan against John Ragno was based upon the contention that Ragno in passing the parked Joos car suddenly swerved to the left, thereby causing Robbiano, driving behind him at great speed, in order to avoid hitting the Joos and Ragno cars, to swerve into the north lane and collide with the Bovet car. In her closing brief she reinforces her contention by asserting that when Ragno made the turn around the Joos car he gave no signal.

In her complaint with much care the plaintiff alleged the positions of the different cars on the bridge immediately before the accident. She alleged that Robbiano was following Ragno three car lengths in the rear. Continuing she alleged: " * * * And said Ragno as he was near the point of the passage of the automobile being driven by him in an easterly direction to his right of said Bovet, driving his Ford automobile in a westerly direction as aforesaid, observed another automobile parked upon said bridge partially to

the right of said Ragno's automobile and partially in the path of said Ragno's automobile, as it was then being driven by Ragno, and that in order safely to attempt to pass said parked automobile, said Ragno suddenly and without warning to any person slowed the speed of his Nash automobile and swerved towards the middle of the lane of traffic upon said bridge, whereupon the said Robbiano, driving said Buick automobile, in order to pass at an excessive speed between said Bovet's automobile and said Ragno's automobile, swung the said Buick automobile to said Robbiano's left of said Ragno's automobile in a careless and negligent manner and in so doing ran into and collided with said Bovet's Ford automobile proceeding westerly on said bridge and on said Bovet's right-hand side of said bridge as above set forth." Those allegations were denied in the defendants' answer. On the trial no witness testified that at any time Robbiano overtook and attempted to pass Ragno. The witnesses testified without conflict that Ragno was at all times ahead, and Bovet testified the Ragno car at no time interfered with him. No witness testified that Ragno slowed down his car until after the accident. No witness testified the accident occurred when the Ragno car, the Bovet car, and Robbiano's car were at the same instant attempting to pass each other and to pass the Joos car. The witnesses Morgan, Bovet, and Lyons each testified they saw the Ragno and the Robbiano cars when they were as much as three-quarters of a mile away. Ragno saw the Ford car a block and a half away. No witness testified that Ragno did not give a signal before attempting to pass the Joos car. Bovet testified that he did not see a signal if one was given. The plaintiff called Ragno as a witness. The defendants also called him as a witness. He was examined and cross-examined; nevertheless he was not asked whether he gave a signal or did not give one. The plaintiff was called as a witness in her own behalf, and testified that she was at all times looking directly ahead. The witness Lyons also testified that he was at all times looking at the movements of the Ragno car and the Robbiano car. Neither witness testified that Ragno did not give a signal.

[2] As we understand the brief of the plaintiff, her reasoning is that the witness Bovet testified he did not see Ragno signal. Relying solely on that proved fact, she contends that it will be inferred Ragno did not signal; that it will then be inferred Robbiano did not know that Ragno was going to make the turn; that it will be inferred Robbiano did not see the Bovet car coming from the east; and therefore that Ragno caused the acts of Robbiano. In the absence of more facts legally proved, that line of reasoning is not permissible. Code Civ. Proc. § 1960. When the de-

fendants made a motion for a directed verdict, the record does not disclose that the plaintiff called to the attention of the trial court the theory which she now presents. In ruling on the motion, the trial court remarked: "If the case went to the jury on that present testimony and the jury found against Ragno I would be compelled on motion for a new trial to grant it as to him." The court applied the proper rule. *Estate of Baldwin*, 162 Cal. 471, 473, 123 P. 267. We think it did not err in applying the rule to the facts before it.

The judgment is affirmed.

Bovet v. Ragno.

In this action, as stated above, the trial court ordered a nonsuit in favor of the defendant upon Bovet's cross-complaint. While the cross-complainant appealed, nevertheless he admitted error in his opening brief, and has not pressed the appeal.

The judgment of nonsuit should be, and therefore is, affirmed.

128 Cal.App. 176

IN RE MILLER'S ESTATE.

MILLER v. CARRASCO, Public Adm'r, et al
Civ. 668.

District Court of Appeal, Fourth District,
California.

Dec. 13, 1932.

1. Wills $\S$ 130.

Two documents found folded together in decedent's pocketbook held to constitute valid olographic will, though neither standing alone was sufficient (Probate Code, § 53).

One document written, dated, and signed by decedent reminded beneficiary of joint bank account and of property which was hers and referred to "another paper in my pocketbook." Folded within this document, there was a smaller sheet of paper written and signed by decedent, but not dated, stating that all bank accounts and property of decedent "will be given" to beneficiary.

2. Wills $\S$ 130.

In alleged olographic will, statement that certain bank account was joint account, and that certain property belonged to another, was not "testamentary disposition of property."

[Ed. Note.—For other definitions of "Testamentary Disposition," see Words and Phrases.]

3. Wills §98.

Nontestamentary document may by reference be incorporated in and made part of will, if description thereof in will is unambiguous, and document is in existence at execution of will.

4. Wills §98.

Reference in document to undated instrument held sufficient to incorporate it into and make it part of will.

The language of the will that "there is another paper in my pocketbook" indicated its existence at that time, and, after decedent's death, such document was found at the place and in the receptacle where he said it was.

5. Wills §72.

Decedent's intention that identical paper in question should stand for will must be plainly apparent.

6. Wills §72.

Effect must be given decedent's intention that particular paper should stand for will, if such intention can be discovered and is consistent with rules of law.

7. Wills §72.

Court is not limited to document itself in determining testator's intention.

Under this rule, evidence of surrounding circumstances has been held admissible for the purpose of showing testamentary intent.

8. Wills §72.

No particular form of words is necessary to show testamentary intent.

9. Wills §72.

Document is effectual as will if it appears from its language and surrounding circumstances as shown by parol that testator intended by such document to make revocable disposition of property to take effect after death.

Appeal from Superior Court, Inyo County; William D. Deby, Judge.

In the matter of the estate of W. S. Miller, deceased. Will contest by Thomas N. Miller against Chris C. Carrasco, as Public Administrator of Inyo County, and Minnie Miller. From an order admitting the will to probate, contestant appeals.

Affirmed.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for appellant.

Rex B. Goodcell and Manley C. Davidson, both of Los Angeles, and Jess G. Sutliff and George Francis, both of Independence, for respondent Carrasco.

Rex B. Goodcell and Manley C. Davidson, both of Los Angeles, and George Francis, of Independence, for respondent Miller.

AMES, Justice pro tem.

This is an appeal from an order admitting to probate two documents as the last will and testament of W. S. Miller, deceased, who died at Lone Pine, Inyo county, on the 27th day of March, 1931. He left surviving him a brother, Thomas N. Miller, the contestant and appellant here, and a sister, Ida May McNeal. The sole beneficiary named in the purported will was Minnie Miller, a cousin of decedent and a respondent here.

A few days after his death there was found among the effects of decedent, under the circumstances hereinafter related, a document which was proved, without controversy, to have been entirely written, dated, and signed in his handwriting, and which is as follows:

"Lone Pine Feb 19 1931

"My dear Minnie do not forget our Bank account in the Farmers and Merchants Nat. Bank is a joint account and is the property of you and myself also the one acre where we live is yours and yours only there is another paper in my pocket book which will explain do not let them rob you as Tom tried to do once when we were in Culver City some years ago if T. N. Miller Ida or any niece or nephew refuses to comply with my request or my Bro or sister close the account and give them nothing as they are not entitled what I am giving them You know why dear Cousin

"W. S. Miller or Bill

"To Minnie Miller."

Folded within this document there was discovered a smaller sheet of paper, also proven to have been written in its entirety by the hand of decedent and signed by him, but not bearing any date, which is as follows:

"All bank accts or any and all property real and person belonging to me will be given to Minnie I. Miller my cousin as she has been my partner and helper. All property and cash I may die possessed of was earned by Minnie Miller and myself and I hope and pray to God to protect her Minnie.

"W. S. Miller."

The trial court concluded, as a matter of law, that the larger paper and the smaller paper together constituted the last will and testament of deceased, was testamentary in character and was executed with testamentary intent by the decedent, and accordingly admitted the same to probate. From such order this appeal is prosecuted.

[1] It is the contention of appellant that neither of these documents, when construed together or separately, discloses a testamentary intent on the part of the decedent. Respondents, on the other hand, maintain that the two documents, when construed together and aided by the extrinsic evidence which was introduced at the trial, clearly establish a testamentary intent.

It will be necessary first to refer briefly to the testimony so introduced. From such evidence it appears without controversy that Miss Miller was a cousin of decedent, with whom he had made his home for more than twenty years. About four days after the funeral of the deceased, one Carter Newlin, who had been an employee of decedent, called at the residence of Miss Miller for the purpose of opening the decedent's safe, which was at her residence. Since the death of Miller, no person other than Newlin knew the combination of the safe, and it had not been opened. Newlin opened the safe in the presence of one Lorene Millner and Miss Miller, and it was found to contain two or three pocketbooks or wallets, in one of which were found the two documents here involved folded together, the smaller folded within the larger one. The pocketbook or wallet in which these documents were found contained no other papers. Lorene Millner, a witness for respondents, who was present when the safe was opened by Carter Newlin, testified that she saw the two instruments folded together, the smaller within the larger one, and the words "To Minnie Miller" were written on the documents. She further testified that about two or three weeks before decedent's death and before his last illness she had a conversation with him at Huntington Park, Cal. In relating that conversation, she testified as follows: "Why he told me that I need not worry about Ma Meemee because she would always be taken care of, at the time of his death there would be papers found amongst his things that would take care of her. Ma Meemee is Miss Miller."

Nellie E. Reynolds, a witness for respondents, testified that about three or four weeks before his last illness, in a conversation with decedent at Lone Pine, he said that he "wanted to fix things for Minnie Miller, that everything he had or ever had been that he owed to her, that he wanted to fix things for Minnie so no one could make any trouble. He was afraid of his brother Tom and he had written these and he showed them to me and told me that this one (indicating)—that Minnie would understand." During the course of this conversation he produced and exhibited to the witness the two documents here in controversy, which were identified by the witness as the identical documents to which decedent referred in the conversation above related. Again she testified that "Both of these pieces of paper were there at that time and he said he had fixed things for Minnie, and then he read them to me and showed them to me. They were folded at that time."

[2-4] The smaller of the two documents, while written and signed in the handwriting of the decedent, did not bear any date, and, standing by itself, would not constitute an olographic will. Probate Code, § 53. The document which bears the date of February

19, 1931, complies with all of the requirements of a valid olographic will, unless it fails to disclose the testamentary intent. The reference to the bank account is not a testamentary disposition of property, but is merely a statement of fact that the same is "a joint account and is the property of you and myself." The same is true as to his reference to "the one acre where we live." Miss Miller testified that that property belonged to her. A testator is not presumed to devise property which already belongs to the beneficiary. This document, standing by itself, would not constitute a will. However, we think that the next clause in this document is significant. The testator there says: "There is another paper in my pocketbook which will explain." The only other paper discovered in the same pocketbook where this document was found was folded within it, and was the undated document which is above set out, and in it he says: "All bank accts or any and all property real and person belonging to me will be given to Minnie I. Miller my cousin as she has been my partner and helper."

It has long been the rule in California that a nontestamentary document may, by reference, be incorporated in and made a part of a will. This rule was announced in *Estate of Young*, 123 Cal. 337, 55 P. 1011, 1012, in which the court says: "Before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt." The same rule has been announced in *Estate of Anthony*, 21 Cal. App. 157, 131 P. 96, *Estate of Shillaber*, 74 Cal. 144, 15 P. 453, 5 Am. St. Rep. 433, and *Estate of Sullivan*, 94 Cal. App. 674, 271 P. 753. In *Estate of Plumel*, 151 Cal. 77, 90 P. 192, 121 Am. St. Rep. 100, it was held that the identification of such document may be aided by extrinsic proof.

Another requirement to a valid incorporation of an extrinsic document into a will by reference is that such document must have been in existence at the time of the execution of the will. *Estate of Shillaber*, supra; *Estate of Anthony*, supra. This requirement has been complied with in this case. The language of the will itself, that "There is another paper in my pocketbook," indicates its existence at that time. After his death that document was found at the place and in the receptacle where he said it was. We think the reference to the undated instrument is sufficient to incorporate it into and make it a part of the will.

[5, 6] Another requirement of a valid will is that the intention of the deceased that the identical paper in question should stand for a last will and testament must be plainly apparent. Effect must be given to such intention if it can be discovered and is consistent with the rules of law. *Estate of Meade*, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244. Such

intention must be clearly expressed and with legal certainty, otherwise title to the heirs at law must prevail. *Estate of Major*, 89 Cal. App. 238, 264 P. 542; *Estate of Button*, 209 Cal. 325, 287 P. 964. An intention to make a testamentary disposition of his property, no matter how clearly expressed, will not suffice as a valid will unless it appears that the very paper upon which his intentions were written was by him intended to operate as a will. The rule which has been quoted many times in decisions in this state is set forth in *Estate of Button*, 209 Cal. 325, at page 331, 287 P. 964, 967, as follows: "In order for a document to be the last will and testament of a deceased person, it must, in addition to meeting all other legal requirements, clearly show that the decedent intended it to take effect only after his death, and it must satisfactorily appear therefrom that the decedent intended by the very paper itself to make a disposition of his property in favor of the party claiming thereunder. *Estate of Meade*, 118 Cal. 428, 62 Am. St. Rep. 244, 50 P. 541; *Major's Estate*, 89 Cal. App. 238, 264 P. 542; *Estate of Beffa*, 54 Cal. App. 186, 188, 201 P. 616; *Estate of Spitzer*, 196 Cal. 301, 307, 237 P. 739, 742."

[7] It is well established in California that in arriving at the intention of a testator the court should not be limited to an examination of the document itself. In *Estate of Spitzer*, 196 Cal. 301, 237 P. 739, 740, the deceased wrote an olographic will in the form of a letter, in which, after referring to the fact that he had conveyed certain property by deed, said: "Bal of estate to go to Lulu M Plane." At the trial of a contest of this will, the court excluded the testimony of a witness to whom decedent had said: "Everything is all fixed. I have written a letter to my brother, and my wife will be taken care of, and I want my daughter to be taken care of." Upon appeal from a judgment refusing probate to this will, the Supreme Court reversed the lower court and held that it was error to exclude such testimony, as it was shown to relate to the identical paper sought to be established as a will. That evidence of surrounding circumstances is admissible for the purpose of showing testamentary intent has been held in the following cases: *Estate of Beffa*, supra; *Clarke v. Ransom*, 50 Cal. 595; *Mitchell v. Donohue*, 100 Cal. 202, 34 P. 614, 38 Am. St. Rep. 279; *Estate of Young*, supra.

[8, 9] No particular form of words is necessary to show a testamentary intent (*Estate of Beffa*, supra; *Estate of Button*, supra; *Estate of Major*, supra), and, if it can be gathered from the language of the document itself and the surrounding circumstances as shown by parol that the testator intended, by the propounded document to make a revocable disposition of his property to take effect after his death, the document will be effectual as his will.

Tested by the foregoing rules, we think that the propounded documents comply with all legal requirements to constitute a valid olographic will.

The language of the undated document that "all property real and person belonging to me will be given to Minnie Miller" expresses a testamentary wish. That these words were penned with a consciousness of approaching dissolution is evinced in the next sentence, in which he asserts that, "all property and cash I may die possessed of was earned by Minnie Miller and myself." The discovery of the undated document folded within the larger one, at the place where he said it was, aided by the parol evidence of witnesses Lorene Miller and Nellie E. Reynolds, is ample evidence of the identity of the former document, which by reference had been incorporated in and made a part of his will; and, finally, his statement to Nellie E. Reynolds, not only that "he wanted to fix things for Minnie Miller," but that "he had fixed things for Minnie," coupled with the exhibition of the two documents to her, furnish ample evidence of a testamentary intent.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 249

In re HORTON'S ESTATE.

HORTON v. HEWITT et al.

Civ. 8634.

District Court of Appeal, Second District,
Division 1, California.

Dec. 19, 1932.

Rehearing Denied Jan. 16, 1933.

Hearing Denied by Supreme Court Feb. 16
1933.

1. Wills ⇨476.

Except as clearly is made to appear to contrary, codicil is affirmation of provisions contained in former testamentary declaration.

2. Wills ⇨155(1).

Where codicil does not change manner or extent of testamentary disposition in will proper, question of undue influence must be determined solely by reference to acts bearing upon execution of codicil.

3. Wills ⇨164(1).

Within reasonable limits of time, whether occurring with direct relation either to codicil or to original will, facts tending to establish that in execution of codicil testator was unduly influenced were admissible.

4. Wills ⇨164(1).

In determining undue influence, evidence tending to show testator's desires were cast

aside and in their place wishes of some other person were substituted became relevant.

5. Trial ⇨139(1).

Nonsuit should be granted only when plaintiff's case entirely lacks substantial evidence tending to establish determinative issue presented by pleadings.

6. Evidence ⇨99.

To be legally admissible, plaintiff's offered evidence must tend to establish ultimate fact on which his asserted right depends.

7. Evidence ⇨314(1).

To be legally admissible, evidence must be positive in character and not dependent on conjecture or hearsay.

8. Trial ⇨139(1).

To avoid nonsuit, evidence should be not only substantial in nature and character, but should bear directly on issue before court.

9. Wills ⇨166(7).

Mere proof of conditions showing opportunity on part of another to exert influence, even when coupled with beneficial interest or motive, would not sustain finding of undue influence.

10. Wills ⇨38(2).

To result in denial of probate of will, insane delusion must have operated on and directly caused inclusion in will of testamentary provision in question.

11. Wills ⇨38(2).

"Insane delusion" invalidating will is one without any basis, in reason, in fact, or in evidence, however slight, adhered to up to and including instant of executing will.

[Ed. Note.—For other definitions of "Insane Delusion," see Words and Phrases.]

12. Wills ⇨324(2).

Evidence that testator had insane delusion that wife refused to accompany him from another state which caused execution of will disinheriting son held insufficient to raise jury question.

13. Appeal and error ⇨1058(1).

Excluding evidence offered *held* harmless, where it was afterward admitted.

14. Appeal and error ⇨1170(7).

Where it is not conceivable that court's rulings on evidence complained of had any effect on final result, new trial should not be granted (Const. art. 6, § 4½).

15. Trial ⇨295(1).

Instructions must be considered as entirety.

16. Trial ⇨296(1).

Where point of law, improperly omitted from instruction, has been covered in another instruction, and jury could not have been misled by omission, error is deemed cured.

17. Trial ⇨260(1).

Where law contained in instruction refused by court is included in instruction given, error is deemed cured.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Suit by Charles Albert Horton against Walter E. Hewitt and others to contest the will of George B. Horton, deceased. From a judgment in favor of proponents, contestants appeals.

Affirmed.

Edwin J. Miller, of Los Angeles, for appellant.

Haygood Ardis, of Downey, Paul Vallee, of Los Angeles, J. H. Ardis, of Downey, and Mott, Vallee & Grant, of Los Angeles, for respondents.

HOUSER, J.

In the year 1868, A. D., George B. Horton, who at that time was a married man of approximately 26 years of age, accompanied a considerable number of other persons on a wagon train from the town of Burleson, Tex., to a destination in the state of California now known as the city of Compton. The wife of George B. Horton remained with her parents at their home in Texas. In the course of many years following their arrival in California, George B. Horton and his younger brother Albert, working together in their several enterprises, accumulated considerable real and personal property, all of which, with the exception of \$90,000 in cash, which was deposited in a bank in the joint names of the two brothers, was carried in the name of the brother Albert. In the month of May, 1930, Albert died, and six weeks later George also passed to his reward. About sixteen months preceding the death of George, each of the brothers executed a will, by the terms of which, in substance, it was provided that on the death of the testator all his property should pass to his said brother; or, in case of the prior decease of such brother, to the nephew of the testator, Walter E. Hewitt and his niece, Della Maud Berryman, "share and share alike." About one week after Albert's death, George made a codicil to his former will by which he expressly disinherited his wife whom many years before he had left in the state of Texas, as well as any son or daughter born to his said wife as the result of the marriage of the testator to her. As hereinbefore stated, five weeks thereafter, George died. Thereupon Charles Horton, who was shown to be a son of said George B. Horton and the wife whom the latter had left in Texas, instituted a contest of the said will and its annexed codicil.

In substance, the grounds of such contest were: (1) That at the time he executed his will and the codicil thereto, George B. Horton "was not of sound and disposing mind and memory"; (2) that at each of said times, and for many years prior thereto, the testator had been afflicted with, and was laboring under, an insane delusion as to the contestant; (3) that the said will and its codicil were, and each of them was, the result of an undue influence exercised upon the testator by his brother Albert, his nephew W. E. Hewitt, and his said niece Della Maud Berryman; (4) that the execution of said will and the said codicil were, and each of them was, brought about by a conspiracy among the said three last-named persons; and (5) that the execution of said will and its codicil were, and each of them was, induced by fraud practiced upon the testator by said Albert, W. E. Hewitt, and Della Maud Berryman.

On the trial of the action, following the introduction of evidence by contestant relative to each of the several grounds of contest, on motion of the proponents of the will and codicil the trial court ordered a nonsuit and dismissed all of the said several grounds of contest, excepting only the first thereof, which, as hereinbefore indicated, was that George B. Horton "was not of sound and disposing mind and memory" at the time he executed the instruments in question. Thereafter, in due course in the proceedings of the action, judgment was rendered in favor of the proponents and against contestant. It is from such judgment that the instant appeal is prosecuted.

[1-4] The first point advanced by appellant is that, as far as the issue of undue influence was affected thereby, the trial court erred in granting the motion for a nonsuit. In this connection it is important to remember that as propounded for probate the will consisted of two parts; namely, the original document, or will proper, together with its additional instrument, denominated a codicil. In a situation such as is here presented, with reference to the question of whether an attempted direction by a testator of the disposition of his property has been unduly influenced by another person, the law is well established that, excepting only as clearly is made to appear to the contrary, a codicil to a will is an affirmation of the provisions contained in the former testamentary declaration. And, since it is here conceded that by no provision or term of the codicil was any attempt made by the testator to change or to modify either the manner or the extent of the testamentary disposition contained in the will proper, it follows that to all intents and purposes the question of whether the will and its codicil, considered as a single instrument, was induced by the undue influence of any person or persons exerted upon the testator,

must be considered and determined solely by reference to the acts of such person or persons as they related to or bore upon the execution of the codicil. In other words, as far as is here material, the acts, general conduct, and declarations of the several interested persons, together with other relevant evidence, if any, which in any substantial manner affected the execution of the codicil only, provide the data upon which must rest a legal determination of the question of whether in the execution of the instrument the testator was unduly influenced. However, notwithstanding the fact that the ultimate question is thus apparently narrowed, the evidence by means of which a correct decision may be reached should not be necessarily confined to the immediate moment at which the signature of the testator was attached to the instrument. Within reasonable limits of time, whether occurring with direct relation either to the codicil or to the original will, any fact which tends to establish the allegation that in the execution of the codicil the testator was unduly influenced is relevant and admissible in evidence. And so, although whether at the very moment when he attached his signature to the codicil the testator was unduly influenced by any person or persons so to do is the ultimate issue of fact, evidence which tends to establish the fact that in the execution of the original will his desires in the premises were cast aside and in their place the wishes of some other person or persons were substituted, becomes relevant and material.

[5-9] Likewise it is a general rule that a motion for nonsuit should be granted only when the case as produced by the plaintiff is entirely lacking in substantial evidence which tends to establish the indispensable and determinative issue of fact presented by the pleadings in the action. *Estate of Ivey*, 94 Cal. App. 576, 271 P. 559, and authorities there cited. But on reflection it becomes apparent that the rule thus broadly stated is incapable of universal and strict operation. The purpose of the plaintiff in the introduction of evidence in an action is to establish the ultimate fact proposed to be proved. If such evidence is not relevant, that is, if it has no tendency toward that end, it has no proper place in the case. In other words, in order to be legally admissible, the offered evidence must tend to establish the ultimate fact upon which the asserted right of the plaintiff depends. At the same time, it must be substantial in its nature; that is to say, it should be positive in character, not dependent upon conjecture or hearsay, or be subject to any infirmity which will or may detract from its proper inference. But manifestly the mere existence of various and sundry pertinent or substantial items of evidence which, considered el-

ther singly or in their combined effect, are capable of logically producing an inference not bearing directly upon the ultimate fact sought to be established, will not suffice as a compliance with the requirement that the assumedly established fact need but tend to prove the ultimate fact in issue. As hereinbefore intimated, all facts, however apparently weak, insignificant, or lacking in weight or importance, properly admissible in evidence, have some tendency to establish the case upon which the asserted right of the plaintiff depends; and to say that the introduction in evidence of any substantial fact which even remotely tends to prove the plaintiff's case will effectually prevent the granting of a motion for a nonsuit, is the equivalent of a declaration that a nonsuit may rarely, if ever, legally be adjudged. As an example of facts which substantially tend to establish the plaintiff's case, but which might not be sufficient in that regard, let us assume an action for the recovery of damages to personal property arising from the collision of two automobiles. Let it be assumed that preceding the date of trial the plaintiff, who was driving his own automobile, unaccompanied by any other person, has deceased; that the defendant is outside the jurisdiction of the trial court; and that there are no witnesses to the happening of the accident. However, on behalf of the plaintiff the facts are established that at the time when the accident occurred the defendant was under the influence of intoxicating liquor; that habitually he was a careless driver; that at a distance one-half mile before reaching the scene of the accident the defendant was driving his automobile recklessly and at an excessive and unlawful rate of speed; and that after the accident the defendant attempted to conceal his identity by assuming for himself a fictitious name. It is clear that, even conceding (but not deciding) the relevancy and the admissibility of each of such facts, also that, considered either singly or together, they tend to establish the negligence of the defendant in causing the accident of which complaint is made, they do not directly reach the real issue in the case. One might guess or surmise that the accident in question arose solely by reason of the negligence of the defendant; but a judgment in favor of the plaintiff should not be permitted to rest upon such a foundation. In order to avoid the granting of a motion for nonsuit, the evidence should be not only substantial in its nature and character, but it should bear directly upon the issue before the court. To establish merely the existence of general, or even special, conditions which, if suitably correlated and synchronized, might, or probably would, yield to an inference helpful to plaintiff's theory of the case, will not suf-

fice. The evidence must tend directly to establish the determinative and ultimate fact at issue. And that principle has been so repeatedly and universally applied in the courts of this state to will contests in which have been involved the issue of undue influence that a complete list of the authorities to that effect would be a superfluity. In substance, the rule has been announced and many times reiterated that, in the absence of evidence showing a pressure operating directly upon the testamentary act by means of which the volition of the testator was overcome and entirely subjugated to that of another, mere proof of conditions in effect showing opportunity on the part of another person or persons to exert such an influence, even when coupled with a beneficial interest or motive so to do, will not suffice to sustain a finding of undue influence. *Estate of Nelson*, 132 Cal. 182, 194, 64 P. 294; *Estate of Morcel*, 162 Cal. 188, 121 P. 733; *Estate of Purcell*, 164 Cal. 300, 128 P. 932; *Estate of De Soberanes*, 182 Cal. 525, 189 P. 103; *Estate of Anderson*, 185 Cal. 700, 198 P. 407; and authorities in each of such cases respectively cited.

Without detail, but in summarization of the facts adduced by contestant relative to the issue of undue influence, and, of course, for the purpose here involved, without considering the question of the truthfulness thereof, it appears that in general they consisted in the disclosure of a situation which surrounded the testator not only at the time when the codicil was executed, but as well when the testator executed the original will, and for many years antecedent thereto—which in gross showed nothing more than general conditions which might be interpreted as favorable to the exertion of the alleged undue influence upon the testator, coupled with opportunity and motive on the part of interested persons to exert undue influence on the testator in the matter of making testamentary disposition of his property. It follows that the alleged error of which complaint is here made cannot be sustained.

As hereinbefore has been indicated, the contest which was filed by Charles Horton contained two separate counts by each of which the mental capacity of the testator to make the will and the codicil in question was challenged. By the first of such counts in substance it was charged that, at each of the times when the will and the codicil respectively was executed, the testator "was not of sound and disposing mind and memory." And in substance the allegation of the second of such counts was that on each of such occasions the testator was affected with, and was laboring under, an insane delusion as to contestant. At the close of the case in chief by the contestant, on mo-

tion of the proponents the trial court ordered a nonsuit as to the said second count, and such order is here made the basis of one of appellant's attacks on the judgment.

As constituting the insane delusion of the testator, the effect of that which was attempted to be proved by contestant on the hearing was that, because of an unfounded belief in the mind of George Horton that his wife refused to go with him from the state of Texas to the state of California, he had an extreme dislike and hatred for and prejudice against her, which extended from her unto his son, and which resulted in the disinheritance of the latter.

[10, 11] In order that an alleged insane delusion of a testator may result in the denial of probate of his will, such delusion necessarily must have operated upon and directly caused the inclusion in the will of the testamentary provision in question; and it must be shown that such delusion was spontaneous, that is to say, without any basis or foundation, either in reason, in fact, or in any evidence, however slight; that in such circumstances the said delusion was persistently and continuously adhered to by the testator against and contrary to reason, facts, and evidence, up to and including the instant of the execution of the will; and that, in reliance upon and as the result of such spontaneous belief or delusion, the testator executed the will propounded for probate. 26 Cal. Jur. 676 et seq., and authorities there cited.

[12] Tested by such requirements, an examination of the evidence produced by the contestant prior to the making of the order by the trial court by which the motion for nonsuit as to the "insane-delusion" ground of contest of the will in question was granted disclosed such a state of facts as warranted the belief in the mind of the testator, as expressed by him in his will, that "my said wife refused to leave the state of Texas and accompany me to California; and she never lived with me after I left Texas, and she never came to California to my knowledge. I have never seen her since we separated in Texas. * * *

It is conceded that the wife of the testator did not accompany him from the state of Texas to the state of California; that she never lived with the testator after that event occurred; that she never came to California; and that he never saw her after they separated in the state of Texas. As shown by the record herein, the wife remarried within five or six years after the testator left the state of Texas, and died more than forty years before the will in question was executed. Considering the fact that in 1868 a period of nine months was required to make the trip by wagon train from Texas

to California, and that, even assuming an early opportunity to do so, at least a similar length of time would be required in order to make a return trip, that there possibly existed a lack of available funds by George Horton necessary for the immediate transportation of himself to Texas and return to California by himself, his wife and his child, that in all probability, before his wife remarried, a divorce was obtained by her from George Horton, and that, following the divorce and preceding her second marriage, some time elapsed during which she was courted by the man whom she married—all of which may have become known to George Horton—it is little wonder that he entertained some resentment of her actions and conduct toward him. The sole fact upon which the so-called insane delusion of the testator depended was whether the wife of the testator "refused to leave the state of Texas" and accompany the testator to this state. It would be a useless task to herein state the evidence which related to that ultimate fact. It is sufficient that at least the dependent facts and circumstances which surrounded the preparation by the testator for his departure from the state of Texas, together with the facts which were shown by the evidence to have thereafter occurred, either immediately or within a few years next ensuing, were such as to entirely refute a conclusion that the belief in the mind of the testator that his wife "refused to leave the state of Texas and accompany me to California" was spontaneous and without basis or foundation in fact. But, aside from such a situation, the attention of this court has been attracted to no evidence which would warrant the inference that any insane delusion which, had it existed, possibly might have affected the testamentary disposition in favor of the wife, either could have reacted, or probably did react, unfavorably as far as any devise or legacy by the testator to the contestant was concerned. At the time the will was executed, the son of the testator was a man more than sixty years of age; the wife of the testator had been dead for more than forty years; and, in the absence of direct evidence to that effect, to assume that because the testator insanely believed that his wife had refused to accompany him from the state of Texas to the state of California was the cause of the disinheritance of the son, would be equivalent to the founding of a judgment on pure conjecture.

With reference to each of the grounds of contest designated as "fraud" and "conspiracy," very little pertinent evidence was introduced. So meager was it that in no legal sense may it be deemed sufficient to support a judgment. To set it forth herein, or even to summarize it, would simply be a waste of time and energy. Suffice it to say that

in that regard, in the opinion of this court, no error was committed by the trial court in directing its order of nonsuit.

[13, 14] Appellant complains that on the trial of the action errors were committed, in that evidence of certain facts was refused admission; and, on the other hand, that certain other evidence was erroneously admitted. In each of several of the instances first referred to it appears that in substance and effect the formerly excluded evidence was afterward admitted; in some of the others, clearly the rulings of the trial court were properly made. It is possible that as to some of such specifications of error appellant's position is well taken; but, assuming that in every instance of alleged error in that regard appellant is right, it does not follow that because of such errors he is entitled to a new trial. Considered either singly or in combination one with the other, it is not conceivable that the action of the trial court of which complaint is made had any effect upon the final result; in view of which situation it follows that a new trial should not be granted. Section 4½, art. 6, Const.

[15-17] Appellant further contends that there were "erroneous rulings on instructions." It may be that by excerpting a portion of a given instruction, or even by taking some entire instruction, and considering such excerpted portion, or such entire instruction, by itself it will be found either too narrow or too broad in its statement of the law with reference to its subject-matter; also that certain instructions offered by appellant correctly stated the law applicable to the situation with which they deal. But it has long been established law that instructions must be considered as an entirety; and that, if so considered, it appears that some point of law, improperly omitted from an instruction given to the jury, has been covered in some other instruction which has been submitted for the consideration of the jury, and that the jury could not have been misled by the omission which occurred in the instruction of which complaint is made, the error will be deemed to have been cured. And the principle likewise applies where the law contained in an offered instruction refused by the court is included in some other instruction which is given to the jury. On examination of the instructions, taken as a whole, it satisfactorily appears that the law which governs and controls in a situation such as was presented by the evidence herein was fairly, reasonably, and clearly submitted to the jury for its guidance in reaching a verdict in the case. It follows that, on the ground of error either in the giving or in the refusing to give to the jury certain designated instructions, the appellant has no just cause for complaint.

No other alleged errors are worthy of serious consideration by this court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

128 Cal.App. 241
CROWELL et ux. v. HARVEY INV. CO.
Civ. 7291.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1932.

Hearing Denied by Supreme Court Feb. 15, 1933.

1. Landlord and tenant ⇨76(2).

Lessee *held* required to pay taxes "payable" at time of assignment to make assignment valid between lessee and lessor (Pol. Code, § 3746, subd. 1, as amended by St. 1927, p. 961).

The lease provided that lessee could "assign its leasehold interest hereunder and thereby be released from all obligations thereafter accruing hereunder; provided, and upon condition that all of the agreements, covenants and conditions imposed upon the lessee hereunder and due at the time of such assignment shall have been fully performed." Under Pol. Code, § 3746, subd. 1, as amended in 1927, second half of tax installment involved, "payable" early in January, 1928, was "due" at time of assignment made on January 31, 1928, because what is "payable" on certain date is "due" on that date; "payable" meaning that may, can, or should be paid, justly due, legally enforceable.

[Ed. Note.—For other definitions of "Due" and "Payable," see Words and Phrases.]

2. Landlord and tenant ⇨76(2).

Installment of taxes payable in January *held* payable by lessee who assigned lease January 31, notwithstanding lease provision respecting time when taxes became due (Civ. Code, § 1657; Pol. Code, § 3746, subd. 1, as amended by St. 1927, p. 961; Code Civ. Proc. § 1963, subd. 15).

Lease covenanted that "lessee shall obtain and deliver to the said lessors * * * original tax receipts for all such taxes * * * ten (10) days before the delinquency thereof."

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Weymouth Crowell and wife against the Harvey Investment Company.

Judgment for defendant, and plaintiffs appeal.

Reversed, with directions.

George H. Moore and Hubert Starr, both of Los Angeles, for appellants.

Lloyd Wright and Charles E. Millikan, both of Los Angeles, for respondent.

WORKS, P. J.

Plaintiffs, as lessors, and defendant, as lessee, entered into an agreement whereby certain real property was let for the term of ninety-nine years. The instrument provided, in part, that the lessee should "bear and discharge all * * * taxes * * * which may be taxed, charged, assessed, levied or imposed upon said leased premises * * * at any time during the continuance of this lease * * * to the end that the rents * * * shall be received by said lessors without any abatement or deduction whatever and shall constitute * * * the net income of said lessors from said property during said term. * * * And it is further covenanted that the lessee shall obtain and deliver to the said lessors * * * original tax receipts for all such taxes * * * ten (10) days before the delinquency thereof." In another part of the lease it was also provided that the lessee could "assign its leasehold interest hereunder and thereby be released from all obligations thereafter accruing hereunder; provided, and upon condition that all of the agreements, covenants and conditions imposed upon the lessee hereunder and due at the time of such assignment shall have been fully performed; and provided * * * in the event of any assignment of the leasehold interest hereby created being made which does not comply with all the conditions and provisions hereof, the assignor shall be and remain liable under this indenture and be bound thereby as though no assignment had been made."

An assignment of the agreement was made on January 31, 1928, but lessee had not then paid and never did pay, nor did its assignee ever pay, the second installment of taxes on the demised property for the fiscal year 1927-1928. This installment became "payable on and after" a day early in January, 1928, under the law. Pol. Code, § 3746, subd. 1 (as amended by St. 1927, p. 961). Because of the nonpayment of the installment and the consequent delinquency arising, the property was in due time sold to the state. Thereafter the lessors redeemed from the sale by the payment of the tax, with the penalties and costs added pursuant to law.

This action was commenced for the purpose of recovering installments of rent which became due after the assignment of the lease, upon the theory that the assignment did not relieve defendant of the obligation to pay such rents for the reason that the installment of taxes above mentioned had not been paid

at the time the assignment was made. Judgment went for defendant, and plaintiffs appeal.

[1] The only point presented on the appeal is as to whether it was the duty of respondent, under the language of the lease above set forth, to pay the tax in question between the day in January fixed by law and January 31, 1928, the last-named day being that upon which the assignment was made.

The lease contains no specific statement that installments of taxes shall be paid by the lessee upon any particular dates, but we think the clear import of the instrument is in accordance with the views of appellants and that the judgment must be reversed. The portion of the lease providing for assignment was to the effect that at the time of an assignment all "agreements, covenants and conditions imposed upon the lessee" and *due* at the time of assignment must have been performed. Under section 3746 of the Political Code (as amended in 1927), the tax installment to which we have referred was *payable* early in January, 1928. What is *payable* on a certain date is *due* on that date (Webst. International Dict., def. "Payable"; "That may, can or should be paid; justly due." Encyclopædic Dict., def. "Payable"; "Due; to be paid; legally enforceable." See, also, Words and Phrases, First, Second and Third Series, def. "Payable"). By lease and law together, then, it is established that respondent should have paid the tax before January 31 in order that the assignment might operate to release it from obligation under the instrument.

[2] If we disregard the presence of the word "due" in the provision concerning assignments of the lease there is yet another method by which it can be determined that the installment of taxes here in question was due before January 31, 1928. Section 1657 of the Civil Code reads: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained." It is obvious that the latter part of this section refers to the ascertainment of the exact amount of money to be paid. So much may be gathered from *Whittier v. Gormley*, 3 Cal. App. 489, 86 P. 726, if authority upon the point, in addition to the section itself, were necessary. Section 3746 of the Political Code provides that on or before the day when taxes are payable the tax collector must publish a notice to the effect, among other things, that they are payable on that day; and it will, of course, be presumed that this official duty is regularly performed. Code Civ. Proc. § 1963, subd. 15. This notice, together with all the provisions of the law concerning the assess-

ment and collection of taxes, of which respondent was bound to take notice, pointed to the records from which, upon inquiry, respondent could have ascertained the amount of taxes to be paid. We think that what respondent thus could have ascertained he must be deemed to have ascertained, within the meaning of section 1657 of the Civil Code. It would be strange indeed if a taxpayer should not be held to notice of such a matter, regulated as it is by law and by official line of duty and practice. In truth, it is quite possible, although we do not decide, that a taxpayer must be deemed to know the amount of a tax assessed against him long before the day upon which it actually becomes payable under the law, especially when, as here, the tax payment in question is a second installment.

Respondent contends that the lease fixes the time for the payment of the respective tax installments at the date ten days before delinquency occurs under the law, this because of the provision that at that time he "shall obtain and deliver to the said lessors" original tax receipts. This clause follows the long provision headed by the statement that the lessee shall "bear and discharge" all taxes, etc., and is itself preceded by the phrase, "And it is further covenanted." Taking together all the portions of the lease which we have quoted, we think the provision as to the production of tax receipts has no bearing upon the question when the tax became due, but that it was inserted for the purpose of fixing the *last day* upon which payment should be made in order to insure to the lessors an ability to protect themselves, in time, against a delinquency in case payment were not made.

Respondent calls attention to the fact that section 3746 of the Political Code (as amended by St. 1927, p. 961) provides that the first installment of taxes shall be *due* and *payable* in October and that the second installment shall be *payable* in January. He then says: "It is thus noted that in the above section the statute does not provide that the second half of the taxes are *due*" (italics his) in January. This statement leads to the patent absurdity that there is no time fixed when second installments are due, while as to first installments the Legislature has prescribed such a date. The rather peculiar state of the statute on this subject goes for naught in legal effect, for we have already shown that the words "payable" and "due" mean the same thing. The use of both words in one place and of but one in the other is simply a legislative idiosyncrasy. Either word, alone, would have served in both places, or one in one place and its synonym in the other.

It is said in appellants' brief: "Upon a reversal, judgment as prayed in the complaint may be entered without a new trial." This statement is not opposed by respondent.

Moreover, the course suggested seems to us entirely proper.

Judgment reversed, with directions to the trial court to enter judgment for plaintiffs as prayed in the complaint.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

128 Cal.App. 322

BECK v. HOAGLAND.
Civ. 7259.

District Court of Appeal, Second District,
Division 2, California.
Dec. 22, 1932.

1. Limitation of actions — 100(5).

Fraud action for spiritualist's misrepresentations regarding invention, inducing plaintiff's investment, brought five years after discovering invention was faulty, *held* barred by limitation (Code Civ. Proc. § 338, subd. 4).

2. Limitation of actions — 179(2).

Complaint in fraud action brought after limitation expired, not showing fraud was discovered within limitation period, why not discovered sooner, and circumstances under which discovered, *held* fatally defective (Code Civ. Proc. § 338, subd. 4).

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by O. C. Beck against Myrtle I. Hoagland. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Milton M. Cohen and Jerome H. Kann, both of Los Angeles, for appellant.

Cantillon & Sievers, of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

Respondent was awarded a judgment for the sum of \$2,000 upon a complaint alleging fraud against appellant and for a judgment of \$4,000 as damages. The answer denies the existence of any fraud or misrepresentation, and sets up as a second defense that the complaint does not state facts sufficient to constitute a cause of action and a third defense that the action is barred by the statute of limitations. The appellant here was the defendant below.

Practically all, if not all, of the persons concerned in the controversy were interested

in spiritualism and either belonged to or attended the same church. Appellant was a medium and the pastor of the flock. A Dr. Coolidge was promoting an automatic automobile gear shift, and appellant was interested with him. Appellant advised respondent to invest money in the project through the direction, as she claimed and as respondent believed, of a spirit guide. She also expressed the view as her own opinion that the invention was meritorious and would be a great success. There is no doubt but that respondent put great credence in the honesty and integrity of appellant personally and in the genuineness of the spirit messages said to have been spoken through her. Dr. Coolidge also spoke of the invention in glowing terms, and on the 12th day of January, 1923, respondent paid Dr. Coolidge \$4,000 for an interest therein.

The government had issued patents upon the invention, and there is evidence that engineers and mechanics had approved the principles thereof. Some time in 1923 it was evident to all closely associated in the enterprise that the invention was not as perfect as it had been represented to be and would not fit all cars except Fords, as it had been represented it would do. In fact, the apparatus as it was then planned was impractical. Two engineers were engaged to work upon the problem, and they made improvements and these were patented. In July of 1923 these engineers were at respondent's home and communicated to him the fact that the original device was not capable of doing what it had been represented to him as being capable of doing. The situation was such that respondent either should have known the frailties and faults of the device or was put upon his inquiry regarding them. It is certain that he then knew that the possibilities of the device were far less than they had been represented to him as being. *Smith v. Martin*, 135 Cal. 247, 67 P. 779; *Simpson v. Dalziel* (confidential relation case), 135 Cal. 599, 67 P. 1080. It was about this time that respondent ceased attendance of the church meetings.

The improved apparatus was very different from the original and much more practical. It was put on several cars and proved something of a mechanical success. Respondent co-operated in these actions and entered into a contract with Dr. Coolidge and another person as of the 16th of August, 1923, to manufacture the apparatus for 75 per cent. of the return from the enterprise. Dissension arose among those interested; there were lawsuits and hearings before the corporation commissioner and delay followed delay. The internal affairs of the entity composed chiefly of the congregation of the church were unsettled, and finally in November of 1927 respondent, so he alleges, discovered that he had been defrauded by appellant. The event that brought this discovery about, he testifies,

was that the appellant expressed a wish that the affairs of the church should be kept out of the investigation before the corporation commissioner; also that appellant had failed to testify before the commissioner. It is undisputed that up to the filing of the instant case no return from investment had ever been made to respondent or any one either in profit or in principal. Up to that time the enterprise had been a financial failure. The full \$4,000 invested by respondent was placed to the use he expected it to be put, to wit, the purchase of additional interests in the original patents. There is no contention that either Dr. Coolidge or appellant ever got a dollar of it. Respondent also made it a condition of the investment that he should be one of the governing board handling the affairs of the enterprise and that but one of any family should be on such board. The latter requirement had been violated long before respondent claimed the discovery of the fraud. There is no claim in the case that anybody connected with the affairs of the enterprise, except the engineers employed long after the investment of respondent, had any special or accurate knowledge of mechanics or of gear shifts. Respondent was a chemist and a graduate of Columbia University.

[1, 2] We think the evidence upon which the trial judge made the finding of fraud in this case is very unsatisfactory, but, however that may be, we think the judgment must be reversed for other reasons. Every representation made by appellant either in her capacity as a medium or personally, that respondent here complains of, was revealed to him as faulty when the engineers reported the necessity of improvement. He knew that the success that had been pictured to him as certain to follow the introduction of the originally planned apparatus could never be attained. Notwithstanding he made no complaint but continued in the active affairs of the concern and even went further to contract a different interest in the improved and greatly changed apparatus. If he ever had a good cause of action for misrepresentation or fraud, it accrued as of the date of his knowledge that the original inventions were not what they had been represented to be. As such knowledge was acquired in July, 1923, and the complaint was not filed until May, 1928, the statute of limitation had run against the action. Section 338, subd. 4, Code Civ. Proc. We also think that the complaint is fatally defective, in that it does not attempt to allege either of the three requirements to a complaint sounding in fraud, that are so clearly set out in *Gray v. Yarbrough*, 61 Cal. App. 724, at page 732, 215 P. 914, 917, as follows: "Where an action for relief on the ground of fraud is brought after the expiration of the statutory period of three years, the complaint must show (1) when the

fraud was discovered, which, of course, must be within the three-year period; (2) why it was not discovered sooner; and (3) the circumstance under which it was discovered.' Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243, 249." See, also, Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809, and Original Mining & Milling Co. v. Casad, 210 Cal. 71, 290 P. 456.

The judgment is reversed, and the lower court is instructed to enter judgment for the defendant.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

In re PITTS' ESTATE.*
Civ. 8583.

District Court of Appeal, First District, Division 1, California.

Dec. 7, 1932.

Hearing Granted by Supreme Court Feb. 2, 1933.

1. Perpetuities ⇨6(17).

Language fixing term of lease to lessor's corporate existence and "any extension" thereof *held* not to embrace plural "extensions" or "all extensions" so as to create perpetuity (Civ. Code, §§ 296, 362c).

2. Perpetuities ⇨6(17).

Courts will not read words into lease so as to create perpetuity unless such intent clearly appears from language used.

3. Landlord and tenant ⇨182.

Lessee's proportionate share of lessor's expense of maintenance and operation, payable quarterly, *held* sufficiently definite as rental.

4. Landlord and tenant ⇨24(1).

That parties to instrument mistakenly denominate it as lease will not render it such.

5. Landlord and tenant ⇨70.

Instrument leasing premises for 50-year term of lessor's corporate existence, and any extensions thereof, and providing for payment by lessee of its proportionate share of lessor's maintenance and operating expenses, as rental, *held* valid lease, creating tenancy for years.

6. Vendor and purchaser ⇨254(1).

Lessor corporation *held* to have no such vendor's lien on leased apartment held by lessee as member of lessor corporation, as would enable lessor to deduct from amount it bid for deceased lessee's lease, sum sufficient to satisfy its lien (Code Civ. Proc. § 1570).

Lessee's interest or lease of an apartment was held by her as a member of the

lessor corporation, in return for the performance of certain covenants regarding rent, repair, maintenance, and subletting, and constituted a leasehold interest, with the fee vested in the lessor.

7. Landlord and tenant ⇨239.

In absence of contractual stipulation, landlord has no lien for rent reserved or for value of use and occupation of property.

8. Landlord and tenant ⇨243.

Lessor corporation, as between itself and lessee, had lien on leased apartment held by lessee as member of lessor corporation, where lease made leasehold interest security for payment of rental (Civ. Code, § 2872; Code Civ. Proc. § 1570).

9. Landlord and tenant ⇨221.

Waiver of lessor's demand for payment of rent will not be implied for purpose of forfeiture of lease (Code Civ. Proc. § 1161).

10. Contracts ⇨318.

Right to forfeiture where created by contract or law must be strictly construed.

11. Landlord and tenant ⇨111.

Forfeiture of lease does not occur until last of acts which are to create it has occurred.

12. Landlord and tenant ⇨108(1).

Where parties specified conditions subject to which lessor could look to leasehold interest for security, contract determines rights of parties (Code Civ. Proc. § 1570).

13. Landlord and tenant ⇨112(1).

Lessor corporation not complying with procedure specified in lease for acquiring lessee's interest as security for rental on lessee's default waived rights granting lessor lien on lessee's interest (Code Civ. Proc. § 1570).

Lien on lessee's interest was waived because lessor did not declare lessee in default as required by the lease, and because lessor did not proceed with reference to the purchase of lessee's interest in the manner provided in the lease.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Proceeding for the allowance of claims of Rosina M. D. Janssen and the Union Terrace against the estate of Mae Purdie Pitts, deceased, Dorothy Mae Weil, Executrix. From an order confirming the sale of real estate, Rosina M. D. Janssen appeals.

Reversed.

Dunne, Dunne & Cook, of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco (Lauder W. Hodges, of San Francisco, of counsel), for respondent Dorothy Mae Weil.

Hartley F. Peart and Gus L. Baraty, both of San Francisco (Russel Shearer, of San Francisco, of counsel), for respondent Union Terrace.

GEARY, Justice pro tem.

Appellant and the respondent Union Terrace, a corporation, are creditors of the estate of Mae Purdie Pitts, deceased, which estate is insolvent. The claims of each were presented, filed, and approved as provided by law, as were other claims against said estate.

On July 2, 1930, the superior court of the state of California in and for the city and county of San Francisco made its order in the above-entitled matter "Confirming Sale of Real Estate" to respondent Union Terrace, a corporation. The sale was made under the provisions of section 1570, Code of Civil Procedure, which at that time provided: "*Holder of lien or mortgage may purchase the lands.* At any sale of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay the court, or the clerk thereof, an amount sufficient to pay such expenses." At the sale, respondent Union Terrace, a corporation, bid the sum of \$12,500, of which amount said respondent Union Terrace, a corporation, retained or deducted the sum of \$7,760.99 in satisfaction of a lien which it claimed upon decedent's interest in the property sold. Appellant herein contends that respondent corporation had no lien upon the interest of decedent in the property sold, so that the effect of the "Order Confirming Sale of Real Estate" was to make respondent corporation a preferred creditor of said estate; and that the bid of respondent corporation was illegal, for the reason that the notice of private sale was specifically limited to cash.

We will take up the points in the above order. There is no dispute about the facts. Respondent Union Terrace is a California, non-profit, co-operative corporation, organized to purchase land on the westerly side of Jones street, San Francisco, and to erect and operate thereon an apartment house for its "members." Each "member" holds a designated apartment from the corporation under what is termed a "lease" upon payment of his proportionate share of the project and the periodic payment of his proportionate share of the maintenance costs. Paying his share of the maintenance costs and otherwise fulfilling the terms of his lease, each "member" holds his lease so long as the interest represented thereby is vested in him, not to exceed, of course, the life of the corporation, which is fixed at fifty years. "Members" are

given equal voting power, but the interest of each "member" in the corporate property is in the proportion the value his apartment bears to the value of the entire premises. By its by-laws a "member" is the person or persons named in a certificate of membership. The word "lease" means the instrument under which a member holds his apartment. An "owner" is the person or persons other than a "member," in whom the interest of a former "member" in an apartment has become vested by the voluntary act of such former member or by operation of law. Only an "owner" is eligible to "membership," and he becomes a "member" upon election by the board of directors and signing the by-laws and the lease of his apartment. Death of, or sale by, a "member" automatically forfeits his "membership" as distinguished from "ownership." Each "member" of the corporation is a director thereof and in the event of a death or vacancy of a "member" the coincident office of director likewise ceases until the election of the succeeding "owner" to "membership" to fill the vacancy. All corporate powers are vested in the board of directors, including the enforcement of leases and the sale of all the corporate property. The by-laws further provide that leases of apartments shall be uniform in character and in form as appended thereto.

In April, 1922, decedent and her husband became a "joint member" of said corporation and lessee as joint tenants of apartment No. 26 under the corporation's written form of lease. Upon executing the lease, decedent and her husband gave to the corporation their three notes in the sum of \$1,700 each in part payment of the "membership." Interest upon these notes was paid to April 1, 1926. On this date Mrs. Pitts, having succeeded to the "membership" upon the death of her husband, gave to the corporation her \$5,100 note in payment of the aggregate principal sums of the said three notes above mentioned. This note remains wholly unpaid and comprises the greater part of respondent corporation's claim of \$7,760.99 for which it claims a lien. The balance of said claim is for interest upon said note, and charges against decedent for her proportionate share of the maintenance costs and is represented by a further promissory note of the decedent in the sum of \$2,000 given to the corporation on November 16, 1928, and by items of operating expenses in an open account between decedent and the corporation.

The lease between respondent corporation and decedent designates the corporation as lessor and decedent and her husband as lessees. It then states in part that the lessor is the owner of that certain lot in the city and county of San Francisco, state of California, and the apartment houses thereon, particularly describing same; that the said premises are subject to a mortgage by the lessor to the

San Francisco Savings & Loan Society for the sum of \$82,000, to secure payment of said sum and interest, a portion of which sum was borrowed to pay a portion of the purchase price of the lessee's apartment, to repay which the lessee has executed three promissory notes payable to the lessor. The value of said premises is fixed therein at the sum of \$345,110, and the value of the apartment at the sum of \$17,800. It is also stated that the lessee is a member of the lessor, and by virtue of such membership and as an inseparable incident thereto is entitled to a lease of the apartment thereafter described under the terms thereafter set forth. The lease then recites that in consideration of the rent and covenants thereafter expressed to be paid and performed by the lessee "the lessor has leased and by these presents does lease unto the Lessee that certain apartment in said apartment house known as No. 26.

* * * To have and to hold the said apartment with the appurtenances unto the Lessee from the date of the completion of said apartment house * * * and during the corporate existence of the Lessor and any extension thereof." (Italics ours.) Then follow covenants for punctual performance of his obligations by the lessee, in default of which the lessor is accorded four alternative rights: (1) To sell the apartment as agent of the lessee, retaining the amount of the indebtedness and costs of sale and giving the lessee the balance; (2) to purchase the lessee's interest by paying him the value of the apartment as fixed in the lease, after deducting his indebtedness; (3) to enter the apartment and lease it as agent of the lessee, and, after deducting his indebtedness and costs, to pay him any excess; (4) in the event that subtenants of the lessee are occupying the apartment, to collect from them to the extent of the lessee's indebtedness. The lease contains the usual restrictive covenants limiting the premises to proper use for residential purposes; forbids subletting or assignment without the consent of the majority of the lessor's directors; forbids alterations without like consent first obtained, and then only under the supervision of the lessor; lessee agrees to keep the apartment in suitable repair to the satisfaction of the lessor, and, in the event of failure of lessee so to do, the lessor is authorized to make the repairs at the lessee's expense. The lessor is relieved from damages caused by defects in other apartments and assumes liability for damages from negligence originating in his apartment. Lessee accepts the lease subject to the \$82,000 mortgage and any renewals, and to other mortgages as specified. For its part lessor agreed to carry fire insurance on the apartment buildings in an amount not less than \$223,000; to provide adequate workmen's compensation, casualty, and other insurance; to pay all taxes and assessments against the property; to properly maintain exteriors and public portions there-

of; to supply steam heat, hot and cold water, a proper number of servants, gas and electricity in the outer spaces of the premises, and to permit reasonable use by the lessee of the driveway, walks, and garden as and by virtue of an easement; to make improvements only on a two-thirds vote of the board of trustees, the expense of which shall be reflected against the owners of the several apartments; and to assure to the lessee the quiet enjoyment of the leased premises. The claim presented and filed herein by respondent sets forth the amounts due to it and recites: "All of which are a lien upon said apartment and secured to be paid by said indenture of lease as therein provided." (Italics ours.) Copies of the notes, lease, and items of current account appear as exhibits thereto attached. Did respondent corporation have a lien either equitable or contractual upon decedent's interest in the apartment house for the sums remaining unpaid under said lease?

[1-5] The determination of this question must depend largely upon the interest which decedent had in said apartment. The "lease," as hereinbefore stated, provided that the lessor was to have and to hold the said apartment with the appurtenances from the date of the completion of said apartment houses and the filing of the notice of completion thereof in the office of the county recorder of the city and county of San Francisco, and "during the corporate existence of the Lessor and any extension thereof," the lessee paying as rent therefor at the office of the lessor in advance on the first day of each and every quarter during said term, such portion of the expense, to be notified by the lessor to the lessee from time to time, incurred by the lessor in the performance by it of the covenants of the lease on its part to be performed as therein specified as the value of the apartment of the lessee bears to the value of the premises of the lessor, as in the lease stated. Union Terrace, a corporation, by its articles of incorporation, was to exist for the term of fifty years from and after the date of its incorporation. Under the "lease" decedent's interest in the apartment was to continue subject to her discharging the covenants thereof for the fixed term of fifty years, and such further term to which the life of the corporation was extended. At the time the lease was executed, section 362c of the Civil Code permitting perpetual existence of corporations had not been adopted, nor does it anywhere appear that steps had been taken prior to decedent's death to extend the term of its corporate existence, as authorized by the Code section just referred to. The "lease" therefore was fixed as to term, with an extension thereof conditioned upon the extension of the life of the corporation. Such extension, under our law as it then existed, was for an additional term of fifty years. Civ. Code, § 296 (1922). It will be observed that the language of the

"lease" is "any extension." That cannot be said to embrace the plural "extensions" or "all extensions," nor can courts read such words into the lease for the effect thereof is to create a perpetuity. This courts will not do unless such an intent clearly appears from the language used by the parties themselves. The rule is stated in *Diffenderfer v. Board of President, etc., of St. Louis Pub. Schools*, 120 Mo. 447, 25 S. W. 542, 544: "Unless it appears from the covenant in the lease by express term, or clearly by implication, that plaintiffs are entitled to have the lease renewed for all time to come, a court of equity will not decree specific performance of the covenant for that purpose. [Citing cases.] A renewal of the lease for all time to come is to create a perpetuity, which is against the policy of the law, and which it does not favor. * * * All that is said in the covenant for a renewal of the lease for more than one term of 50 years, either by implication or otherwise, is as follows: 'And every renewed lease shall contain all the covenants, agreements, clauses, and stipulations herein contained, with this exception only.' * * * Do the words, 'and every renewal,' as used and when used in the lease, clearly show that the lessors intended to covenant for a renewal of it for more than one term? * * * There being no clear words in the covenant for renewal in this case, nor any words, relative to a perpetual renewal, we are constrained to hold that by the words, 'and every new lease' * * * as used in the first lease, in the absence of more positive stipulation, the covenant of renewal means only a second lease, and not a perpetuity." See *Becker v. Submarine Oil Co.*, 55 Cal. App. 698, 700, 204 P. 245; 15 Cal. Jur. 658.

Rental appears in the transaction as the sum to be paid quarterly as may prove to be the lessee's proportionate share of the expense of maintenance and operation. Although the lease contains no stated or fixed sum as rental, the amount to be paid quarterly by the lessee is capable of ascertainment by computation, which is sufficient. 36 C. J. 286; *Ross v. Keaton Tire, etc., Co.*, 57 Cal. App. 50, 206 P. 645. The parties themselves regarded the instrument as a lease, as is evident by the language employed in the corporate by-laws and throughout the lease; for example: " * * * The Lessee does hereby covenant with the Lessor as follows: First: To pay to the Lessor during the term hereby granted the rent as above provided, and any other sums payable by the Lessee to the Lessor pursuant to any provision of this lease." It is true that, if the parties to an instrument mistakenly denominate the same a "lease," that will not render it such. *Mahoney v. City and County of San Francisco*, 201 Cal. 248, 258, 257 P. 49. The instrument involved herein, however, contains every requisite of a valid and binding lease creating a

tenancy for years. As is stated by the court in *Levin v. Saroff*, 54 Cal. App. 285, 289, 201 P. 961, 963: "To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials. *Jones on Landlord and Tenant*, p. 170, § 137a; *Cochrane v. Justice Min. Co.*, 16 Colo. 415, 23 P. 780; *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 P. 715." *Morris v. Iden*, 23 Cal. App. 388, 393, 138 P. 120; *Dodd v. Pasch*, 5 Cal. App. 686, 688, 91 P. 166.

Respondent Union Terrace has likened the relationship of the parties hereto to that existing between the members of a stock exchange. The lease, however, between Union Terrace and decedent and other tenants creates a separate and distinct relationship from that existing between "members" of the corporation as such. The articles of incorporation recognize this by reference to "members" as distinguished from "owners." The lease must be considered as determining the interests of the respective parties to the apartments. " * * * Where there is an intention on the part of the owner to dispossess himself of the premises for a specified time in return for a rental, and the intention on the part of the other party to enter on the premises and hold in subordination to his title, the relation is that of landlord and tenant." 15 Cal. Jur. 607; *Morris v. Iden*, supra.

[6] Decedent's interest in the premises in question being a leasehold interest with the fee vested in the Union Terrace, a corporation, it follows that the latter could not have a vendor's lien upon the leasehold interest. In the case of *Avery v. Clark*, 87 Cal. 619, 623-626, 25 P. 919, 920, 22 Am. St. Rep. 272, it is held: "*Properly speaking, a vendor's lien does not exist until the vendor has parted with his title.* So long as he retains the title he cannot be said to have any implied lien upon the land. The security which he then has for the purchase money is created by express reservation, and cannot be impaired by any act of the vendee. This is an *express* lien existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by his assignee. *Taylor v. McKinney*, 20 Cal. 618. Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies on behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. *For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves.*" (Italics ours.) *Gessner v. Palmateer*, 89 Cal. 89, 92, 93, 24 P. 608,

26 P. 789, 13 L. R. A. 187; *Allen v. Wilson*, 178 Cal. 674, 676, 174 P. 661; *Gard v. Gard*, 108 Cal. 19, 22, 23, 40 P. 1059.

[7] "A landlord in this state [in the absence of any contractual stipulation] has no lien for rent reserved, or for the value of the use and occupation of property." *Hitchcock v. Hassett*, 71 Cal. 331, 333, 12 P. 228, 229; *Ferguson v. Murphy*, 117 Cal. 134, 138, 48 P. 1018; 15 Cal. Jur. 726.

There being no implied lien in favor of the lessor as such, as a matter of law, Does the lease reflect the intent of the parties that such a lien should in fact exist in favor of the lessor so that equity, regarding "that which ought to have been done will be deemed to have been done," may decree an equitable lien? The lease is a lengthy document. Therein the rights and obligations of each of the parties thereto are set forth with great care. The lease specifies what the lessor may do in the event of the failure of the lessee to pay the sums due to the lessor in accordance with the terms thereof, or in the event of other breach of covenant. It declares that punctual payment is of the essence of the lease, and for breach of any of the lessee's covenants, the lessor may declare the lessee in default thereof, forfeit his membership in the lessor, whereupon all rights of the lessee shall cease and determine. Thereupon the lessor may sell the apartment as agent of the lessee and retain the amount due if; or, it may purchase the lessee's interest by paying him the value of the apartment as fixed by the lease after deducting the amount due it and costs; or, it may enter the apartment as agent of the lessee and lease it, and, after deducting the amount due it with costs, pay the balance to the lessee; or, it may collect from the sublessee, if any, to the extent of the indebtedness.

[8-11] It is apparent that as between themselves the parties were agreed that the lessor, in the event of a failure to pay the sums due and consequent breach of covenant by the lessee, might secure the sums due to it from the lessee's interest in the apartment. As between the parties, in so far as the lease made decedent's leasehold interest security for payment of the rental, the lease may be said to have given the lessor a lien thereon. Civ. Code, § 2872. It is likewise apparent, however, that the parties were definitely agreed as to the precise manner in which the lessor should proceed in the event of nonpayment or other breach of the covenant. By the terms "the Lessor may declare the Lessee in default thereof," the parties set forth a condition precedent to either of the four remedies available to the lessor in the event of a breach of covenant by the lessee. The lease did not by its terms waive the necessity for demand by the lessor of the payment of rent, and waiver of demand will never be implied

for the purpose of forfeiture. *Mossi v. Fairbanks*, 19 Cal. App. 355, 357, 125 P. 1071, citing *Gaskill v. Trainer*, 3 Cal. 335; Code Civ. Proc. § 1161. Therefore, according to the terms of the lease, before the lessor could forfeit the interest of the lessee under the lease, it was necessary that it "declare the lessee in default" and give the three days' notice thereof in writing. Code Civ. Proc., § 1161, subd. 2. "The established rule is that, where the right to a forfeiture is created by contract or by law, 'it has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised.' [Citing cases.] Under this rule it must be admitted that the forfeiture does not occur until the last of the acts which are to create it has occurred." *Downing v. Cutting Packing Co.*, 183 Cal. 91-95, 190 P. 455, 457. The lease provided that, in the event of the default of the lessee, the latter's interest in the apartment could be acquired by the lessor "by paying to the lessee the value of said apartment as established pursuant to the terms of the lease" after deducting therefrom the sums due to the lessor. The lease by its terms fixed the value of the lessee's interest at \$17,500, from which sum the lessor was authorized to deduct its claim of \$7,760.90.

[12] " * * * Under the well-established principle of equity that that which ought to have been done will be deemed to have been done, it is held that where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same." *Beckwith v. Sheldon*, 168 Cal. 742, 746, 747, 145 P. 97, 99, Ann. Cas. 1916A, 963, citing cases; *Title Ins., etc., Co. v. California Dev. Co.*, 171 Cal. 173, 200-202, 152 P. 542. In the instant case, however, the parties definitely and precisely set forth the terms and conditions subject to which the lessor could look to the leasehold interest for its security. In such a case the contract itself must determine the rights of the parties. *Avery v. Clark*, supra. "A court of equity cannot undertake to set aside the deliberate contracts or obligations of parties, fairly and freely assumed, because time may show that the obligation was onerous or unprofitable." *Parsons v. Smilie*, 97 Cal. 647, 657, 32 P. 702, 705; *Avery v. Clark*, supra; *Grey v. Tubbs*, 43 Cal. 359, 364; *Boyce v. Fisk*, 110 Cal. 107, 112, 42 P. 473; *Brethauer v. Foley*, 15 Cal. App. 19, 28, 113 P. 356. The lease itself must be looked to in order to ascertain the extent and the terms and conditions, if any, of an agreement for a lien between the parties. Then, if the lessor, complying with all of the terms upon its part to be performed, is entitled to a lien and through some defect in the terms

of the lease is unable to secure that which the lease imperfectly sought to grant him, equity may come to his assistance. The lessor, however, has neglected to declare the lessee in default, nor has it proceeded with reference to the purchase of the lessee's interest in the manner provided in the lease. To hold the leasehold interest as security for the payment of the sums due to it, the fulfillment of these conditions was required.

[13] In view of the fact that any rights under the lease whereby, as between the parties, it may be said the lessor was granted a lien or a right to the same, have been waived by the lessor, it becomes unnecessary to determine the effect thereof upon the rights of other creditors. In view of the foregoing it is unnecessary to pass upon the question whether the bid of Union Terrace was illegal.

Order appealed from reversed.

We concur: KNIGHT, acting P. J.; CASHIN, J.

128 Cal.App. 328

MEADS v. DEENER et al.
Civ. 4756.

District Court of Appeal, Third District,
California.

Dec. 22, 1932.

Hearing Denied by Supreme Court Feb. 20,
1933.

1. Automobiles ⇨168(9).

Motorist driving in street at 25 miles per hour, although blinded by sunlight so that he did not see approaching automobile until just before collision, *held* negligent.

2. Automobiles ⇨245(35).

Whether motorist in collision drove automobile while intoxicated *held* for jury (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537, § 44).

3. Automobiles ⇨242(4).

Statute changing rule as to burden of proof of negligence does not change rules of law based on statute requiring motorist to drive at reasonable and proper speed (St. 1923, p. 553, § 113, subds. a, d, as added by St. 1931, p. 2120, § 34).

St. 1923, p. 553, § 113, subd. d, as added by St. 1931, p. 2120, § 34, provides, in substance, that in any civil action driver of vehicle who has operated vehicle at speed in excess of miles per hour set forth in subdivision b, shall not be deemed to have been negligent by reason thereof as matter of law, but burden shall be upon opposing party to establish that operation of vehicle at such speed constituted negligence, and St. 1923, p. 553, § 113, subd.

a, as added by St. 1931, p. 2120, § 34, provides that any person driving vehicle on public highway shall drive same at careful and prudent speed not greater than is reasonable and proper, and that no person shall drive vehicle at such speed as to endanger life, limb, or property of any person.

4. Appeal and error ⇨1170(7).

Errors, if any, committed as to shifting burden of proof *held* harmless in view of defendant's own testimony, fully establishing his negligence (Const. art. 6, § 4½).

5. Damages ⇨132(7).

\$18,000 *held* not excessive for kneecap and other injuries to married man, 49 years old, causing 50 per cent. permanent disability.

Evidence disclosed plaintiff, a truck driver was married man 49 years old, with expectancy of 22 years, who had artificial leg before accident, but had no difficulty in walking without crutch or cane, that he earned \$150 monthly before accident, but that after injury, consisting of complicated fracture of kneecap, fracture of large bone of left forearm, dislocation of bones in wrist, fracture of tip of small bone in left wrist, and fracture of end of nose, he was unable to walk without crutches and was permanently disabled from doing heavy work, and that bill for doctors and hospital was \$708.35, and that his loss of wages was \$1,350.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Action by J. A. Meads against Neil Deener and another, doing business under the firm name and style of Mother's Cake and Cookie Company. From a judgment for plaintiff, defendants appeal.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellants.

Langdon & Tope, of Stockton, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendants for damages based upon injuries received in an automobile collision occurring on the 21st day of May, 1931. The collision took place on Folsom boulevard between Forty-Seventh and Forty-Eighth streets in the city of Sacramento, at about 5:30 o'clock in the afternoon. Just prior to the collision the plaintiff was driving easterly and the defendant Deener was driving an automobile westerly on the boulevard. The record shows

that Deener was the agent of the defendant Wheatley, in transacting business for him in the city of Sacramento. Folsom boulevard, at the place of the collision, is 48 feet wide, level, paved, and is a straightaway for many blocks. At the time of the collision the pavement was dry and had no obstruction thereon, other than the usual traffic. The testimony varies as to the speed of the automobiles being driven by the respective parties; witnesses estimating the speed of the car driven by the defendant Deener, at from 25 to 45 miles per hour, and that of the speed of the car driven by the plaintiff at about 20 miles per hour.

The cause was tried before a jury, and the plaintiff awarded damages in the sum of \$18,000. The testimony showed that the plaintiff had incurred special damages in the sum of \$1,350 on account of loss of earnings, and \$708.35 on account of doctors' and hospital bills.

Upon this appeal the appellant assigns three reasons as grounds for reversal: First, that the court erred in instructing the jury on the question of negligence, in that it instructed the jury that a violation of the provisions of the California Vehicle Act, regulating the speed of automobiles, constituted negligence. Second, that counsel for the plaintiff were guilty of prejudicial misconduct in the examination of the witness McDonald, touching the sobriety of the defendant Deener. Third, that the damages were excessive.

The cause of action, as we have stated, is based upon an automobile collision which occurred on the 21st day of May, 1931. The action was begun by the filing of a complaint by the plaintiff on the 26th day of October, 1931. By an act of the Legislature which became effective on August 14, 1931 (St. 1931, p. 2120, § 34) subdivision (d) of section 113 of the California Vehicle Act was added by the Legislature. That subdivision reads: "In any civil action the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b), applicable at the time and place, shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence."

After reading to the jury the various provisions of section 113 of the California Vehicle Act (St. 1927, p. 1436, § 30) as it read prior to the amendment thereto which we have just set forth in full, relative to the speed of automobiles, allowed by law, the court instructed the jury as follows: "You are instructed that the violation of a positive duty enjoined by law is negligence, and if such negligence is the proximate cause of injury to another, the injured person or persons may recover from the person or persons guilty of such violation if the party injured is himself free from

contributory negligence. You are further instructed that an act which is performed in violation of an ordinance or statute is presumptively an act of negligence, and while the defendants are permitted to rebut such presumption by showing that the act was justifiable or excusable under the circumstances, until so rebutted it is conclusive. * * * I further instruct you that if you find from the evidence that the defendant Neil Deener, at the time and place of the accident complained of, violated any of the provisions of the California Vehicle Act which are included in these instructions, and that such violation is the proximate cause of the injuries to the plaintiff; and you further find from the evidence that at said time said defendant Neil Deener was employed by and working for the defendant N. W. Wheatley, doing business under the firm name and style of 'Mother's Cake and Cookie Company', and that said Neil Deener was at said time and place driving and operating the Ford automobile, which he was driving in the course of such employment; and if you further find that the plaintiff was not guilty of contributory negligence, your verdict should be in favor of the plaintiff and against the defendants."

On the part of the appellant it is contended that the amendment to section 113 of the California Vehicle Act in 1931, relates only to a matter of evidence, and did not affect any vested rights, the argument being that there is no constitutional prohibition preventing the Legislature from changing rules of evidence, and that such rules become effective immediately, unless otherwise controlled by the act affecting the change, and apply to pending cases and to causes of action which may have arisen at a date prior to such change, and therefore, at the time of the trial of this action, proof of the violation of any of the provisions of the California Vehicle Act relative to speed, did not establish negligence as a matter of law, but that it still devolved upon the plaintiff to establish, in addition to the excessive speed, the fact of negligent driving.

On the part of the respondent it is contended that the fact of excessive speed, constituting negligence per se at the time of the collision involved herein, gave to the plaintiff a vested right, and that his right of recovery of damages based thereon was and is a property right which could not be taken away by any subsequent act of the Legislature—citing such cases as *Scragg v. Sallee*, 24 Cal. App. 133, on page 144, 140 P. 706, 710, where, it is said that in this state the infraction of an ordinance or rule of law is "conclusive evidence of negligence" (citing a long list of cases). That such was the law on the 21st day of May, 1931, is not disputed.

[1] While it would be interesting to follow the line of argument of the respective coun-

sel, to take up and analyze and apply the various cases cited by them, by reason of what appears in the testimony of this case, it is wholly immaterial upon whom the court, in its instructions, placed the burden of proof, for the simple reason that the testimony of the defendant Deener fixes negligence upon his actions, irrespective of anything offered by the plaintiff. This testimony shows that on the afternoon in question, the defendant Deener was driving westward facing the sunlight, at a speed of 25 miles an hour, which he did not lessen; that he was blinded by the sunlight so that he did not see the approaching car of the plaintiff until "just before the collision"; that he had just passed another car going in the same direction. The defendant's explanation was further: "I don't know how I can make it more plain—the sun in my eyes, and I presumed anyone coming on the other side had room to get by." As shown by the cases hereafter cited, such testimony establishes negligence on the part of the driver who takes no precautions to avoid colliding with on-coming cars, when his sight is blinded by the sun. Though offered as an excuse by automobile drivers who fail to take any precaution to avoid accidents when blinded by the sunlight, such action constitutes strong evidence of negligence in every state.

[2] In addition to section 113 of the California Vehicle Act we may quote section 112 (St. 1929, p. 537, § 44), to wit: "It shall be unlawful for any person who is an habitual user of narcotic drugs or who is under the influence of intoxicating liquor or narcotic drugs to drive a vehicle on any public highway within this state." The testimony shows that the defendant drank a bottle of "home-brew" beer about two hours before the collision; that at the time of the collision his breath was strongly impregnated with the odor of alcohol; that he staggered when he walked; that before the collision he was crouched down over the steering wheel; that he was examined at the hospital where he was taken, for intoxication. The examining physician certified that he was not then intoxicated, although he detected the odor of alcohol. Several witnesses testified to the condition of the defendant which we have just stated, amply justifying the jury in concluding that the defendant had violated section 112 of the California Vehicle Act.

The testimony in this case justified the jury in concluding that the following facts have been established: That the plaintiff was driving easterly on Folsom boulevard on the south half thereof; and that, about the middle of such south half; that the defendant was driving westerly on the boulevard; that he was driving in that direction in a zigzag course; that the automobile went from the north to the south side without any warning, then changed its course back to the center

again and to the south side; that the plaintiff brought his car almost to a complete stop; that the defendant was driving anywhere from 25 to 40 miles an hour; that the left side of the defendant's car collided with the plaintiff's car. This is, in substance, the testimony of the plaintiff.

The witness, Mrs. Nott, who was a passenger of the plaintiff, testified in substance as follows: That she was sitting on the right side of the car, with the plaintiff's wife between her and the plaintiff; that the plaintiff was at the wheel. She first saw the automobile driven by the defendant as it crossed Forty-Seventh street, when it was about a block away. Plaintiff was driving about 20 miles an hour, and continued at that speed. The defendant's car was on the north side of the street when the witness first saw it. Plaintiff was driving in the main line of traffic going easterly. Defendant's car suddenly darted from the north side of the street over to the south curb. After the defendant got there he didn't stop, but turned and came back toward the center of the street. The defendant came weaving down the south side of the center, at such a rate of speed that after you saw what he was going to do, there was no opportunity to get away from him. This witness estimated defendant's speed at 40 or 50 miles an hour. The plaintiff had applied the brakes on his car prior to the collision, and had almost practically stopped. The defendant made many crooked turns; he would go over to the center of the street, then come back to the south side, then weave in, with perhaps half or a little more of his car over the center line, and then swing on to the south, almost all the time, and would get part of his car over the middle, and then make a larger circle over to the south side.

The testimony of the witness, Mrs. Meads, was practically the same as that of Mrs. Nott.

J. E. Morrow and his wife, Daisy Morrow, witnesses on the part of the plaintiff, testified in substance as follows: We were following the plaintiff's car with our own car. The plaintiff was proceeding at a speed of from 20 to 25 miles an hour, running about 12 feet from the south curb. The width of the street at the point of the collision was 40 feet from curb to curb. These witnesses testified as to wild zigzagging of defendant's car.

The defendant Deener testified that he was driving west on Folsom boulevard; that just prior to the collision he was going about 25 miles an hour; that before the collision he saw no car on the street coming toward him, nor did he see the plaintiff's car until immediately before the collision; he saw no cars parked along the north curb near the scene of the accident. (There is testimony in the record showing parked cars.) The last thing he remembered he was pulling his wheel to the

right. The defendant testified he was not under the influence of intoxicating liquor at the time, and had had only one bottle of "home-brew" about half past 2 in the afternoon. The defendant further testified that after passing Forty-Eighth street going west, the car ahead of him was going slowly; he said it pulled to the south to the approximate middle of the street in order to pass, and that he might possibly have gone 6 inches beyond the center. The defendant, as we have said, testified that he did not see the Meads car until just before the collision, by reason of the sun blinding his eyes, giving the testimony which we have heretofore quoted.

The witness McDonald stated that he examined the defendant for intoxication at about 5:40 p. m. on May 21st; he made a memorandum reading: "He is not intoxicated now." The witness stated, however, that there was the odor of alcohol on the defendant's breath.

The additional testimony in the record as to what occurred in the main substantiates what we have set forth, but need not be summarized further, other than to say it amply supports the finding of the jury, and were there no other reasons for supporting the verdict, we think it is sufficient, under section 4½ of article 6 of the Constitution, to preclude a reversal on account of any alleged erroneous instructions given to the jury. However, the cases bearing upon driving when one is blinded by either the lights of on-coming cars or by sunlight, are decisive, and establish the negligence of the defendant in this case beyond controversy.

[3] While our attention has been called to subdivision (d) of section 113 of the California Vehicle Act relative to the change in the proof of negligence, it apparently has been overlooked that subdivision (d) is confined exclusively to that portion of section 113 of the California Vehicle Act as it appears in subdivision (b). It does not affect or limit or modify or change any rules of law or decisions of courts based upon subdivision (a) of section 113 of the California Vehicle Act (St. 1931, p. 2120, § 34) which reads: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

That this subdivision of section 113 of the California Vehicle Act was violated by the defendant, and his negligence established by his own testimony, is shown by the following cases:

In *Woodhead v. Wilkinson*, 181 Cal. 599, 185 P. 851, 853, 10 A. L. R. 291, it is said: "Appellant also complains of the finding that

he was negligent because, when he found that his vision was obscured by the glare upon his wind shield from the lights of the approaching automobile, he failed to look around the side of the shield. Obviously, he would be bound as a careful driver to stop as soon as he could reach a place by the side of the road, or to place himself in a position from which he could see the road over which he was driving. He did not stop at once, and if, under all the circumstances, looking around the end of the wind shield was the only way in which he could safely proceed, then he was negligent in failing to adopt that plan. The same reason applies to the finding that he was negligent in failing to observe the highway immediately in front of the car which he was driving."

The cases showing that a driver is negligent in not slowing up his car and bringing it under such control that he can stop immediately when blinded by approaching lights, are carefully reviewed in the opinion in the case of *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 715, 41 A. L. R. 1027, in an opinion written by Mr. Justice Hart of the Third District Court of Appeal and adopted as its opinion by the Supreme Court. Quoting from the case of *Woodhead v. Wilkinson*, supra, the following appears in the opinion: "That it is the duty of a driver of an automobile to anticipate the presence of pedestrians upon the highway over which he is thus traveling, is thoroughly settled as a part of the law of the road and is emphasized in *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 37 (15 A. L. R. 401), 179 P. 203, 205, and in *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125, 127. In the first named of these cases it is said: 'Aside from the mandate of the statute, the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there.' And further: "In the case last mentioned the court said: 'He (the driver) still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop'"—citing authorities.

In the case of *Havens v. Loebel*, 103 Cal. App. 209, 284 P. 676, 679 (hearing denied by the Supreme Court), this court had occasion to again review the law relative to the duty of an automobile driver, when blinded by headlights of approaching cars, or when blinded by the sunlight, and held that the duty devolving upon the driver was the same in both instances. This court quoted from the *Hatzakorzian Case*, supra, as follows: "It is only necessary to compare the foregoing ré-

sumé of Kennell's own testimony with the requirements of the law with respect to the duties of operators of automobiles when driving over the highways of the state to force the conclusion that, from the time the glare from the lights of the approaching car first reflected through his windshield into his eyes, he proceeded on until he struck and killed the deceased with a degree of indifference or recklessness as to the rights and safety of others who might be ahead of him on the highway closely approaching, if indeed, not amounting, under the circumstances, as revealed by his own testimony, to gross negligence." And then this court added: "We think this statement of the law a true and correct statement as applicable to the case at bar. The plaintiff, by his own testimony, was traveling 30 miles an hour, with his eyes blinded by the sunlight so that he could not or did not see the approach of the defendant's automobile. He did not slacken his speed during the time that he was blinded, but permitted his car to move forward under conditions rendering it impossible for him to see the defendant's car until he was within four or five feet of it. Thus, his negligence, by his own words, continued right up to and including the time when his automobile crashed into the one driven by the defendant." This language applies in every particular to the conditions presented by the record on appeal in this case. The defendant, by his own testimony, proves that he proceeded forward on a city street, so blinded by the sunlight that he could not see the plaintiff's approaching car until he crashed into it. His testimony further establishes beyond controversy that he did not slacken the speed of his car, notwithstanding the fact that the law requires every automobile driver to anticipate the presence of others upon the highway. Indeed, the traffic has become so heavy, whether upon country highways or city streets, that constant vigilance is required on the part of drivers, and no driver is at liberty to assume that others will keep out of his way when his sight is blinded either by the headlights of approaching cars or by the glare of the sun.

The cases are so numerous supporting what we have just said, and as decided by our own courts, that reference need be made only to a few of them.

In *Holsaple v. Superintendents of Poor*, 232 Mich. 603, 206 N. W. 529, 531, we find the rule which we are supporting thus stated: "If, as he claims, the driver was confused or blinded by the bright lights of the other car so he could not see, it was his duty to stop or slacken his speed to safety. 'If his vision was obscured by the glaring lights of the approaching car, it was his duty to slacken his speed and have his car under such control that he might stop it immediately, if necessary'"—citing additional cases.

[4] In *Mathers v. Botsford*, 86 Fla. 40, 97 So. 282, 32 A. L. R. 881, the duty of automobile drivers, when blinded by approaching lights, is worded as follows: "Where the vision of the driver of an automobile is so obstructed or obscured by bright lights on a car coming from the opposite direction that the driver could not see any one on the road ahead of him, it is the duty of the driver whose vision is so obscured to exercise all ordinary and reasonable care and diligence to avoid injury to any one who might rightfully be on the road in front of him, even to the extent, if need be, of stopping his car if he could not see ahead of him because of the bright lights of the car he was meeting on the road." A number of cases supporting this rule will be found in the annotations of the case as reported in 32 A. L. R., supra, beginning on page 887. Other cases might be cited from other jurisdictions, but we think the rule sufficiently established by the three California cases from which we have quoted, and that the negligence of the defendant is so fully established by his own testimony that no errors of the court, if errors were committed as to the shifting of the burden of proof, could or would constitute prejudicial error.

We do not need to enter into a discussion of whether the defendant was scientifically intoxicated, or intoxicated as a matter of fact, as we think the evidence amply justified the jury in concluding that the latter was the case.

[5] The following résumé of the injuries suffered by the plaintiff as set forth in the respondent's brief, which we have verified by an examination of the record, we think shows that the judgment cannot be considered as excessive: "Plaintiff is a married man, 49 years old, with an expectancy of 22 years. Occupation: drives a truck and trucking logs to sawmill. Right leg amputated about six inches below knee in 1906. Artificial leg on right side. Plaintiff did not use crutch or cane before accident; uses crutches now. Weighed 205 lbs. before accident, as compared with 185 lbs. after release from sanitarium. Plaintiff had no difficulty in walking without crutch or cane, and in carrying on heavy work before accident, and received wages of \$150.00 per month. Had total disability at time of trial, which was many months after the accident, and has a 50% permanent disability caused by injuries received in this accident. Commutated fracture of knee-cap left leg. Fracture of radius, the large bone of left forearm. Dislocation of one of bones in wrist, left hand. Fracture of tip of small bone at left wrist. Fracture end of nose. Knee-cap operated upon. Knee opened up from one side of knee to the other. Knee-cap smashed and fragments tied together with wire. Wire still in knee, and will require a future operation

to remove the wire. One hundred stitches on inside of knee, and 32 stitches on outside of knee. Permanent scar on knee 8½ inches long. Plaster of paris cast on left leg from hip down for several weeks. Operation on forearm. Attempted to set forearm twice before operating, but unsuccessful. Necessary to open up flesh and wire bones together. Wire still in forearm and will necessitate future operation to remove the same. In Sutter Hospital 34 days. Laid on back in hospital 27 days. Thereafter in Sanitarium 37 days. In bed most of the time. Thereafter removed to his home and in weakened condition and in bed most of the time for many weeks. Took two anaesthetics. Permanent scar on arm 3½ inches long. Will suffer future pain, both in knee and arm. Plaintiff is nervous and will continue nervous in the future. Cries and has nervous chills. Has shaking spells. The arm and left knee cause spasmodic jerking spells at night, and interferes with plaintiff's sleep. Existing from date of accident up to date of trial. Temperature for several days of 101½ degrees. Face bleeding, nose swollen and for 2 weeks both eyes swollen shut and black and blue after the accident. Under opiates for several days. Cannot work since accident, and does not know when his health will permit him to resume work of any kind. Still has discomfort in knee and water on the knee, stiffness in knee, which will permanently persist. Plaintiff has chronic inflammation in knee-joint. Permanent limitation of motion of left knee and restricted flexion of the knee. Pain in knee will not permit plaintiff to resume his work. Permanently disabled from doing heavy work. Unable to straighten knee fully. Permanent arthritis in knee-joint. Use of knee will make it worse instead of better. Vigorous use would also make arthritis in the knee worse. Disability in left knee is worse than if plaintiff had a normal right leg. Permanent disability in the movements of left arm, and permanent limitation of movement in turning left hand. Permanent traumatic arthritis in both left knee and left wrist. Carried left arm in splint and sling for 70 to 80 days. At the time of trial, several months after accident, plaintiff had a loss of grip in the left hand 80 to 85 compared with 200 degrees in right hand. It was stipulated that the plaintiff's bills for doctors and hospital at time of trial were \$708.35, and that his loss of wages at time of trial was \$1350.00."

The assignment of misconduct on the part of counsel for the plaintiff refers only to the introduction in evidence of the memorandum made by Dr. McDonald heretofore referred to, and does not appear to have sufficient merit to warrant a reversal, even if the court erred with respect thereto. In view of the record, no reversal of the judgment could be had based upon such grounds, and therefore does

not call for any further lengthening of this opinion.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 192
ISKE v. STOCKWELL-KLING CORPORATION.
Civ. 8663.

District Court of Appeal, Second District,
Division 2, California.

Dec. 14, 1932.

Hearing Denied by Supreme Court Feb. 10, 1933.

Appeal and error ⇐345(1).

Notice of intention to move for new trial, filed before service of notice of judgment entry, started 60-day period running for passing on motion, so that notice of appeal filed more than 30 days after such 60-day period was too late (Code Civ. Proc. § 939, and § 660, as amended by St. 1929, p. 842, § 5).

Appeal from Superior Court, Los Angeles County.

Action by H. C. Iske against the Stockwell-Kling Corporation. From the judgment, plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

J. Marlon Wright, of Los Angeles, for appellant.

Rohe & Weikert, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

Respondent has moved to dismiss the appeal in this case upon the ground that the notice of appeal was not filed within the time required by law. The record shows that notice of intention to move for a new trial was filed on May 27, 1932, there having been no notice of entry of judgment theretofore served upon appellant. Subsequently, and on May 31, 1932, respondent served upon appellant a notice of entry of judgment. A motion for a new trial was made and a denial thereof was entered on July 27, 1932, and a notice of appeal was filed on August 26, 1932.

The parties agree that if the sixty-day period within which the court had power to rule on the motion for a new trial started to run from the time notice of intention to move for a new trial was filed the ruling of the court on such motion was beyond the sixty-

day period, that the motion was therefore deemed denied by operation of law on July 26, 1932, and hence the notice of appeal was not filed within thirty days thereafter as required by the provisions of section 939, Code of Civil Procedure, which reads as follows: "An appeal may be taken from any judgment * * * within sixty days from the entry of said judgment. * * * If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, *or other termination in the trial court of the proceedings upon such motion.*" (Italics ours.)

Respondent contends that under the provisions of section 660, Code of Civil Procedure, as amended in 1929 (St. 1929, p. 842, § 5), and in effect at the time of the trial, the date on which notice of intention to move for a new trial was filed started the time running within which the court had power to rule on such motion. That section reads as follows: "The power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not *theretofore* been served, then sixty (60) days after filing of the notice of intention to move for a new trial. If such motion is not determined within said sixty (60) days, the effect shall be a denial of the motion without further order of the court."

Appellant contends that defendant's notice of entry of judgment, filed subsequent to the notice of motion for new trial, started the time running. He cites several cases which involved the section as it existed prior to the 1929 amendment, and which held that the time begins to run from the filing of notice of entry of judgment, and not from the notice of intention to move for a new trial. But these cases are beside the point. The section as it existed prior to the 1929 amendment reads as follows: "The power of the court to pass on motion for new trial shall expire within two months *after the verdict of the jury or service on the moving party of notice of the entry of the judgment.* If such motion is not determined within said two months, the effect shall be a denial of the motion. * * *" (Italics ours.) A comparison of the section as amended and as it stood prior to the amendment leaves no doubt but that the Legislature intended by the amendment that in cases where no notice of entry of judgment is served prior to the filing of notice of intention to move for a new trial, the sixty-day period begins to run from such time and that no notice of entry of judgment

is necessary before a motion for a new trial may be made, and properly so because the notice of intention indicates actual notice. The section as amended is in the alternative, providing that the court may pass upon the motion within sixty days "from and after service on the moving party of written notice of the entry of the judgment, *or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial.*" (Italics ours.) In the case of *Payne v. Hunt*, 7 P.(2d) 302, 303, the Supreme Court said: "In the instant case, no notice of entry of judgment was served. The sixty-day period must therefore be counted from * * * the date of filing of the notice of intention to move for a new trial." See, also, *Knight v. Paulton* (Cal. App.) 14 P.(2d) 94, and *Lawson v. Guild* (Cal. Sup.) 10 P.(2d) 459. It is patent, we think, that the notice of appeal came too late.

Appeal dismissed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

128 Cal.App. 779
William RISHEBARGER, Plaintiff and Appellant, v. STOCKWELL-KLING CORPORATION (a Corporation), Defendant and Respondent.

Civ. 8664.

District Court of Appeal, Second District,
Division 2, California.

Dec. 14, 1932.

Hearing Denied by Supreme Court Feb. 10, 1933.

Motion to dismiss appeal by plaintiff from a judgment of the Superior Court of Los Angeles County.

J. Marion Wright, of Los Angeles, for appellant.

Rohe & Weikert, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The facts in this case and the questions involved are identical with those in the case of *Iske v. Stockwell-Kling Corporation* (Cal. App.) 17 P.(2d) 203, this day filed; and for the reasons therein stated the appeal in this case is dismissed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

1. Partnership ⇨217(3).

In action to quiet title to stock certificate, evidence *held* to support finding that certificate, purchased with partnership's surplus funds, was never partnership property to which plaintiff succeeded as owner, and that defendant had one-fourth interest in certificate.

2. Appeal and error ⇨1010(1).

If inferences fairly deducible from evidence would justify different conclusions by men equally sensible and impartial, trial court's conclusion should not be disturbed on appeal for want of sufficient evidence.

In such case, decision of trial court or jury is as conclusive as where conflict arises directly from the evidence.

3. Appeal and error ⇨1010(1).

In action to quiet title to stock certificate, finding, supported by evidence, that defendant had one-fourth interest in certificate, though contrary to defendant's allegation that he was one-fifth owner, *held* not ground for reversal.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Belle Silva against the Gustine Creamery and Jose M. Avila. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

L. C. Pistolesi, of San Francisco (O. F. Meldon, of Sacramento, of counsel), for appellant.

Edward T. Taylor, of Modesto, for respondents.

CURTIS, J.

This action was brought to quiet plaintiff's title to certificate No. 39 for ten shares of the capital stock of the Gustine Creamery standing in the name of Silva & Fontes. Silva & Fontes was a copartnership consisting of M. N. Silva, M. J. Fontes, Jose M. Avila (respondent), John Brazil, and Serino Alves. The copartnership was organized for the purpose of carrying on the creamery business, and thereafter engaged in said business. While so engaged the stock in question was purchased. The question involved in the present controversy is whether said stock was purchased by the copartnership or by the individual members of said copartnership. Plaintiff has succeeded to the interests of all the copartners in the partnership property. The trial

court found that certificate of stock No. 39 was purchased with surplus funds of the copartnership and that it was not and never had been partnership property. It accordingly held that as the defendant Avila was a fourth owner in the partnership property he was entitled to a one-fourth interest in said certificate of stock. The trial court's opinion was brief, and is as follows:

"The burden is upon the plaintiff to prove that the stock in question is partnership property. And the court is of the opinion that the evidence, while not entirely satisfactory, preponderates in favor of the contention that the stock was never intended to be considered as a part of the partnership assets. Of course, it follows that the stock could not pass under any agreement such as that between Silva and Avila.

"It is the opinion of the court that the monies taken out of the profits of the partnership by the direction of the partners themselves and used for the purpose of making the purchase of the stock in question was not necessarily partnership property after being thus converted into property which was not necessary or useful in the operation of the partnership business, in the absence of a specific agreement therefor.

"The subsequent manner of handling of this stock by the partners favors the position that they were not regarding it as partnership assets. When we add to this the fact that equity and fairness is subserved by taking this view, the court should so hold.

"It follows from what is above stated that defendants are entitled to judgment, and counsel for defendants is directed to prepare findings."

[1] Plaintiff has appealed from the judgment, and contends that there is no evidence to support the finding of the trial court that the stock in question was the property of the individual members of the copartnership and not the property of the copartnership. The evidence is extremely meager. It shows, however, that M. N. Silva was the manager of the copartnership and had active charge of all its business with authority to make purchases for and on behalf of the copartnership which were necessary to carry on said business. The stock in dispute was not purchased by M. N. Silva upon his general authority as manager of the company. We gather from the record that shortly after the Gustine Creamery was organized the proposal was made that either the copartnership or its members purchase stock therein. At this time there was a surplus in the funds of the copartnership, and a meeting of the members of the copartnership was called to consider the advisability of making a purchase of stock in the new company. M. N. Silva testified that the copartnership could not buy the stock unless the members said so. At the

meeting called it was decided by the members to purchase the stock, and thereupon funds were drawn from the surplus in the treasury, and the stock was purchased with such funds. The actual purchase was made by the manager, M. N. Silva, who had the certificate issued in the name of the copartnership. The copartnership never made any use of the facilities of the Gustine Creamery in the transaction of the business of the copartnership. The stock was evidently purchased as an investment. The trial court, after listening to the evidence of the several witnesses, evidently drew the conclusion therefrom that the members of the copartnership, instead of dividing the surplus money in the treasury among themselves, concluded to invest the same in the purchase of the stock and that they acquired and held said stock as their individual property and not through their membership in the copartnership. We cannot say that such a conclusion was wholly unwarranted from the evidence. The question was one for the determination of the trial court, and its determination thereof will not be disturbed on appeal.

[2] If the inferences fairly deducible from the evidence are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, the conclusion reached by the trial court should be deemed final and not disturbed on appeal for want of sufficient evidence to justify the findings. *MacDermot v. Hayes*, 175 Cal. 95, 170 P. 616. "In such case the decision of the trial court or the jury is as conclusive as where the conflict arises directly from the evidence. If a finding of fact is based upon a reasonable inference, it is not within the power of an appellate court to set it aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence." 2 Cal. Jur., § 549, p. 934.

[3] In Avila's answer to the complaint it is alleged that he was the owner of an undivided one-fifth of said certificate of stock. The court found that said certificate of stock was purchased by the members of said copartnership and that the defendant Avila was the owner in common with other members of the copartnership of one-fourth of said stock. Appellant now contends that as there were five members of the copartnership the presumption is that they were all equal partners and that there is no evidence to rebut this presumption. In making this claim regarding the evidence the appellant is in error. The defendant testified that he was a one-fourth owner in the firm and in the written transfer of his interest in the copartnership to the appellant said interest is described as "an undivided one-fourth interest in that certain dairy business." There was ample evidence to support the finding of the court relative to Avila's ownership of the stock. Appellant further contends that this finding is contrary

to the allegations of the answer of Avila in which he alleged that he was the owner of one-fifth of said certificate of stock. In this appellant is correct. While this may be an error, in view of the evidence just noted, it is not such an error as will justify a reversal of the judgment on that ground. *Turner v. Stock*, 79 Cal. App. 662, 251 P. 814; *Wagner v. Meinzer*, 53 Cal. App. 783, 200 P. 838; *Spellacy v. Dauterman*, 122 Cal. App. 416, 10 P.(2d) 114. At the argument of this appeal the respondent Avila made application to amend his answer to conform to the proof. From what we have said such an amendment is not necessary. Said application to amend will, therefore, be denied solely on that ground.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

Gibson, and others, in which Grace Ina Gibson and another, executrices of the last will and testament of John W. Gibson, deceased, were substituted as defendants in the place of the deceased defendant John W. Gibson. Motion of defendants to vacate judgment and to grant new trial was granted as to Grace I. Gibson individually, but denied as to the other defendants, and they appeal from the judgment, and plaintiff appeals from the order vacating judgment against Grace I. Gibson. On motion to dismiss the appeal from an order vacating the judgment against Grace I. Gibson individually and on plaintiff's motion for diminution of record.

Motions granted.

J. K. Wilson and J. C. Landry, both of Los Angeles, for appellant.

Frederick M. Kincaid, Anderson & Anderson, and Edward K. Sheahan, all of Los Angeles, for respondent Grace I. Gibson, etc.

PER CURIAM.

Motion to dismiss an appeal from an order of the trial court vacating a judgment in favor of appellant Grace I. Gibson, in her individual capacity. In an action based upon fraud and conspiracy to defraud, plaintiff Lillian E. Evans, secured judgment against several individual defendants, including Grace I. Gibson, and also against Grace I. Gibson and Thelma M. Gibson, as executrices of the will and testament of John W. Gibson, deceased, in the sum of \$26,316.06, and costs. After entry of the judgment, Grace I. Gibson, in her individual capacity, Grace I. Gibson and Thelma M. Gibson, as executrices, and Frederick M. Kincaid separately served and filed notices of intention to move to vacate and set aside the judgment and to grant a new trial to each respectively. The motion was denied as to Kincaid and as to Grace I. Gibson and Thelma M. Gibson, as executrices, but granted as to Grace I. Gibson, in her individual capacity. Thereafter the defendants whose motions for a new trial were denied appealed from the judgment. Lillian E. Evans appealed from the order of the trial court granting the motion of said Grace I. Gibson, in her individual capacity. Grace I. Gibson, in her individual capacity, has moved to dismiss the appeal so taken upon the ground that the order is an order granting a new trial, and, inasmuch as the trial or action was tried by the court and not by the jury, such an order does not fall within the classification of section 963 of the Code of Civil Procedure, which provides that an appeal may be taken from "an order granting a new trial * * * in an action or proceeding tried by a jury where such trial by jury is a matter of right. * * *"

217 Cal. 171

EVANS v. GIBSON et al.

L. A. 13740.

Supreme Court of California.

Dec. 30, 1932.

1. Appeal and error ☞110.

Order granting new trial is not appealable except in jury action, where jury trial is matter of right (Code Civ. Proc. § 963, as amended by St. 1915, p. 209).

2. Appeal and error ☞110.

Order vacating judgment also granted new trial, although it did not expressly so state; hence order, being in action tried to court, was not appealable (Code Civ. Proc. § 963, as amended by St. 1915, p. 209).

Order granted new trial, since it granted defendant's motion and vacated the judgment, and defendant's motion not only sought to have judgment vacated, but also sought a new trial.

3. Appeal and error ☞659(3).

Motion to diminish record would be granted, where summary of testimony and order striking portion of answer were omitted from transcript through oversight (Code Civ. Proc. § 670, subd. 2).

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Lillian E. Evans against John W. Gibson, Frederick M. Kincaid, Grace Ina

[1] It is well settled that since the amendment of 1915 of section 963 of the Code of

Civil Procedure (St. 1915, p. 209), an order granting a new trial is no longer an appealable order except "in an action or proceeding tried by a jury where such trial by jury is a matter of right." *Dean v. Midlands Farms Co.*, 96 Cal. App. 214, 274 P. 71; *Nason v. Shinjo*, 72 Cal. App. 530, 237 P. 559; *Diamond v. Superior Court*, 189 Cal. 732, 739, 210 P. 36.

[2] The notice of motion by Grace I. Gibson, in her individual capacity, stated that she would move the court "to vacate and set aside the judgment heretofore rendered against said defendant in said action and to grant the said defendant a new trial of said action." The order of the trial court is in the following language: "It is ordered that the motion of the said Grace I. Gibson be granted in so far as the judgment herein affects her personally, and the judgment as to her only, will be vacated and set aside on the ground that the evidence is insufficient to show that (1) she had any knowledge of the fraud complained of, (2) or that she benefited personally, by the fraud complained of." Although it is true that the order does not state in so many words, "a new trial is granted," it does in express words grant the motion of the defendant Grace I. Gibson, in her individual capacity, which motion expressly sought the granting of a new trial, and we see no escape from the conclusion that thereby a new trial was in fact granted. In *Eades v. Trowbridge*, 143 Cal. 25, 76 P. 714, the court held that an order setting aside the verdict and not expressly granting a new trial will be treated as an order granting a new trial if such is its legal effect. And we think the same rule is applicable here.

The appellant Lillian E. Evans asks that, if the appeal from the order be dismissed, it be dismissed without prejudice in order that the order granting a new trial may be considered upon the appeal from the judgment upon its merits. Grace I. Gibson, in her individual capacity, having been granted a new trial, is not appealing from the judgment in her individual capacity, and therefore there is not before us any judgment in conjunction with which the order granting the new trial may be considered. The appeal before us is an appeal from the judgment against them perfected by the other defendants, and with this judgment and the appeal therefrom Grace I. Gibson, in her individual capacity, has no concern.

Motion to dismiss the appeal from the order granting a new trial is granted, and the appeal is dismissed.

[3] A motion by plaintiff on suggestion of diminution of record was noticed for the same calendar of this court. The matters sought to be added to the record consist of a summary of certain testimony of Frederick M. Kincaid, and a copy of an order granting the motion of plaintiff to strike out certain portions of the joint answer of defendants to amended and supplemental complaint. The motion was supplemented by the affidavit of the clerk of the trial court certifying to the correctness of the order to strike, and also by the affidavit of the trial judge to the effect that both the summary of said testimony and the order to strike were before him on the trial of said action and on the settlement of the bill of exceptions and were a part of the record on which he based the judgment and order settling the bill of exceptions, and were omitted from the transcript through an oversight. This court has the power to order such a diminution of the record, and, under the circumstances here presented, it seems clear that the motion of plaintiff should be granted. *Webster v. Webster* (Cal. Sup.) 14 P.(2d) 522; *McMahon v. Hamilton*, 202 Cal. 319, 325, 260 P. 793.

There can be no doubt but that the order granting plaintiff's motion to strike out portions of the joint answer of the defendants, constituting as it does a part of the judgment roll (section 670, subd. 2, Code Civ. Proc.), should be incorporated in the transcript on appeal. It is possible that the summary of the testimony sought to be included by this motion, if it relates solely and only to the defendant Grace I. Gibson, in her individual capacity, who has been eliminated by the order granting her motion for a new trial, may not be pertinent to the issues presented on the appeal of the other defendants. It is impossible, however, without a careful examination of the entire record and a detailed study of the issues presented by the appeal of the other defendants, to determine whether or not this testimony does in fact relate solely to the defendant Grace I. Gibson, in her individual capacity, or whether it may not have some application to the other defendants. We are not inclined at this time to make such a detailed study of the case. If this testimony is not relevant to any of the issues presented when the appeal is considered on its merits, it may then be disregarded.

Plaintiff's motion to diminish the record, as set forth in her notice of motion and suggestion of diminution of the record is granted. Diminution is ordered in accordance therewith.

217 Cal. 90

GLASSCO et al. v. EL SERENO COUNTRY CLUB, Inc., et al.
L. A. 12817.

Supreme Court of California.

Dec. 27, 1932.

1. Appeal and error ⇨418.

Portion of judgment not mentioned in notice of appeal could not be considered.

2. Appeal and error ⇨417(1).

Notices of appeal must be liberally construed with view of hearing causes on merits.

3. Mechanics' liens ⇨53.

Where contract provided pay rolls and orders placed by contractors should be in owner's name, with contractors assuming no liability therefor, money expended by contractors for materials and labor held voluntary advancement; hence contractors were not entitled to lien therefor.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by R. J. Glassco and another, copartners doing business under the fictitious name and style of the Stiles Construction Company, against the El Sereno Country Club, Inc., and others. From an adverse judgment and from an order denying a new trial, plaintiffs appeal.

Judgment affirmed, and appeal from the order denying a new trial dismissed.

W. C. Dalzell, of Los Angeles, for appellants.

J. Wiseman Macdonald, of Los Angeles, for respondent.

WASTE, C. J.

Plaintiffs appeal from an adverse judgment in an action brought to foreclose a mechanic's lien.

The defendant Clotilde Castruccio, owner of the property upon which it is sought to impose the lien, was the only defendant to appear and answer the complaint. It appears that on March 2, 1926, the defendant Castruccio agreed to sell a large parcel of land to three named individuals, a small down payment being made by the purchasers. Thereafter the defendant El Sereno Country Club, deriving whatever interest it had in the property from the purchasers thereof, undertook to construct a clubhouse and golf course on the property. To accomplish this objective, the club entered into a contract with the plaintiffs, doing business as copartners, whereby the latter, for a fixed fee, were to

furnish engineering service and superintend the construction work. The lien here sought to be imposed is an outgrowth of said contract. At the close of the trial the court below entered judgment for the plaintiffs and against the El Sereno Country Club in the sum of \$8,729.66, but decreed that plaintiffs were not entitled to a lien on the property of the defendant Castruccio. Plaintiffs were also denied any relief against the defendant Castruccio personally. Plaintiffs appealed.

[1, 2] Preliminarily, it might be said that that portion of the judgment denying the appellants a lien, and which is attacked by the plaintiffs in their brief herein, is not properly a subject of review upon this appeal because of the insufficiency of the notice of appeal. The notice states that the appeal is "from so much of the judgment herein as denies relief to the plaintiffs against the said defendant, Clotilde G. Castruccio. * * *" The notice of appeal makes no mention of that separate and distinct portion of the judgment denying plaintiffs a lien. It is elementary that an appeal from a portion of a judgment brings up for review only that portion designated in the notice of appeal. 2 Cal. Jur. 155, § 25. While it is true that notices of appeal are to be liberally construed with a view to hearing causes on their merits (*Harrelson v. Miller & Lux*, 182 Cal. 408, 414, 188 P. 800), we are of the opinion that the notice filed in the present case does not present "a mere misdescription" of the judgment, calling for the application of said rule, but rather presents a situation somewhat analogous to that presented in *Dimity v. Dixon*, 74 Cal. App. 714, 718, 241 P. 905, viz. one where the description of that portion of the judgment appealed from is so clear and unmistakable as to preclude a description of that portion of the judgment denying appellants a lien.

Though we are satisfied for the foregoing reason that the judgment might well be affirmed, we have examined the record, and have concluded that on its merits the judgment of the court below is eminently proper. Under the terms of their contract with the El Sereno Country Club, the appellants were to receive a fee of \$8,000 for acting as the "construction, purchasing and engineering department" in the carrying out of the proposed development; this fee to be increased or diminished, not to exceed 50 per cent., depending on whether the actual cost of construction was less or greater than the estimated cost. The trial court found on competent evidence that the full amount of such fee had been paid to the appellants. No lien is therefore available to the appellants in connection with this sum.

[3] The contract further provides, in substance, that the appellants in the course of the

construction work were to contract for all materials and labor essential thereto. Having expended various sums of money for labor, the appellants now seek to impose a lien therefor. Clause V of the contract is fatal to the appellants' claim of lien. It reads in part: "All contracts and orders placed by us [appellants], pay rolls and other obligations, shall be in your name by Stiles Construction Co., Agents, and it is understood that we assume no liability under or by reason of such obligations." The trial court found, in effect, that the appellants had expended \$8,729.66 for materials or labor, for which amount they were entitled to judgment against the defendant El Sereno Country Club, but that said sum represented "money voluntarily paid as an advance and a loan by the [appellants] for said El Sereno Country Club," and as to which sum they were not entitled to a lien against the respondent's property. That such money was voluntarily advanced by the appellants on behalf of the El Sereno Country Club is amply supported by the provision of the contract, above quoted, which provides that "all contracts and orders" placed by the appellants, "pay rolls and other obligations" were to be placed in the name of the club, by the appellants as "agents"; it being understood that the appellants "assume no liability under or by reason of such obligations." It necessarily follows that all sums so expended by the appellants constitute but loans or advancements to the El Sereno Country Club. It has long been the settled law of this state that "the mechanic's lien law provides exclusively for the security of material-men and laborers; and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the law." *Godfrey v. Caldwell*, 2 Cal. 489, 491, 492, 56 Am. Dec. 360.

The case of *Burr v. Peppers Cotton Lumber Co.*, 91 Cal. App. 268, 266 P. 1025, 1026, hearing denied by this court, is substantially on all fours with the present case. There, as here, the plaintiff contractor was to receive a stipulated fee for his services in the construction of a railroad. There, as here, the company for whom the construction work was being done "was to pay all costs and expenses of construction, including all materials and labor." There, as here, though not obligated to, the contractor expended certain sums in payment of material and labor bills for which a lien was sought to be imposed. In denying such lien, the decision declares: "But one question for solution is presented by this appeal. Does the California mechanic's lien law give a lien to secure repayment of mon-

neys voluntarily advanced by a contractor in payment of claims against an owner which the contractor is not obligated to pay by his agreement? * * * The placing of appellant [the contractor], by reason of his alleged acts, within the classes afforded a lien under the California statute, would give any one advancing moneys, which paid for supplies or material, in effect, a mortgage or trust deed upon property. That such is not the rule is announced both in text books on the subject of mechanics' liens, and the decisions of the Supreme Court of this state. *Boisot on Mechanics' Liens*, § 114, says: 'A statute giving liens to those furnishing work or material does not extend to those furnishing money with which the work and materials are paid for. * * * And a contractor who makes, in the name and on the credit of the owner of the building, a contract with a third person to do certain work on the building, and pays him therefor, has no lien for such work, since the work was furnished by the owner, through the contractor as his agent, and the contractor merely furnishes the money with which to pay for the work.' * * *

The decision quoted from contains a lengthy and instructive discussion of the problem here presented. The principles therein announced are recognized in *Sweet v. Fresno Hotel Co.*, 174 Cal. 789, 795, 164 P. 788, Ann. Cas. 1918D, 346. We are satisfied that the situation here confronting us is akin to that presented by the "nonlienable" contract involved in the *Sweet Case*, supra. In the case at bar the appellants did not contract and expend money for materials or labor in their own right, but did so, under the terms of their contract, as "agents" of the El Sereno Country Club. Appellants assumed "no liability" in connection therewith. It follows, therefore, that any moneys so expended by the appellants were loans or voluntary advancements for which, under the authorities, they are not entitled to a lien. For the recovery of these sums they must look to their judgment against the El Sereno Country Club.

What has been said sufficiently disposes of this case. We deem it unnecessary to prolong this opinion by considering and discussing other contentions urged by the parties.

The judgment appealed from is affirmed. The order denying a new trial is nonappealable (section 963, Code Civ. Proc.), and the purported appeal therefrom is therefore dismissed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.; SEAWELL, J.; SHENK, J.

217 Cal. 209

MULLIA v. MAYER et al.
L. A. 12851.

Supreme Court of California,
Dec. 30, 1932.

1. Parties $\hookrightarrow$ 93(2).

In action for accounting, permitting evidence in behalf of cross-defendant's claim *held* proper where, until evidence was offered, no objection was made to appearance of cross-defendant who, though not served with cross-complaint, alleged that she was fictitious party named therein.

2. Pleading $\hookrightarrow$ 258(4).

Refusal to grant request, made after all testimony was closed, to file amended answer denying contract which was denied in original answer, *held* proper.

3. Trial $\hookrightarrow$ 377(2).

Refusal to grant defendant's request, made at conclusion of trial and unaccompanied by specific offer of proof, to again testify after he had previously testified, *held* proper.

4. Attorney and client $\hookrightarrow$ 149.

Attorney's assignee *held* entitled to fee of attorney who was to receive 10% of money collected from client's partners where client ultimately received the money, though, following partnership compromise, action was instituted to determine claims of other parties against client.

In Bank.

Appeal from Superior Court, Los Angeles County; R. E. Lambert, Judge.

Action by Ellen C. Mullia against John Mayer and others, wherein defendants filed cross-complaints. From a judgment for cross-defendant D. A. Woods, plaintiff and defendant George L. Mullia appeal.

Affirmed.

Anthony Jurich and Geo. E. Cryer, both of Los Angeles, for appellant.

McGee & Robnett, of Los Angeles, and Pascal H. Burke, of Beverly Hills, for respondent John Mayer.

Stanley A. Phipps, of Los Angeles, for respondent D. A. Woods.

PER CURIAM.

This is an appeal by certain parties from a judgment in an action for an accounting. Defendants Vuksich, Vukoja, and George L. Mullia entered into an agreement by the terms of which Vuksich was to make a bid on sewer construction for the city of Southgate; Mullia was to assist in securing bonds and to fur-

nish premiums; and the three parties were to share profits or losses equally. The contract was awarded to Vuksich, but defendant George L. Mullia, being unable to raise the sum of \$10,385 for premiums and \$1,000 for other necessary expenses, offered defendant Mayer one-half of this one-third interest if Mayer would pay one-half of said premium and expenses. Mayer accepted and paid \$500, but being unable to raise the balance, interested plaintiff Ellen C. Mullia, who advanced \$5,000 with the understanding that she and defendants George L. Mullia and Mayer would each share in the latter's one-third of the profits, in proportion to the amount advanced by each. This one-third share ultimately was fixed at \$20,000.

Plaintiff filed this action to establish a partnership and for an accounting. Defendant United States Fidelity & Guaranty Company filed an answer admitting holding the sum of \$20,000, and a cross-complaint praying that all parties be brought into court to determine their rights. Several other defendants appeared and filed answers and cross-complaints. Subsequent to the trial, a settlement was reached by all of the parties save plaintiff Ellen C. Mullia, defendant George L. Mullia, and respondent D. A. Woods. This last-named party appeared as the assignee of Robert F. Shippee, an attorney at law. Her claim was for the sum of \$2,000, under a contract of said attorney with defendant George L. Mullia, whereby Shippee was to receive 10 per cent. of the amount collected from Vuksich and Vukoja the other members of the partnership. The court found that Shippee had already been paid \$150, and was entitled to the further sum of \$1,850. This appeal is taken by plaintiff Ellen C. Mullia and defendant George L. Mullia from the judgment awarding said sum to respondent D. A. Woods.

[1-3] The contentions of appellants are that respondent was not a proper party to the action; that the court should have granted leave to appellant George L. Mullia to file an amended answer denying the contract; that the court erred in refusing to permit George L. Mullia to testify as to the alleged contract; and that the findings and judgment are erroneous because Shippee did not perform his contract. None of these points are substantial. Respondent appeared upon the filing of a cross-complaint by United States Fidelity & Guaranty Company, and claimed an interest in the fund. She was not served with the cross-complaint, but alleged that she was entitled to appear as the fictitious party ("Jane Doe") named therein. No objection was made to her appearance until evidence was sought to be introduced in behalf of her claim, and we think that the court acted within its discretion in permitting such evidence to be presented. With respect to the request

of George L. Mullia to file an amended answer, the record shows certain denials relating to the contract in his original answer, and no sound reason appears for the request, which was made after all the testimony was closed. Similarly, the request of George L. Mullia to take the stand again, after he had previously testified, was made at the conclusion of the trial, and was unaccompanied by a specific offer of proof. In these matters the trial court necessarily has a wide discretion, and we are given no indication of any possible prejudice suffered as a result of its ruling.

[4] The final proposition urged is that by the terms of the contract, Shippee was not entitled to his fee unless the money sued for was actually collected; and since it had become necessary for the parties to go to court to settle the matter, Mullia was never in default since Shippee had not performed. This is not a necessary interpretation of the agreement. It appears that Shippee conducted negotiations, and brought an action on behalf of Mullia against his other partners, Vuksich and Vukoja, which action was compromised and Mullia's share set at \$20,000. This sum was held by the United States Fidelity & Guaranty Company, pending determination of the claims of the other parties having rights against Mullia. Ultimately Mullia received the money to which he was entitled, and on the merits, there is no reason why Shippee should not receive his agreed fee.

We are satisfied that the court properly disposed of the issues before it.

The judgment is affirmed.

217 Cal. 138

VANNUCCI et al. v. PEDRINI et al.

S. F. 14546.

Supreme Court of California.

Dec. 30, 1932.

Rehearing Denied Jan. 27, 1933.

1. Corporations ¶113.

By-law of corporation imposing limitation on stockholders' sale of stock, requiring stock to be first offered to other stockholders, held valid and effective as against one who purchased stock with knowledge of by-law.

2. Corporations ¶113.

By-law of corporation imposing limitation on stockholders' sale of stock, requiring stock to be first offered to other stockholders, held not in violation of statute authorizing transfer of stock by indorsement of certificate (Civ. Code, § 324).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Joseph Vannucci and others against Felice Pedrini and others. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment reversed, with directions.

Aaron N. Cohen, Daniel A. Ryan, Thomas C. Ryan, and Edward Schary, all of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellants.

Sylvester Andriano and Albert Picard, both of San Francisco, for respondents.

CURTIS, J.

The question presented on this appeal is the legal effect of a by-law of a corporation which was assented to by all the stockholders and of which the party dealing with the stockholders had notice and knowledge. The defendants Henry Matteucci, Oreste Matteucci, Vincent Matteucci, Evelyn Matteucci and Ida Bianchini were stockholders of the Roma Macaroni Factory, a corporation organized under the laws of this state, and while such stockholders said corporation adopted, with the acquiescence and express consent of said defendants, a by-law reading as follows:

"No transfer shall be valid or shall be registered on the books of the Company without the Order of the Board of Directors, of any shares upon which any assessments have been levied and are unpaid, or the holders of which are indebted to the corporation on any account whatever.

"If certificates shall be lost or destroyed, the Board of Directors may order new certificates to be issued, upon such terms as they may deem satisfactory.

"The shares of stock of the Company shall not be transferable or the subject of sale or pledge, until first offered to the Company at the then book value. If said offer is refused by the Company then said stock shall be offered to the stockholders and if necessary prorated among them or such of them as desire to purchase.

"In each of the foregoing cases, if such offer shall be made and declined by the Company and the stockholders, the shares so offered shall be subject to sale, pledge or transfer, but not otherwise. The shares, if any, so purchased by the Company, shall be resold by it upon such terms as the Board of Directors may determine, but all remaining shareholders shall be first entitled to participate in the purchase in proportion to the number of shares then held by them.

"In no case shall any shares be assignable or transferable until after offer to the company and refusal by it and subsequent of-

fer and refusal by the stockholders to purchase, as aforesaid."

[1, 2] Notwithstanding this provision in the by-laws, said defendant stockholders sold, or at least attempted to sell, seventy-one shares of stock owned by them in said corporation, without complying with the terms and provisions of said by-law, to the defendant Camilla Pedrini, who had knowledge of the existence of said by-law and of its terms and provisions. This appeal comes to us after judgment rendered upon sustaining a general demurrer to the complaint. To be more specific, plaintiffs filed an amended complaint in which four causes of action are set out in which they asked that defendants be required to deliver to plaintiff stockholders a fair and just proportion of said seventy-one shares, or a minimum of thirty-eight shares, upon the plaintiffs paying over to said defendants the book value of said stock at the time of said pretended sale, which was alleged to be the sum of \$4,282.22. The four causes of action are little more than restatements of the same facts in somewhat different form. It is not material to any issue involved to show the several statements of these facts in said four causes of action. To each of these four causes of action the defendants interposed a general demurrer. The court sustained the demurrers and entered judgment accordingly in favor of the defendants, from which the plaintiffs have appealed.

The validity and binding effect of a by-law of a corporation somewhat similar to that set forth above have been before the appellate courts of this state in at least the following three cases of Mancini v. Setaro, 69 Cal. App. 748, 232 P. 495, 498; Mancini v. Patrizi, 87 Cal. App. 435, 262 P. 375; Mancini v. Patrizi, 110 Cal. App. 42, 293 P. 828. These three cases evidently arose out of the same state of facts, and are relied upon by respondents to support the judgment in the instant case. The first of these three cases, in view of the language used by this court in its order denying a hearing before the Supreme Court, to the effect that "We express no opinion as to the question of the validity of the by-law discussed in the opinion of the district court of appeal," must be disregarded as authority upon the point now being considered.

In each of these three cases the plaintiff sued to recover from the secretary and president of a corporation as liquidated damages the sum of \$400 under section 324 of the Civil Code, which provided for such penalty in that amount "whenever any officer of any corporation shall refuse to make entries upon the books thereof, or to transfer stock therein, or to issue a certificate or certificates therefor to the transferee as provided by this and the next preceding section." In those cases the transferee of said stock, the plaintiff in said actions, was a purchaser for value of the

stock which defendants had refused to transfer, and purchased said stock without notice of the by-law of said corporation, which provided that: "No share of stock of this corporation is transferable without the holder thereof first presenting same at the office of this corporation and offering the same for sale to said corporation." This by-law was not complied with by the owner of said stock prior to his sale thereof to the plaintiff in said actions.

It will be noted that the facts in those cases differ in two material respects from the facts in the case now before us. In those cases the transferee or purchaser of said stock purchased the same without any notice or knowledge of said by-law. In the present case it is alleged that the purchaser of said stock "was informed of and knew of the existence of" the by-law "providing for the offer of said capital stock to the plaintiff stockholders herein prior to such * * * purchase" by her. In the second place, the by-law considered by the court in those three cases simply provided that no stock should be sold, unless the holder thereof should first offer the same to the corporation for sale. The by-law we are considering in the present instance requires that no stock shall be subject to sale "until first offered to the company at the then book value," and then provides: "If said offer is refused by the company then said stock shall be offered to the stockholders and if necessary prorated among them or such of them as desire to purchase." The three cases mentioned above, and particularly the last two, lay great stress upon the fact that the purchaser in those cases bought the stock without any knowledge of the existence of the by-law requiring a prior offer thereof to the company. They also hold that a purchase of its stock by a corporation under the law as it then stood would be in violation of section 309 of the Civil Code prohibiting the dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock of the corporation except such as remained after payment of its debts upon dissolution. In support of the first of these two statements we quote from Mancini v. Patrizi, 110 Cal. App. 42, at page 45, 293 P. 828, 829, as follows:

"By issuing the certificate in the form in which it did [with the usual recitals found in certificates of stock as follows: 'Transferable on the books of the company by endorsement hereon and surrender of this certificate'] the corporation clothed the holder with the apparent authority to transfer title to the shares of stock which it represented by indorsement in such manner as to entitle the transferee to have the stock transferred to him upon the books of the corporation without restriction. Respondent having purchased the stock in reliance upon that appearance of authority, the corporation must

be held estopped to assert against him the restrictive by-law of which he had no notice or knowledge at the time of purchase."

In support of the other of said statements we quote from the case reported in 87 Cal. App. 435, at page 439, 262 P. 375, 376, as follows: "It is manifest that the effect of the purchase by the corporation would have been to divide, withdraw and pay to the holder of the certificate a part of the assets or capital stock of the corporation. * * *"

These three cases relied upon by respondent are not controlling in the present action. Here the by-law, assented to by all the stockholders, including the defendant stockholders, and which the defendant Camilla Padrini had notice of before she attempted to purchase the stock, provided that the shares of stock in said corporation should not be transferable or subject to sale until first offered to the company, and, if refused by the company, then to the stockholders. We may disregard that portion of said by-law requiring that the stock be offered to the company, as it is severable and is in no way dependent upon the remaining part providing that an offer be made to the stockholders before any stock of the corporation is subject to sale. We then have a by-law requiring that, before the stock of one stockholder is subject to sale, he must offer it to the remaining stockholders and give them an opportunity to purchase the same at its then book value. Five of such stockholders attempted to sell their stock to one who had knowledge of said by-law, and without complying with the terms of said by-law. Is such a sale legal? The law upon this question seems to be well settled.

"Although a by-law which contravenes the Constitution and laws of the state is unenforceable as such against non-assenting stockholders, it may, nevertheless, if assented to, and is not opposed to public policy, be enforced as a contract, even though it is invalid as a by-law because unreasonable, or not properly adopted, or violative of statutory rights, or obligations. The reason for this is that a man may part with a right voluntarily, although it would be unjust to deprive him of such right by a by-law passed without his assent or knowledge." 6 Cal. Jur. pp. 718, 719.

"It is argued that the terms upon which shares of stock may be transferred are prescribed by the statute, and that the corporation had no power to annex other conditions. So far as the power of corporate legislation is concerned, this may be conceded, and it may be assumed for the purpose of the case that a corporation could not make a by-law which would operate in and of itself to create a lien upon the stock for the indebtedness of the stockholder. But the power to legislate is one thing, and the power to contract is quite another. In the language of Angell: 'What may be bad as a by-law, as against

common right, may be good as a contract; since a man may part with a common right voluntarily of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or, perhaps, knowledge, by those who might not know or would not consult his individual interests.' Ang. Corp. (8th Ed.) § 342. And to say, as is said by the learned counsel, that no additional limitation can be added by contract in a particular case, seems to us to be going altogether too far." *Jennings v. Bank of California*, 79 Cal. 323, 325, 21 P. 852, 853, 5 L. R. A. 233, 12 Am. St. Rep. 145.

"Article 9 aforesaid is, moreover, not only a by-law for the regulation of the affairs of the corporation, but it is also a contract between the parties signing the same, on the one part, and the corporation, on the other, and may be enforced as such by the corporation. While provisions for regulating the rights of the members of a corporation as between themselves, duly adopted by a majority of the stockholders, may not be enforceable as a by-law upon nonconsenting stockholders, yet, if assented to by all, they may be enforced as a contract." *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 197, 81 P. 1029, 1032.

Many authorities from other jurisdictions are to the same effect. *Sterling Loan & Investment Co. v. Litel*, 75 Colo. 34, 223 P. 753; *Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 91 N. E. 991, 137 Am. St. Rep. 764, 19 Ann. Cas. 699; *Moses v. Soule*, 63 Misc. 203, 118 N. Y. S. 410; *Bloomingtondale et al. v. Bloomingtondale et ux.*, 107 Misc. 646, 177 N. Y. S. 873; and *Baumohl v. Goldstein*, 95 N. J. Eq. 597, 602, 124 A. 118, 120. In this last case the court aptly says: "As among the original incorporators there seems to be no reason in principle why they should not be permitted to retain the control of the corporation in which they have embarked their fortunes among themselves, or such of them as stand by the vessel, where no question of a bona fide purchaser without notice is involved. In this court, where the intent of the parties is the thing sought to be enforced, every effort should be made to hold men to agreements into which they have voluntarily entered, where the same are not obnoxious to any law or policy, and upon the strength of which others have changed their position or circumstances, or parted with a valuable consideration. It is their business and their money which is involved. It is by their efforts that success is attained, if attained at all. Surely the public cannot be aggrieved, and individuals acting in accordance with equitable doctrines cannot be injured, because if they have no knowledge of notice of a fact they are not injured by it."

A further discussion of the question involved herein is unnecessary. The above authorities cover the case before us completely. There is no merit in respondent's con-

tention that the restriction against the sale of stock as contained in said by-law is a violation of section 324 of the Civil Code as it stood at the time the stock in question was attempted to be sold to Mrs. Pedrini. This section then provided that capital stock of a corporation might be transferred by indorsement of the certificate by the proprietor and delivery of the certificate. The contention that this Code section renders the restriction against sale contained in said by-law invalid we think is answered by the quotation above from the case of Jennings v. Bank of California, 79 Cal. 323, 21 P. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145, supra.

We of course do not express any opinion as to the facts in this case. We are simply considering them as they are alleged in plaintiffs' amended complaint. Whether plaintiffs can sustain these facts by competent evidence must be determined at the trial of the action.

The judgment is reversed, with direction to the trial court to overrule the demurrers to the amended complaint filed by defendants and to permit them to answer as they be advised.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

217 Cal. 124

**HOLLYWOOD CLEANING & PRESSING
CO. v. HOLLYWOOD LAUNDRY
SERVICE, Inc.
L. A. 12102.**

Supreme Court of California.
Dec. 28, 1932.

Rehearing Denied Jan. 27, 1933.

1. Appeal and error §907(3).

On appeal taken on judgment roll, nothing can be assumed or considered unless appearing on face of judgment roll, and all intents and presumptions must support judgment.

2. Corporations §1.

That one corporation owned all stock of another held not to require disregarding corporate entity, so as to bring laundries acquired by parent corporation within subsidiary's contract for giving exclusive benefit of dry cleaning business from its laundries.

Fact that all stock of corporation owning laundry was owned by another corporation did not require treatment of subsidiary as alter ego of parent corporation, since trial court found that subsidiary had not acquired any laundry, and evidence

was not presented before reviewing court, and no facts were alleged or found which indicated fraud or injustice resulting from failure to observe fiction of separate existence.

3. Corporations §1.

Parent corporation's ownership of all stock of another corporation will not warrant disregarding separate corporate entity unless unity of interest has destroyed individuality of each corporation, and observance of separate existence would sanction fraud or promote injustice.

4. Corporations §1.

Bad faith in some form must be shown before court may disregard fiction of separate corporate existence.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by the Hollywood Cleaning & Pressing Company against the Hollywood Laundry Service, Incorporated. From the portion of the judgment adverse to it, plaintiff appeals.

Affirmed.

For prior opinion, see 12 P.(2d) 145.

Meserve, Mumper, Hughes & Robertson, Harry W. Hanson, and Baldwin Robertson, all of Los Angeles, for appellant.

Mott, Vallee & Grant, Walter H. Hewicker, and O'Melveny, Tuller & Myers, all of Los Angeles, for respondent.

PER CURIAM.

Plaintiff appeals from that portion of a judgment adverse to it, rendered in an action brought by plaintiff for damages for breach of a written contract by defendant. The appeal is taken on the judgment roll alone so that none of the evidence produced before the trial court is before us. Defendant has separately appealed from those portions of the judgment adverse to it. See Hollywood Cleaning & Pressing Company v. Hollywood Laundry Service, Incorporated (Cal. Sup.) 17 P.(2d) 712.

The facts giving rise to the controversy between the parties are as follows:

On April 18, 1924, plaintiff and defendant entered into a written contract by the terms of which defendant agreed that for a period of ten years it would solicit, together with its general laundry business, dry-cleaning, dyeing, and pressing business, and would turn over to plaintiff exclusively all the dry-cleaning, dyeing, and pressing business it thus acquired. Defendant agreed that all during the term of the contract it would advertise for and solicit such business in order to secure

the maximum thereof. The contract provided that the drivers of defendant should pick up the cleaning, dyeing, and pressing work from its customers and should deliver the same to plaintiff's plant, and should redeliver the goods to the customers after plaintiff had completed it. Plaintiff agreed to furnish special accommodations at its plant for handling the business secured by defendant. Defendant was to collect for the work, and to retain 37½ per cent. thereof for itself and to remit the balance to plaintiff. There was an express provision to the effect that defendant "agrees to include in this agreement any other laundry plant that it may acquire during the continuation of this agreement, provided that any other agreement does not exist covering its dry-cleaning, dyeing and pressing business with the other laundry plant."

For a short time after the agreement was entered into both parties lived up to its terms and conditions. The court found that about January, 1925, defendant "without cause or justification breached said agreement and sent only a part of its dry-cleaning, dyeing and pressing business to the plant of plaintiff, and thereafter from on or about the 21st day of March, 1925, without cause or justification defendant failed and refused, in all respects and in every respect, to comply with the terms of said written agreement." Plaintiff elected to treat the breach by defendant as terminating the contract, and brought this action. The trial court awarded damages to plaintiff, in the amount that it found plaintiff would have made as profit had the contract been fully performed. The correctness of that award is not involved on this appeal. Defendant has perfected a separate appeal from that award. 17 P.(2d) 712. The present appeal is concerned with the following facts: The trial court found that at the time the written contract was entered into all of the capital stock of defendant Hollywood Laundry Service, Incorporated, was owned either by Frank L. Meline, an individual, or Frank L. Meline, Inc., a corporation; that all of the capital stock of Frank L. Meline, Inc., was then owned and is still owned by Frank L. Meline; that on various dates during the period included within the contract, Frank L. Meline, Inc., acquired all the capital stock and assets of four laundry companies; that defendant Hollywood Laundry Service, Incorporated, did not cause these laundries acquired by Frank L. Meline, Inc., to turn their dry-cleaning, dyeing, and pressing business over to plaintiff; that, if defendant had required these newly acquired laundries to turn their dry-cleaning, dyeing, and pressing business over to plaintiff during the term of this contract, plaintiff would have made a profit of approximately \$10,000 from such business. However, the trial court refused to include this amount as damages for the reason that it found that "it is not true that it was intended or contemplated by the

parties hereto, or that said written agreement provided, that any other laundry plants acquired by either Frank L. Meline or Frank L. Meline, Inc., during the terms of said agreement should be included in the terms of said agreement of April 18, 1924." The trial court also found that "it is further true that defendant has not acquired any laundries since the execution of said agreement."

[1-4] Plaintiff has appealed solely from this portion of the judgment refusing to award damages for the failure of defendant, Hollywood Laundry Service, Incorporated, to turn over to plaintiff the dry-cleaning, dyeing, and pressing business of the four laundries acquired by Frank L. Meline, Inc. It is the contention of the plaintiff that under the above circumstances a situation is presented where this court should hold, as a matter of law, that the separate corporate existence of Frank L. Meline, Inc., should be disregarded and that the laundries acquired by it must be deemed to have been acquired by defendant corporation within the meaning of the contract. Plaintiff asks that this be done, even though it failed to plead or prove so far as the findings disclose, that title was taken to the newly acquired laundries by Frank L. Meline, Inc., instead of in the name of Hollywood Laundry Service, Incorporated, with the intent or for the purpose of evading liability under the contract. For all that appears on the record before us the corporation Frank L. Meline, Inc., acquired these laundries in good faith without any intent of assisting defendant to evade liability under the contract. No facts are pleaded or found which would indicate that to recognize the separate corporate entities of the two corporations would, under the circumstances, sanction a fraud or promote injustice. It must be remembered that this appeal is taken on the judgment roll alone. None of the evidence introduced before the trial court is before us. It is, of course, elementary that, when an appeal is taken on the judgment roll, nothing can be assumed or considered that does not appear upon the face of the judgment roll. All intendments and presumptions must be made in support of the judgment. In the absence of any finding to the contrary, we must conclusively assume that Frank L. Meline, Inc., acquired these laundries in good faith and without any intent of assisting defendant in evading liability under the contract. The burden of proof to show the contrary was on the plaintiff, and, in the absence of a record, we must necessarily assume that plaintiff failed to sustain the burden imposed upon it. Keeping these well-settled rules in mind, we can come to no other conclusion but that the judgment appealed from should be affirmed. The trial court expressly found that it was not intended or contemplated by the parties to the contract that any laundries acquired by Frank L. Meline or Frank L. Meline, Inc., should be included within the

contract. Under ordinary circumstances we would have to assume that the above finding was amply supported by the evidence. However, we find in the record a stipulation between counsel representing the respective parties to the effect that "no evidence whatever was offered or received during the trial of this action touching the intention or contemplation of the parties to the contract of April 18, 1924, as to whether any other laundry plants acquired by either Frank L. Meline or Frank L. Meline, Inc., during the term of said agreement should be included within the provisions thereof." Assuming that this stipulation may be considered as properly before us (but see *Spreckels v. Ord*, 72 Cal. 86, 13 P. 158; *Spinetti v. Brignardello*, 53 Cal. 281; *People v. Hawes*, 41 Cal. 632; 2 Cal. Jur., p. 519, § 258), a question we do not find it necessary to now decide, we fail to see how the fact that that finding is unsupported by the evidence can assist the plaintiff. The finding that defendant did not acquire any new laundries stands unimpaired. All that the record shows, even if this last-mentioned finding were to be disregarded, is that the plaintiff corporation entered into a contract with defendant, Hollywood Laundry Service, Incorporated; that all of the stock of defendant was owned either by Frank L. Meline or Frank L. Meline, Inc.; that Frank L. Meline owned all the stock of Frank L. Meline, Inc. What other stock was owned by Frank L. Meline, Inc., if any, does not appear. The contract purports to be between plaintiff and defendant alone. It does not purport to bind any other person or corporation, whatsoever. No facts are alleged or found which would indicate that to refuse to recognize the separate corporate entities of the two corporations would sanction a fraud or promote an injustice. In other words, plaintiff's contention narrows down to the contention that the separate corporate entities of the two corporations should be disregarded solely because all of the stock of defendant corporation is owned by another corporation, Frank L. Meline, Inc., or by Frank L. Meline, and that the last-named party owns all the stock of Frank L. Meline, Inc. This has never been the rule in this state. Whatever may be the rule in other jurisdictions, the rule is well settled in this state that the mere fact one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the last corporation and to treat it as the alter ego of the individual or corporation that owns its stock. In addition it must be shown that there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be

shown before the court may disregard the fiction of separate corporate existence.

In the leading case of *Erkenbrecher v. Grant*, 187 Cal. 7, 11, 200 P. 641, 642, the rule is stated as follows: "The finding of the trial court that the company acquired the notes because the then holder of them was pressing plaintiff in his capacity as indorser for payment does not negative the separate entity of the company. In the absence of any dishonest motive or intention to accomplish a wrong, and as we have said, none was proven, we fail to discover any objection whatever to plaintiff directing the company to purchase the notes. If it be assumed that he caused their purchase for the reason that it was not then convenient for him to meet his obligations as indorser, there would still be wanting the elements to which we have referred, and the presence of which we hold is essential to justify treating plaintiff and the company as identical—as a unit. In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders, but it must further appear that they are the 'business conduits and alter ego of one another,' and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization."

In *Wood Estate Co. v. Chanslor*, 209 Cal. 241, 245, 286 P. 1001, 1002, it is stated: "The law is well settled that, in order to cast aside the legal fiction of a distinct corporate existence, it must appear that the corporation is the business conduit and alter ego of its stockholders, and that to recognize it as a separate entity would aid in the consummation of a wrong. In other words, not only must it appear that one man or two men own the stock and control the policies, but it must also be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person or persons has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." See, also, *D. N. & E. Walter & Co. v. Zuckerman*, 214 Cal. 418, 6 P. (2d) 251, 79 A. L. R. 329; *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 P. 986; *Wenban Estate, Inc. v. Hewlett*, 193 Cal.

675, 227 P. 723; *Ellet v. Los Altos Country Club Properties*, 88 Cal. App. 740, 264 P. 270.

Under the principles enunciated in the above cases, and for the reasons already advanced, it is obvious that on the record before us it is impossible for this court to disregard the separate existence of Frank L. Meline, Inc., and to treat it and the Hollywood Laundry Service, Incorporated, as the alter ego of Frank L. Meline.

For the foregoing reasons that portion of the judgment appealed from by plaintiff is hereby affirmed.

217 Cal. 131

**HOLLYWOOD CLEANING & PRESSING
CO. v. HOLLYWOOD LAUNDRY
SERVICE, Inc.
L. A. 12345.**

Supreme Court of California,
Dec. 28, 1932.

As Modified on Denial of Rehearing Jan. 27,
1933.

1. Appeal and error ⇨1010(1).

Findings of trial court supported by record cannot be disturbed on appeal.

2. Damages ⇨26.

One suing for breach before termination date of contract may recover future damages.

3. Appeal and error ⇨1178(6).

Judgment must be reversed for retrial on issue of damages for breach of contract, where court awarded future damages at rate approximately four times that awarded for past damages and only evidence was of past damage.

While court might have found that plaintiff's past damages had accrued at rate actually found for future damages, evidence as to past damages was highly conflicting, and the only method for trial court's determination with reasonable certainty of amount of future damage was by evidence of past damage. Therefore, the finding awarding future damages at a greatly increased rate was highly inconsistent with and contradictory to finding of past damage.

4. Appeal and error ⇨1071(1).

Appellate court must reverse where there are contradictory, irreconcilable findings about matters material to proper disposition of case.

5. Appeal and error ⇨839(1).

Party cannot attack findings or conclusions with respect to portion of judgment from which he has not appealed.

6. Appeal and error ⇨1075.

Appellate court to which entire judgment is taken for review is not estopped from passing on correctness of judgment as whole by any confession of appellant as to correctness of particular finding.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by the Hollywood Cleaning & Pressing Company against the Hollywood Laundry Service, Inc. From that portion of the judgment adverse to it, defendant appeals.

Reversed and remanded for retrial of issue of damages only.

For prior opinion, see 12 P.(2d) 147.

Walter H. Hewicker, Mott, Vallee & Grant, Paul Vallee and O'Melveny, Tuller & Myers, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for respondent.

PER CURIAM.

This appeal is from the same judgment involved in 17 P.(2d) 709, L. A. No. 12102, this day decided. The present appeal, however, is prosecuted by the defendant from that portion of the judgment adverse to it, while L. A. No. 12102 was an appeal by the plaintiff on the judgment roll from that portion of the judgment adverse to it. The present appeal is by the alternative method, so that the entire record is before us.

[1] It is not necessary to restate all of the facts, as some of the facts pertinent to this appeal have been stated in L. A. No. 12102, to which reference is hereby made. There can be no doubt that the evidence clearly shows that defendant and plaintiff entered into a written contract whereby defendant agreed that for a period of ten years (April 18, 1924, to April 17, 1934) it would solicit, together with its general laundry business, dry-cleaning, dyeing, and pressing business, and would turn over to the plaintiff exclusively all of the dry-cleaning, dyeing, and pressing business it thus acquired. Defendant expressly agreed that all during the ten-year term of the contract it would advertise for and solicit such business in order to secure the maximum thereof. Plaintiff agreed that defendant was to retain 37½ per cent. of the proceeds of all such business as its commission, and agreed to provide proper facilities at its plant to handle all of the business so acquired. The evidence amply supports the finding that for a short period after the agreement was entered into both parties lived up to its terms and conditions. The court found that "about

the month of January, 1925, defendant, without cause or justification, breached said agreement and sent only a part of its dry cleaning, dyeing and pressing business to the plant of plaintiff, and thereafter from on or about the 21st day of March, 1925, without cause or justification, defendant failed and refused, in all respects and in every respect, to comply with the terms of said written agreement, and from and after the 21st day of March, 1925, defendant failed and refused to send any of its said business to plaintiff." The court also found that plaintiff complied with all the terms of the contract, and after its breach was ready, able and willing to perform. These findings are amply supported by the record, and cannot, under well-settled principles, be now disturbed.

After defendant had breached the contract and refused to comply with any of its terms, plaintiff elected to treat defendant's breach as terminating the contract, and in September of 1926, brought this action for the damages it had already sustained and would sustain during the entire period of the contract. The case went to trial in March of 1929, and resulted in a verdict for plaintiff in the sum of \$43,865. The trial court allowed as damages the profits lost by plaintiff by reason of defendant's breach from the date of breach to the date of trial, and also the loss of prospective profits from the date of trial to the termination date of the contract. The trial court made separate findings as to past and future damages, but in rendering judgment added both sums together and rendered judgment for the total.

[2] In the briefs filed with the District Court of Appeal in this case defendant contended that it was error for the trial court to award as damages the prospective profits for the period from the date of trial to the termination date of contract. This contention was based on certain language appearing in *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313, and *Selden v. Cashman*, 20 Cal. 57, 81 Am. Dec. 93. It is true that there is language in those two cases tending to support defendant's position that such prospective profits are not a proper element of damage, but the more recent cases have clearly established the rule that, when an action is brought for breach of a contract before the termination date of the contract, the injured party may recover not only the damages that have accrued at the time of trial, but also the loss that will be incurred for the balance of the contract period. *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 P. 929, 8 L. R. A. (N. S.) 1171. It is true that in most cases the determination of future damage is surrounded with many difficulties, but it hardly rests with defendant to complain of such difficulties, since they exist only because of the wrongful act of the

defendant, itself. *Seymour v. Oelrichs*, supra. It should be mentioned that defendant, in its later briefs, has virtually conceded that it was in error on this point, and that upon proper proof, plaintiff is entitled to both past and future damages.

The sole point now urged by defendant is that the finding in reference to past damage is totally inconsistent with and contradictory to the finding in reference to future damage; that under the evidence in this case the finding as to future damage was predicated on the finding as to past damage; that both findings cannot be correct; that because of the alleged inconsistency the judgment must be reversed. We are inclined to the belief that defendant is correct in this regard.

The trial court found, as already stated, that defendant partially breached the contract in January of 1925, and totally breached the contract in March, 1925. The case went to trial in March, 1929. It therefore follows that at the time of trial there had elapsed a period of three months during which the contract was partially breached, and a period of approximately four years during which the contract had been totally breached. In reference to this period, which we will designate as the period of "past" damage, the court found that, had the defendant complied with the terms of the agreement, plaintiff "would have received prior to the commencement of the trial of this action dry cleaning, dyeing and pressing business from defendant * * * in such amount that plaintiff would have realized and would have made as its net profit * * * the sum of \$7,150.00." In one place in this finding the trial court stated that this sum of \$7,150 was awarded to plaintiff for the period from the date of the breach to the date of the "commencement of this action" (September, 1926). A reading of the entire finding, however, clearly indicates that this was a mistake and that the intent was that the award should be for damages accruing from the date of breach to the date of trial (March, 1929).

[3, 4] After finding that the plaintiff had suffered damage for this period of approximately four years in the sum of \$7,150, the court found that for the period from the date of trial (March, 1929) to the termination date of the contract (April 17, 1934), the plaintiff would have made a net profit of \$36,715. This award was made for a period of approximately five years, which period will be hereafter referred to as the period of "future" damage. If the awards for past and future damages be reduced to a yearly figure, we find that the trial court awarded plaintiff approximately \$1,787.50 per year for past damage, and approximately \$7,343 per year for future damages. We have searched the record carefully and can find no evidence which would

justify this large disparity between past and future damages. Plaintiff admits that the only evidence of damage in the record is evidence of past damage. The only way the trial court in this case had to determine with reasonable certainty the amount of future damage was by the evidence of past damage. In other words, the finding as to future damage, under the evidence produced, was necessarily dependent upon the evidence as to past damage. We find no evidence in the record that could possibly justify a conclusion that future damage would accrue at approximately four times the rate of past damages. Since this is so, it is obvious that both findings cannot be correct. In fairness to plaintiff it should be stated that had the trial court found that plaintiff's past damages had accrued at the rate actually found for future damages, such finding would have ample support in the record. Stated in another way, there is ample evidence to the effect that plaintiff's loss for the four years immediately preceding the trial was in excess of \$7,343 per year. Since future damages can properly be estimated from past damages it therefore follows that the trial court's finding as to future damages finds support in the record. But it is likewise true that the evidence as to past damages was highly conflicting. Defendant offered evidence which if believed would indicate that plaintiff's past damages were not as large as found by the trial court. The lower court, faced with the problem of ascertaining the proper amount of damage, both for the past and future, chose to believe that the past damage actually incurred was approximately \$1,787.50 per year. Since the finding of future damages, under the evidence offered, necessarily had to be predicated on the amount of past damages, the finding that awarded future damages at a rate approximately four times that awarded for past damages, is highly inconsistent with and contradictory to the finding of past damage. This court cannot uphold the finding of future damages, even though it is supported by the evidence, and disregard the finding as to past damage, when such findings are dependent upon each other and are both necessary in order to sustain the judgment, when such findings are utterly contradictory, and cannot possibly be reconciled. Although it is true that findings must be liberally construed to support the judgment if possible, it is equally true that, where there are contradictory, irreconcilable findings about matters material to a proper disposition of the case, the appellate court can do nothing but reverse the case. *Learned v. Castle*, 78 Cal. 454, 18 P. 872, 21 P. 11; *Estep v. Armstrong*, 91 Cal. 659, 27 P. 1091; *Los Angeles, etc., Land Co. v. Marr*, 187 Cal. 126, 200 P. 1051; *Clavey v. Loney*, 80 Cal. App. 20, 251 P. 232; *Meyer v. White*, 54 Cal. App. 293, 201 P. 801.

[5] Plaintiff seeks to avoid the application of the above rule on the theory that, since

the evidence does support the finding of future damage, the finding as to past damage is incorrect. This contention is without merit. Plaintiff has not appealed from this portion of the judgment and so, of course, is in no position to attack the findings or conclusions of law. *Trevaskis v. Peard*, 111 Cal. 599, 44 P. 246; *Garibaldi v. Grillo*, 17 Cal. App. 540, 120 P. 425. This is not a case where the evidence as to damage, either past or future, is uncontradicted. The evidence as to damage was highly conflicting, and for that reason we cannot say, as a matter of law, that either the finding as to past damage or the finding as to future damage was correct or incorrect. Either finding, standing alone, finds support in the record, but together they are contradictory and irreconcilable. Both cannot be correct and this court has no power to determine on conflicting evidence which is correct.

[6] Defendant contends that all the plaintiff can recover is the past damage as found by the trial court, and future damage computed on the same basis. It is argued that plaintiff, not having appealed from this portion of the judgment, cannot attack either of the findings as to damage. This, as we have seen, is correct. But it is further argued that defendant can attack either or both findings, and that since defendant concedes the finding as to past damage is correct, that finding is conclusive, not only on plaintiff but also upon this court. This contention is without merit. The judgment in this case was for \$43,865, which sum included the amount found by the trial court as to future as well as past damage. Defendant has appealed from that money judgment. The entire judgment is before us for review and no concession on the part of defendant as to the correctness of any particular finding can estop this court from passing on the correctness of the judgment as a whole.

From what has already been said it is obvious that that portion of the judgment appealed from by defendant must be reversed. There is no reason, however, for the retrial of any issue other than that of damage, both as to the past and future. The existence of the contract is undisputed. Defendant has conceded that the finding of the trial court that defendant breached the contract without cause is amply supported by the record, and cannot, for that reason, be successfully attacked on this appeal. The evidence clearly establishes that plaintiff abided by all the terms of the contract. The only issue still to be determined is the amount of damage, both past and future, that plaintiff has suffered by reason of the breach.

The portion of the judgment appealed from by defendant is therefore reversed, and the cause remanded for a retrial of the issue of damage only.

217 Cal. 150

PEOPLE v. DUNTLEY.

L. A. 13384.

Supreme Court of California.

Dec. 30, 1932.

1. Automobiles ⇨76.

To subject one to gross receipts highway transportation tax, he must be common carrier and operate between fixed termini or over regular route (Pol. Code § 3664aa, as added by St. 1927, p. 17; Const. art. 13, § 15, adopted 1926).

2. Automobiles ⇨69.

State may classify carriers as common carriers and private or contract carriers for purpose of taxation and regulation (Pol. Code, § 3664aa, as added by St. 1927, p. 17; Const. art. 13, § 15, adopted 1926).

3. Automobiles ⇨65.

Gross receipts highway transportation tax is a "property tax" (Pol. Code, § 3664aa, as added by St. 1927, p. 17; Const. art. 13, § 14 as amended in 1930; § 15, adopted 1926).

[Ed. Note.—For other definitions of "Property Tax," see Words and Phrases.]

4. Statutes ⇨245.

Provisions of tax statutes should not be extended by implication.

5. Statutes ⇨245.

Doubts arising in construing tax statutes are construed most strongly against government.

6. Carriers ⇨4.

Whether carrier is common or private carrier is primarily question of fact.

7. Automobiles ⇨76.

Evidence held to show that motor carrier of gas products for various customers, pursuant to individual contracts, was not "common carrier" subject to gross receipts highway transportation tax (Pol. Code, § 3664aa, as added by St. 1927, p. 17; Civ. Code, §§ 2168-2209; Const. art. 13, § 15, adopted 1926).

"Common carrier" is one who undertakes generally and for all persons indifferently to carry goods and deliver them for hire, and whose public profession or obvious employment is such that if he refuses without some just ground to carry goods for any one in the course of his employment and for a reasonable and customary price he will be liable in an action. "Private carriers" are such as carry for hire, and do not come within definition of common carrier.

[Ed. Note.—For other definitions of "Common Carrier" and "Private Carrier," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the People of the state of California against G. M. Duntley. From the judgment for defendant, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., R. Lee Chamberlain and Warner I. Praul, Deputy Attys. Gen., for the People.

Harry A. Encell and Hugh Gordon, both of San Francisco, and Arlo D. Poe, of Los Angeles, for respondent.

SHENK, J.

This is an appeal from a judgment for the defendant in an action to recover highway transportation taxes.

During the years 1928 and 1929 the defendant was engaged in the business of transporting gasoline and crude oil products between various points throughout the southern part of the state by means of auto trucks for hire. This action was commenced to recover a tax levied against the defendant by the state board of equalization amounting to 5 per cent. of the gross receipts from the operations of the defendant during the year 1928, and accruing penalties.

The state bases its claim to the tax under section 15 of article 13 of the Constitution, and section 3664aa of the Political Code (added by St. 1927, p. 17). The constitutional section provides, so far as pertinent, that any person or company owning, operating, or managing any trucks or auto trucks used in the business of transportation of property "as a common carrier for compensation over any public highway in this State between fixed termini or over a regular route" shall be taxed exclusively for highway purposes, and shall pay annually to the state a tax upon the franchises, trucks, or automobile equipment, and other property used exclusively in the operation of the business in this state, equal to 5 per cent. of the gross receipts from operation; and that such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property enumerated.

Political Code § 3664aa and subsequent sections provide the machinery for the ascertainment, levy, and equalization of the tax by the state board of equalization, the payment thereof to the state treasurer, and the enforcement of payment by action in the name of the state. The tax for any one year is based on the gross receipts from operations during the preceding year, and the state board of equalization is granted authority, among other things, to ascertain the amount of the tax by an examination of the books of the op-

erators. Pursuant to this authority the state board of equalization caused an audit to be made of the records of the defendant showing his operations for the year 1928. The audit disclosed gross receipts for that year, subject to tax, in the sum of \$293,153.08. Suit was brought for 5 per cent. of the amount and penalties.

Upon the trial the plaintiff offered in evidence a certified copy of the assessment roll. Under the statute this established a prima facie case on behalf of the plaintiff. The defendant did not question the amount of the tax, but interposed the defense that he was not subject to any tax for state purposes, and introduced evidence in support of his claim. The court found: "II. That in the conduct of said business, said defendant, G. M. Duntley, did not offer to the public to carry oil, gasoline or other liquid oil products or any commodities whatsoever and did not undertake generally, for all persons indifferently, to haul or transport oil, gasoline or liquid oil products or other commodities; that in the operation of said business said defendant transported property only for a limited number of persons, firms and corporations selected by said defendant and only pursuant to agreements for such transportation entered into in each instance prior to performing such transportation service; that the persons, firms and corporations for whom such transportation service was rendered did not constitute any distinct part or class of the general public; that in the course of said business said defendant did not haul or transport any property without first having entered into a special agreement with the shipper thereof for such transportation; that frequently and at numerous times said defendant, in the course of his said business, declined and refused to haul shipments of oil, gasoline and other oil products offered to him for transportation; that said defendant did not advertise to the public generally that he was engaged in the business of transporting oil, gasoline, oil products or any other commodities whatsoever and did not solicit generally for such business; that said defendant did not publish or maintain any schedule of rates and charges for the transportation service rendered by him in the course of said business; that the rates charged and collected by said defendant for his said transportation service were in every instance fixed by agreement with the shippers. III. That in the operation of said transportation business, said defendant did not maintain regular schedules, either as to time, routes or termini, but on the contrary, defendant operated his trucks at such times and between such points as were required by his agreements with shippers and over such routes as best suited his convenience; that the points of origin and destination of the shipments transported by said defendant

were scattered throughout the southern portion of the state of California from Imperial Valley points on the south to points in the Owens Valley and in the southern portion of the San Joaquin Valley on the north."

The court concluded that the business of the defendant in 1928 was not that of transportation of property as a common carrier for compensation over public highways in this state between fixed termini or over a regular route, and that the assessment and levy attempted to be imposed upon him was illegal and void.

The question presented is whether the foregoing findings are supported by the evidence. It necessarily requires an examination of the record. In support of the assessment roll the plaintiff also introduced the report of the board's auditors taken from the records of the defendant and showing his 1928 operations. During that year the defendant operated twenty-five tank trucks and twenty-five tank trailers. The report classified the defendant's operations into six major routes, designated as regular routes, with the gross revenue from each, and arranged in schedules. Schedule A classified the regular routes as follows: Harbor route, between the city of Los Angeles and Harbor points; Bishop route, between Los Angeles and Bishop, via Mojave; Imperial Valley route, between Los Angeles and Imperial Valley, including Yuma; Coast route, between Los Angeles and Ventura, Santa Barbara, etc.; Ridge route, between Los Angeles and Newhall, Saugus, etc., over the Ridge road; and San Diego route, between Los Angeles and San Diego. Under a separate heading was placed the item of "Miscellaneous Hauling, not over a regular route, non-taxable," the gross revenue from which was \$52,681.53. Schedule B listed the customers on each route and the revenues from each customer. On the Harbor route there were twenty-one customers; on the Bishop route, five customers; on the Imperial Valley route, sixteen customers; on the Coast route, fourteen customers; on the Ridge route, eight customers; and on the San Diego route, seven customers. With very few exceptions the customers were oil, gas, or refining companies. Eighty-five per cent. of the defendant's business was with the five major oil companies, namely: Union Oil Company, Shell Oil Company, Standard Oil Company of California, Western Oil & Refining Company, and Sunset Pacific Oil Company. He also hauled for the Fruit Growers' Supply Company.

The hauling was done from the oil fields, storage plants, or refineries of the major oil companies to their gas and oil service stations and customers located at various cities, towns, and localities in the southern part of the state. The rates for the trucking were arrived at by agreement in advance of the service performed, between the defendants and

his customers. The method of arriving at the rates to be charged is illustrated by the Defendant's Exhibit G, which is a letter dated October 29, 1928, addressed to the defendant and signed by the traffic manager of the Standard Oil Company of California as follows: "Please quote me rates for trucking gasoline in truck and trailer lots from Vernon and Burnett to the following points." Then follows a list of numerous cities and towns in southern California. The defendant complied with the request by noting on the letter opposite the name of each place the rate submitted, and when the bid was accepted the commodity was hauled by the defendant at the specified rate. Another illustration is the request for quotation of rates from the Shell Oil Company for trucking orchard heater oil from the Wilmington or Dominguez refineries to forty-seven towns in the so-called citrus belt, and the submission by the defendant of rates as requested, following which trucking was done by the defendant in accordance with the quoted rates.

The defendant, G. M. Duntley, testified that all of the trucking done by him was performed after a written or oral agreement with each shipper as to the rate to be charged and collected; that on occasion the rate quoted by the defendant would not be accepted and the trucking business would go to some other concern; that on other occasions he would refuse to quote a rate or to meet the rates requested, and that no steps were ever taken by any shipper to compel the defendant to haul at a particular or any rate; that on many occasions a part of the consideration for the trucking with the major companies was the requirement that the products of the latter be used by the defendant. When asked to state how frequently the defendant refused business, Mr. Duntley stated: "Oh, we refused business every day. Sometimes they wanted us to take a load here or there—many times, we didn't have the equipment available. Many times we didn't want to haul for certain people. The major companies didn't want us to haul for bootleggers, so-called gasoline and crude oil products brokers, that they claimed were bootleggers, and they asked us not to haul for them, in many cases." He further defined bootleggers as "fellows who sit on the outside of the city and sell gasoline much below the city regulation for gasoline, and sell it much cheaper." He further testified that he hauled for some of those dealers after he started hauling gasoline in 1926, but that the major companies asked him to get away from that work, which he did generally, but that he hauled for some of them from time to time; that he refused at least 50 per cent. of the business offered to him by the "outsiders"; and that he did no work for any of them except in pursuance of a contract theretofore entered into.

The defendant owned oil-spreading ma-

chines, and obtained, after the submission of bids, contracts for spreading oil over highways. The percentage of revenue from this work is not shown, and the amount thereof is undoubtedly included in the board's item of nontaxable revenue. The hauling done for the Fruit Growers' Supply Company consisted of the delivery of oil to individual orchardists at their ranches. The defendant originally owned numerous dump trucks, which he used under contracts with the Riverside Portland Cement Company in the handling of ore, and from which he received a considerable revenue. These dump trucks were later converted into tank trucks and trailers used in 1928. The books of the defendant disclosed that in 1928 he hauled for numerous individual customers in addition to the five major companies. This business was done under special contract, constituted odd loads in the main, and did not exceed 10 per cent. of the total business.

The defendant paid the state license fees required by the statute for commercial trucks. Under the schedule prescribed by law he paid a license fee of \$143 on each tank truck and a like amount on each trailer. This was in addition to the personal property taxes and other local charges not imposed on common carriers. The defendant sold out his trucking business in 1930. During the time he was engaged in this business he was the president and general manager of the Motor Freight Terminal Company, a certificated public utility operating a general motortruck freight business between Los Angeles, San Luis Obispo, and intermediate points, and spent much of his time superintending that business. The public utility business so conducted was in no wise connected with the oil tank trucking business.

Other witnesses corroborated the testimony of Mr. Duntley to the effect that no tank trucking was undertaken except upon preliminary negotiations as to rates and points of service; that the principal business of the defendant was with the five major oil companies and the Fruit Growers' Supply Company; that the defendant refused to bid for the business of other major oil companies and refused to take business generally, partly because the business was undesirable and partly because the five major oil companies insisted that the defendant's business be confined to their activities; that by no means did the defendant receive all of the business of such major companies; that the defendant never held himself out as a carrier willing to take the business of any or all who might apply and that no business was done even with the principal customers of the defendant except after preliminary negotiations and arriving at an agreement as to the price for the service.

Representatives of the major oil company customers of the defendant testified that there

was no regularity with reference to the service performed by the defendant; that the business given to the defendant depended largely on production and consumption of oil products; that they did business not only with other so-called contract carriers, but also with others who were certificated or common carriers; and that the defendant never represented himself as willing to handle all their business, but only such as might be the result of negotiation and contract.

In rebuttal the auditor of the state board of equalization testified that he assembled the data and prepared the schedules and routes specified therein solely from an examination of the records of the defendant; that he found in those records no routes specified by name, but allocated the business of the defendant arbitrarily to the several routes designated by him in his report to the board, using as a basis for his conclusions the ledger accounts, truck tickets, and weigh bills submitted to him by the defendant. Those records showed the points of origin of the hauls and the destinations. The points of origin were numerous localities in the Los Angeles area, and the points of destination spread out in fan shape and in varying distances from Los Angeles to San Diego, to the Imperial valley, to San Bernardino, to Bishop, to Bakersfield, and to Santa Barbara. He arbitrarily placed each destination on a route from the point of origin which in his opinion the average truckmen would follow, and gave that route a name.

[1] Before the defendant may be held for the gross receipts highway transportation tax two combinations of fact must exist. First, he must be a common carrier and operate between fixed termini, or, secondly, he must be a common carrier and operate over a regular route. Essential to each combination must be the fact that he is a common carrier. If he is not a common carrier, the fact that he may operate between fixed termini or over a regular route would not subject him to the gross receipts tax.

[2] The law of this state specifically recognizes a distinction between common carriers and private or contract carriers. There can be no doubt that the state may so classify them for purposes of taxation and regulation. A state may subject a private or contract carrier to a state tax based upon the amount of business done, and it may impose the same burden of taxation on them as it does on common carriers. The state of Kansas in its 1931 Motor Vehicle Act (Laws Kan. 1931, c. 236) provided the same state highway tax on both private or contract carriers and on common carriers, based upon the amount of business done, and measured by the gross ton mile. The statute was upheld. *Continental Baking Co. v. Woodring*, 286 U. S. 352, 52 S. Ct. 595, 76 L. Ed. 1155.

The state of Texas, by statute (Acts Tex. 1919, c. 314 as amended by Acts Tex. 1931, c. 277 [Vernon's Ann. Civ. St. art. 911b, § 1 et seq.]), provides for certificates of public convenience and necessity to autotruck common carriers, and requires that contract carriers shall obtain a permit from the Railroad Commission before they may lawfully conduct their business. In granting the permit the commission has power to fix the minimum rates to be charged by the contract carrier. Discretion is lodged in the commission to deny a permit if in its opinion "the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory." The statute declares that the business of operating as a motor carrier of property for hire along the highways of the state is one affected with the public interest. The Texas statute was upheld as a valid exercise of the legislative power of the state in regulating the use of the highways of the state, in an exhaustive opinion by the Supreme Court of the United States. *Stephenson et al. v. Binford et al.*, 53 S. Ct. 181, 77 L. Ed. —, filed December 5, 1932.

Unregulated truck transportation over the highways has developed a difficult and perplexing problem. The state of California has approached the problem of such regulation in a much more restricted fashion. Common carriers are required under the Auto Stage and Truck Transportation Act (St. 1917, p. 330 as amended) to obtain from the Railroad Commission a certificate of public convenience and necessity. Contract carriers are claimed to be without adequate regulation both as to rates of service, use of the highways, and interference with regulated common carriers. This is undoubtedly true, but the problem suggested is a legislative and not a judicial one. We are here dealing not with a regulatory measure in its proper sense, but with a tax question arising under our Constitution and statutes.

[3] This state has also approached the problem of imposing a tax on highway transportation from an angle different from and more restricted than that imposed by the state of Kansas, as above indicated. Prior to the enactment of section 15 of article 13 of our Constitution in 1926, autotruck owners and operators, whether common carriers or not, were subject to taxation on the ad valorem basis provided by section 1 of article 13 of the Constitution. By the enactment of said section 15 auto stage and autotruck common carriers of passengers and freight described in that section were removed from the operation of section 1. *Los Angeles, etc., Transp. Co. v. Superior Court*, 211 Cal. 411, 295 P. 837. The tax provided by section 15 is a property tax the same as that imposed on public utilities generally by section 14 of ar-

title 13. *Alward v. Johnson*, 208 Cal. 359, 281 P. 389. Two main objects were accomplished by the enactment of section 15. First, from the standpoint of the state, it withdrew the tax revenues from autotruck common carriers from local taxation and allocated such revenue exclusively to state highway purposes. And, secondly, from the standpoint of the common carriers involved, they were relieved of the payment of all other taxes and licenses, state, county, and municipal. Section 15 was not entirely self-executing, but subdivision (b) thereof provided that the Legislature should pass all laws necessary to carry the section into effect. Pursuant to this authorization the Legislature in 1927 enacted section 3664aa of the Political Code, specifically providing for the levy and collection of the tax on common carriers as authorized by section 15 of article 13 of the Constitution. Since the latter section did not authorize the taxation of private and contract carriers for compensation on the basis of a percentage of their gross receipts and solely for highway purposes, or otherwise, the Legislature of 1927 was apparently confronted with the problem of exacting from private or contract carriers a revenue for highway purposes approximating the gross receipts tax on common carriers. Accordingly in 1927 section 77 of the California Vehicle Act (St. 1927, p. 1708) was attempted to be amended to provide, first, for the regular registration fee of three dollars for every motor vehicle and trailer; and, secondly, an additional registration fee on vehicles and trailers used for the transportation of passengers and freight for hire based on the weight and capacity of the truck and trailer. This 1927 enactment was subjected to the referendum and was approved by the electorate of the state at the general election held on November 6, 1928. Said section 77 was re-enacted in 1929 (St. 1929, pp. 508, 524), and has withstood the final test of judicial scrutiny. *Carley & Hamilton v. Snook*, 281 U. S. 66, 50 S. Ct. 204, 74 L. Ed. 704, 68 A. L. R. 194. Under said section 77 of the California Vehicle Act the contract carriers for compensation in this state pay a substantial revenue to the state. It is under this statute that the defendant paid during the year 1928 the sum of \$143 on each truck and trailer. This exaction is necessarily in addition to the ad valorem taxes paid by the carrier each year under section 1 of article 13 of the Constitution and also in addition to whatever local taxes and license fees are imposed. The fees provided by section 77 of the California Vehicle Act are paid into the motor vehicle fund of the state and are available first, for the support of the motor vehicle department, and are then distributed to the state highway fund and to the several counties of the state in accordance with the provisions of the statute. These funds must be used exclusively for road and

highway purposes, including some support to the motor vehicle department.

The laws relating to the taxation of common carriers on the one hand, and contract carriers on the other, have been referred to at some length for the purpose of indicating that in this and other similar cases pending, the general revenues of the state are not affected; that the Constitution and laws of the state recognize a distinction between autotruck common carriers and contract carriers for hire; that the Constitution by imposing the ad valorem tax, and the Legislature by the enactment of section 77 of the California Vehicle Act are deemed to have imposed upon contract carriers a substantial equivalent of the gross receipts tax imposed on autotruck common carriers for hire; that the finding of the trial court that the defendant is not a common carrier, but is a contract carrier, has not resulted in an escape of substantial taxation on the part of the defendant, and that from a practical standpoint the controversy presented appears to be, in its major aspect, whether the tax and license exactions on the defendant, and others similarly situated as contract carriers, shall inure to the public only in part for state highway purposes, or shall inure in whole to the benefit of the state highway funds. It may be said in passing that if the fees and exactions of section 77 of the California Vehicle Act, plus the ad valorem taxes and license fees, are not a substantial equivalent of the gross receipts tax imposed on common carriers, the rates of the former are subject to change at the lawful will of the Legislature.

It is plain to be seen that one of the main purposes of the contract carriers in declining to dedicate their property to public use and in resisting the efforts of the state to impose the status of a public utility upon them is to avoid, as to their business, the incidents of a common carrier, chief among which is perhaps the result that when their property is subjected to public use they become subject to the jurisdiction of the Railroad Commission under the Auto Stage and Transportation Act, in which event the discretion is vested in the Railroad Commission to grant or deny a certificate of public convenience and necessity to a common carrier. If one be denied, the common carrier as such must go out of business entirely. If it be granted, the rates and charges and services are subject to regulation by the Railroad Commission. If it had been the intention of the people of the state to subject all carriers, whether public or private, to regulation by the Railroad Commission, the Constitution could have so provided, as was done by general statute in the state of Kansas. Not having done so, the refusal of a carrier in good faith to dedicate his property to public use, and his insistence upon his right to operate as a contract carrier under the exactions imposed by

law upon him in that capacity, would seem to be entitled to respect. *Frost v. Railroad Commission*, 271 U. S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457; *Pond on Public Utilities* (4th Ed.) vol. 3, § 727, p. 1454.

Of course, where a carrier is in fact and law a common carrier masquerading as a private or contract carrier, he should be declared to be a common carrier and be held to his duties and responsibilities as such. But in this case there is no charge or showing of bad faith on the part of the defendant. The assumption of a false position on the part of a carrier is tantamount to fraud on his part, and, when the question of his good faith is not raised, bad faith on his part will not be assumed; and, when such be the issue, the burden is necessarily on the plaintiff to show that he is something other than he holds himself out to be.

We come now to the question whether the defendant, notwithstanding the findings of the court, is under the facts a common carrier in law. Neither the Constitution nor section 3664aa of the Political Code, nor the Auto Stage and Transportation Act, defines the term common carrier used therein. Section 2168 of the Civil Code defines a common carrier as follows: "Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." Section 2169 provides: "A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." Then follow sections 2170 to 2209, inclusive, of the Civil Code defining the duties, rights, and liabilities of a common carrier. This court has followed the statutory definition. *Walther v. Southern Pacific Co.*, 159 Cal. 769, 116 P. 51, 37 L. R. A. (N. S.) 235. It has also approved the definition of Moore on Carriers, p. 20, vol. 1 (1st Ed.); vol. 1 (2d Ed.) p. 22, as one who "holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable in an action." Associated, etc., Co. v. Railroad Commission, 176 Cal. 518, 522, 169 P. 62, L. R. A. 1918C, 849. "The authorities recognize two classes of carriers, viz., private carriers and common carriers. All persons who undertake for hire, to carry the goods of another, belong to one or the other of these classes. * * * The former are not bound to carry for any reason unless they enter into a special agreement to do so. The latter are bound to carry for all who offer such goods as they are accustomed to carry and tender reasonable

compensation for carrying them, and if they refuse to perform their obligation in this respect, they are liable to respond in damages. Private carriers are such as carry for hire and do not come within the definition of a common carrier." 4 R. C. L., p. 549, and cases cited. "A common carrier has been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently; and hence he is regarded, in some respects, as a public servant. In order to impress upon one the character and impose upon him the liabilities of a common carrier, his conduct must amount to a public offer to carry for all who tender him such goods as he is accustomed to carry. The definition has not always been thus restricted, but the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it." 4 R. C. L., p. 546, and cases cited.

There are cases in this state involving the scope of the powers of the Railroad Commission in declaring, under the Constitution and the Public Utilities Act, certain concerns to be public utilities, and holding the power to have been lawfully exercised. *Allen v. Railroad Commission*, 179 Cal. 68, 175 P. 466, 8 A. L. R. 249; *Klatt v. Railroad Commission*, 192 Cal. 689, 221 P. 923. In the *Allen Case* it was said (page 85 of 179 Cal., 175 P. 466, 473) that "to hold that property has been dedicated to a public use is 'not a trivial thing' * * * and such dedication is never presumed 'without evidence of unequivocal intention.'" In the *Klatt Case*, this court said (page 702 of 192 Cal., 221 P. 926, 931): "The law requires that there shall be clear proof of an unequivocal intention to dedicate property to a public use before it can be taken from the owner." Those cases involved the question whether certain water companies were public service corporations. If they had been lawfully so declared, the result would not have been that subsequently they could have been put out of business at the discretion of the Railroad Commission without compensation, but only that they would thereafter have been subject to control and regulation on the part of the commission. When business, such as that of the defendant herein, has been declared to be that of a common carrier, and as such a public utility in its essential characteristics (*Western Ass'n, etc., R. R. v. Railroad Comm.*, 173 Cal. 802, 162 P. 391, 1 A. L. R. 1455), jurisdiction is vested in the commission to deny to such carrier the right to continue in business commenced since 1917, upon a showing

and determination that public convenience and necessity do not require or justify such further operation. Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 209 P. 586. This is true, notwithstanding the fact that such operation has continued for a long series of years under his belief in good faith that he was a private carrier. When so denied the right, he is denied compensation for the right of which he has been deprived, presumably on the theory that he had no such right in the beginning without public sanction, and he must then cease to do business at least as a common carrier.

[4, 5] When we come to the more specific question of subjecting a person to a tax on the ground that he has devoted his business and property to public use, another rule of law may not be disregarded, and that is, that in "the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." Pioneer Express Co. v. Riley, 208 Cal. 677, 687, 284 P. 663, 667.

[6, 7] The findings of the trial court quoted in the earlier portion of this opinion are an admixture of findings of fact and conclusions of law. That this is so does not subject them to severe criticism, for the reason that the problem presented to the court was a mixed question of fact and law. Whether a carrier is common or private is primarily a question of fact in each case. Haynes v. MacFarlane, 207 Cal. 529, 279 P. 436. In so far as the findings of the trial court are of the facts they may not be said to lack substantial support. The only showing counter thereto is the arbitrary segregations and classifications of the auditor of the state board of equalization and the records on which his report was made which we deem insufficient to justify a reversal. As to the conclusions to be drawn from the facts found, it may not fairly be said that they are unreasonable under all of the facts and circumstances appearing in the record. If it be assumed that the opposite conclusion might likewise have been supported on findings against the defendant, it would, of course, not change the result on this appeal. The determination that the record supports the findings and conclusions of the trial court that the defendant is not a common carrier renders it unnecessary to decide whether he conducted his operations between fixed termini or over a regular route. If those questions were resolved against the defendant, it would not follow that he would be subjected to the gross receipts tax, because of the ab-

sence of the essential element of a common carrier status.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; TYLER, Justice pro tem.

217 Cal. 166

PEOPLE v. LANG TRANSPORTATION
CO. et al.

L. A. 13629, 13630.

Supreme Court of California.

Dec. 30, 1932.

1. Automobiles ⇨76.

Court cannot assume subterfuge on part of highway motor carriers not holding themselves out as common carriers, so as to hold them common carriers subject to gross receipts highway transportation tax (Pol. Code, § 8664aa, as added by St. 1917, p. 17; Const. art. 13, § 15, adopted 1926).

2. Automobiles ⇨76.

Whether truck operator for hire is common or private carrier is primarily question of fact.

3. Public service commissions ⇨19(2).

Regularity of Railroad Commission's action will be presumed same as court's judgment; absent application for review (Code Civ. Proc. § 1908, subd. 1).

4. Automobiles ⇨100.

Railroad Commission's final determination in former case, that motor operators for hire were not common carriers, held conclusive in state's proceeding against same operators for gross receipts highway transportation tax upon showing that operators' status remained unchanged (Pol. Code, § 8664aa, as added by St. 1917, p. 17; Const. art. 13, § 15, adopted 1926).

5. Automobiles ⇨100.

Findings of state board of equalization as to facts necessary to give it jurisdiction are reviewable by Supreme Court.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Actions by the People of the state of California against the Lang Transportation Company and others. From the judgments for plaintiff, defendants appeal.

Judgments reversed.

Sanborn, Roehl, Smith & Brookman, A. Roehl, Douglas Brookman, Hugh Gordon, Sanborn, Roehl & Brookman, and Sanborn & Roehl, all of San Francisco, for appellants.

U. S. Webb, Atty. Gen., Warner I. Praul and R. L. Chamberlain, Deputy Attys. Gen., for the People.

SHENK, J.

The appeals in these cases (consolidated for the purpose of the appeals) are from judgments in favor of the plaintiff in actions to recover highway transportation taxes assessed against the defendants for the years 1928 and 1929. The taxes were assessed by the state board of equalization pursuant to the provisions of section 15 of article 13 of the Constitution, and section 3664aa of the Political Code (as added by St. 1927, p. 17). The actions were commenced in September, 1928, and April, 1930, respectively, and judgments were entered for \$30,344.18 for the 1928 tax, and \$26,274.69 for the year 1929; the same being 5 per cent. of the defendant's gross receipts from operations for those years, plus penalties. The defendants are Mike Lang and his son and daughter, Howard and Gene, operating as a partnership under the name of Lang Transportation Company.

The amount of the 1929 tax was ascertained by the board from a report of its auditor gleaned from the defendants' report to the board of their 1928 revenue and from the records of the business of the defendants for that year. The tax for 1928, which normally would be based on the revenues for 1927, was arbitrarily assessed for the reason that the defendants made no report to the board of the revenues of that year, and the complete records of the defendants for that year were not available. In making up his report, the auditor of the board proceeded in substantially the same manner as that described in the opinion in the case of *People v. Duntley* (Cal. Sup.) 17 P.(2d) 715, this day decided. The certified copy of the assessment rolls and the report of the auditor, having been received in evidence as a prima facie case for the plaintiff, the defendants introduced evidence in support of their claims that their transportation business was that of a contract carrier, and that none of their business was carried on between fixed termini or over a regular route. The trial court found, in effect, that the defendants were operating as common carriers between fixed termini or over a regular route, and entered the judgments appealed from.

Prior to 1922 the defendants were engaged in a general trucking and draying business in and around Bakersfield, Kern county. In that year they removed their center of operations to Los Angeles. From 1922 to 1925 they were engaged as general contractors

in the construction of oil and gas pipe lines, and in the hauling by autotrucks of construction material and equipment, heavy machinery, tanks, poles, pipes, and oil well equipment, between supply houses in Los Angeles and various oil fields and other places where construction work was in progress. In 1925 they took on the transportation of gasoline by tank truck in truck load quantities from oil refineries to numerous oil stations scattered throughout the southern and central portions of the state. In 1927, 99 per cent. of the gasoline hauled by the defendants was hauled for four companies, and 80.1 per cent. of their general trucking business, other than gasoline hauling, was done for three customers. In 1928, 94.3 per cent. of their gasoline hauling was done for six companies, and 86.9 per cent. of their other trucking business was done for eight companies. In all cases the hauling by the defendants was performed pursuant to individual contracts entered into prior to the commencement of any work and after negotiations with the customers as to price and service. The defendants reserved the right to reject, and rejected, hauling of merchandise of a similar kind for numerous other oil companies and corporations, and many times refused to bid on the business offered by their regular customers. In performing the hauling service the defendants' trucks were subject to the directions of their customers. The defendants have never held themselves out as common carriers to the public nor to that portion of the public which has need of such service as they perform, and have always reserved and exercised the right to accept or reject business offered to it.

[1] It may be assumed that, notwithstanding the foregoing facts, the defendants might properly be held to be common carriers. This would especially be true if there were in the case any evidence of bad faith or evasion, or an attempt on the part of the defendants falsely to assume the attitude of a private carrier, as was the case in *Haynes v. MacFarlane*, 207 Cal. 529, 279 P. 436. This is not such a case on the record presented, and subterfuge and pretense contrary to the fact may not be inferred. *Weaver v. Public Service Commission*, 40 Wyo. 462, 278 P. 542. The fact is that for the year 1929 the defendants paid to the state and to its counties and municipalities on account of taxes and license fees an amount in excess of the 5 per cent. gross receipts tax now sought to be collected.

[2-4] Assuming, as is the law, that the question of whether an autotruck operator for hire is a common carrier or a private carrier is primarily a question of fact in each case (*Haynes v. MacFarlane*, supra), when we come to consider the findings of the trial court in the present case we are

met with the following undisputed facts: On July 3, 1926, the Railroad Commission found and determined (Dec. No. 17088) that the defendants were not common carriers at that time, and that when their status was brought on for consideration by the state board of equalization and by the superior court, the nature, character, and conduct of their business was the same as it was when the Railroad Commission found them not to be common carriers. The proceeding before the commission was instituted by the Bakersfield and Los Angeles Fast Freight Company, a corporation, and the Los Angeles and Westside Transportation Company, as complainants, against these defendants as certain of the defendants. (Commission Case No. 2006.) The purpose of the proceeding was to have the commission find and declare the defendants common carriers operating between fixed termini or over regular routes. After a full hearing the commission found, as above stated, that the defendants were not common carriers, and dismissed the proceeding. No application to this court to review the action of the commission was presented, and the order became final. The presumption of regularity of that proceeding will be indulged, the same as is done with respect to judgments of courts. *Western Canal Co. v. Railroad Commission* (Cal. Sup.) 15 P.(2d) 853. The effect of a final order of the Railroad Commission on the rights of the parties in subsequent proceedings was accorded like vitality in *Carlson v. Railroad Commission* (Cal. Sup.) 15 P.(2d) 859, and in *Albin v. Railroad Commission* (Cal. Sup.) 15 P.(2d) 860. While the parties to the present case are not technically the same as in the proceeding before the Railroad Commission, wherein the defendants were found not to be common carriers, we think the determination of the commission should be given controlling weight in the case at bar on the record presented. To permit the common carrier status of the defendants, finally determined in their favor by the Railroad Commission in an adversary proceeding, to be here questioned, and to permit the state to relitigate the identical issue before the state board of equalization or the superior court, when the status of the defendants has not changed and is affirmatively shown to have continued the same, would not accord to the order of the Railroad Commission the finality to which it is entitled in this case. The proceeding before the commission was in the nature of a proceeding in rem. The commission exercises judicial powers, and its final determinations within its jurisdiction have the formality of judgments of courts of record. Within its limited sphere its final determinations and orders with reference to the condition or relation of the defendants may well be as conclusive as the judgment

of a court under subdivision 1 of section 1908 of the Code of Civil Procedure.

The finding of the court of the common carrier status of the defendants is therefore not supported by the record. The question whether they were operating between fixed termini or over a regular route becomes immaterial.

[5] It is insisted by the plaintiff that the determination of the state board of equalization that the defendants were common carriers is conclusive and beyond review. It is assumed that if the right to levy the tax were unquestioned the action of the board would be conclusive (*Los Angeles, etc., Co. v. County of Los Angeles*, 162 Cal. 164, 121 P. 384, 9 A. L. R. 1277), but the determination of the board on the question whether the facts existing were sufficient to bring the case within the scope of its powers is subject to review in so far as they do, as here, present a question of law bearing upon the subject. In other words, the finding of the board is not conclusive as to the facts necessary to the existence of the board's jurisdiction. *Allen v. Railroad Commission*, 179 Cal. 68, 74, 175 P. 466, 8 A. L. R. 249; *Traber v. Railroad Commission*, 183 Cal. 304, 191 P. 366.

Other points involved herein are discussed and passed upon in the opinion in the *Duntley Case* (Cal. Sup.) 17 P.(2d) 715, this day filed.

The judgments are reversed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; TYLER, Justice pro tem.

217 Cal. 102

CORPORATION OF AMERICA v. EUSTACE
et al.

L. A. 12804.

Supreme Court of California.

Dec. 28, 1932.

1. Mortgages — 512.

Under statute, holder of sheriff's deed under execution sale of debtor's interest in one of two mortgaged lots could require sheriff at foreclosure sale to offer lots separately (Code Civ. Proc. §§ 694, 726).

2. Mortgages — 594(2).

That holder of sheriff's deed, under execution sale of husband's interest in one of two mortgaged lots owned by husband and wife as joint tenants, purchased both lots at foreclosure sale, did not have effect of statu-

tory redemption; hence wife's judgment creditor was entitled to redeem under statute (Code Civ. Proc. § 700a et seq.).

Claim that wife's judgment creditor under circumstances had no right to make statutory redemption from mortgage foreclosure sale was based on contention that owner or his successor in interest has ultimate right of redemption, and that once title disposed of at foreclosure sale rests in original owner or his successor in interest, than statutory right of redemption as such may no longer function. In other words, it was argued that if debtor or his successor in interest purchased at sale, this has effect of statutory redemption, and therefore is attended with statutory consequences; namely, termination of effect of sale and restoration of estate, with resulting conclusion that any right of redemption is thereby terminated.

3. Execution ☞302.

Judicial sales ☞59.

"Redemption" under statute from execution or judicial sale is not "sale" mentioned therein; purchase and redemption being fundamentally different (Code Civ. Proc. § 700a et seq.).

[Ed. Note.—For other definitions of "Redemption" and "Sale," see Words and Phrases.]

4. Mortgages ☞624(1).

As respects redemption person, such as junior lienholder, who elects to purchase, as at mortgage foreclosure sale, is bound by his election.

5. Mortgages ☞624(1).

Whether person has redeemed from mortgage foreclosure sale must be determined by acts done (Code Civ. Proc. § 700a et seq.).

6. Mortgages ☞624(1).

Debtor and lienholders have right to know whether redemption has occurred from mortgage foreclosure sale (Code Civ. Proc. § 700a et seq.).

7. Mortgages ☞594(2).

One holding sheriff's certificate of sale under mortgage foreclosure and claiming title thereunder cannot resist redemption by mortgagor's creditor (Code Civ. Proc. § 700a et seq.).

8. Mortgages ☞624(1).

Sheriff's certificate of sale under mortgage foreclosure is no evidence of redemption, and cannot be transmuted by purchaser into certificate of redemption (Code Civ. Proc. § 700a et seq.).

9. Mortgages ☞624(1).

Sheriff's "certificate of sale" under mortgage foreclosure is authority merely to de-

mand deed unless property is redeemed (Code Civ. Proc. § 700a et seq.).

[Ed. Note.—For other definitions of "Certificate of Sale," see Words and Phrases.]

10. Mortgages ☞624(1).

Where husband and wife owned two mortgaged lots as joint tenants, wife's judgment creditor redeeming from foreclosure sale of both lots to holder of sheriff's deed under execution sale of husband's interest in one lot thereby acquired complete title (Code Civ. Proc. § 700a et seq.).

11. Mortgages ☞591(1).

Mortgagor's judgment creditor redeeming from foreclosure sale of two lots held bound to redeem property as whole (Code Civ. Proc. § 700a et seq.).

12. Mortgages ☞600(1).

As condition of judgment creditor's right to redeem from mortgage foreclosure sale of two lots owned by joint tenants, sheriff could not increase creditor's burden by demanding price paid for one joint tenant's interest in one lot on execution sale by predecessor in interest of purchaser at foreclosure (Code Civ. Proc. § 700a et seq.).

13. Mortgages ☞600(1).

Principle of proportionate contribution relating to purchase by cotenants had no bearing on statutory right of wife's judgment creditor to redeem from mortgage foreclosure sale of two lots owned by husband and wife as joint tenants (Code Civ. Proc. § 700a et seq.).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Corporation of America against John M. Eustace and others. From a judgment for defendants Lotta A. Wagner and another, who were the only defendants served, plaintiff appeals.

Affirmed.

Freston & Files, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for appellant.

Charles W. Fourl and Edward W. Tuttle, both of Los Angeles, for respondents.

PER CURIAM.

Appeal from a judgment rendered against plaintiff in an action brought by it for declaratory relief, and to determine title to a parcel of real property. The judgment was in favor of defendant Lotta A. Wagner and Sheriff Traeger, decreeing title in defendant Wagner and directing the sheriff to pay to the plaintiff or other holder of the sheriff's certificate of sale the sum of \$13,175.49, being the amount paid by defendant Wagner to the

sheriff in redemption of the property from a mortgage foreclosure sale. Wagner and the sheriff were the only defendants served or who appeared. The appeal is brought upon the judgment roll alone.

The case was tried upon the pleadings and a stipulated set of facts which have been restated as the findings of fact of the trial court. As shown by such findings, they are in substance as follows: John M. Eustace and Katie M. Eustace, his wife, were the owners, as joint tenants, of lots 36 and 37 of Hollenbeck Park tract in Los Angeles. On March 31, 1922, they mortgaged both lots to the California Bank to secure an indebtedness of \$10,000 evidenced by a three-year note. Thereafter, on October 28, 1925, the Hellman Bank, appellant's predecessor in interest, sued John M. Eustace for \$8,492 and levied an attachment against his interest in lot 37. On August 22, 1927, this action resulted in a judgment in favor of said last-named bank and against Eustace for the sum of \$8,814.60, which judgment was entered and recorded. Writ of execution thereunder was issued September 17, 1927, and a levy made on Eustace's interest in both lots 36 and 37, and on November 7, 1927, such levy was followed by a sale of Eustace's interest in lot 37 only to the Merchants' National Trust & Savings Bank, the successor in interest of the Hellman Bank, upon a successful bid of \$3,000, which amount was credited against the judgment of the bank. Thereafter the judgment against Eustace was duly satisfied by sales of other properties owned by him. Under the sale of lot 37 a certificate of the sheriff was issued to the bank and, no redemption having been made from such sale, a sheriff's deed as to the interest of Eustace in lot 37 was executed and delivered to the bank, and it was duly recorded.

In the meantime the mortgage of the California Bank became due, and this bank commenced an action to foreclose the same, making all interested persons parties, including the bank holding the sheriff's certificate to an undivided one-half interest in lot 37 as above mentioned, and it filed a *lis pendens*. Thereafter a judgment was rendered in favor of the California Bank, and an order for sale was issued under which the sheriff in due course sold lots 36 and 37 together, for the lump sum of \$11,763.81, to the Bank of America, successor in interest of the Merchants' National Bank which held the sheriff's deed to John M. Eustace's interest in lot 37. The sheriff issued his certificate of sale, reciting that the property was subject to redemption, and recorded a duplicate thereof. Thereafter plaintiff, Corporation of America, took an assignment of this certificate of sale and acquired the interest of the Bank of America in lots 36 and 37. Thereafter, on December 31, 1929, and prior to the expiration of the statutory redemption period on the mortgage fore-

closure sale, defendant Lotta Wagner obtained a judgment against Katie M. Eustace. This judgment was docketed and recorded. Lotta Wagner then notified the sheriff of her intention to redeem from the mortgage foreclosure sale of the lots. She ascertained from the sheriff that the amount necessary for this purpose was \$13,175.49, being the foreclosure sale price plus the statutory interest and costs, and deposited this sum with the sheriff, who thereupon issued his certificate of redemption to her. The sheriff notified the Bank of America, to whom he had previously issued the certificate of sale on the foreclosure, of the redemption by Wagner. Thereafter the Corporation of America, assignee of the certificate, made demand for a deed upon defendant Traeger, as sheriff of Los Angeles county and as the officer making the foreclosure sale of the lots, and that same be executed and delivered to plaintiff herein, as the holder of the sheriff's certificate of sale of said lots under the mortgage foreclosure sale, and as claimed owner of an undivided one-half interest in lot 37. Traeger refused; whereupon this action was brought.

The trial court concluded from the foregoing facts that Lotta Wagner, by reason of her redemption, was the sole owner of lots 36 and 37, and that plaintiff had no interest in the same, and that its only right was to receive the money paid by Lotta Wagner to the sheriff to redeem.

[1] Plaintiff complains of the judgment for the reason that it has the effect of excluding the bank from its undeniable one-half interest in lot 37, which it acquired under its judgment against John Eustace, and for which it had paid \$3,000 under its execution sale. It seems to be conceded that the property has increased in value since the sale. It may be said in passing that the bank could have protected its interest by bidding in lot 37 in which it had an interest, as it appears from the record that the sheriff offered the lots separately as the bank could have required him to do (Code Civ. Proc. §§ 694, 726), but no bid was obtained under this separate offer. Both lots were then sold to plaintiff for the lump sum stated, subject to redemption. For reasons best known to itself, the bank preferred to purchase both lots, in one of which it had no interest whatsoever. It could also have purchased the prior outstanding and overdue mortgage held by the California Bank and, by tacking its judgment lien to it, insured the return of its \$3,000 lien. Instead, plaintiff elected to purchase both lots after foreclosure.

[2, 3] In order to extricate itself from the position it finds itself in, it now claims as ground for reversal that Lotta Wagner, under the facts of the case, had no right to make a statutory redemption. This claim is based upon the contention that an owner or his successor in interest has the last and ultimate

right of Code redemption, and that once the title disposed of at the foreclosure sale rests in such original owner or his successor in interest, either through the making of an actual Code redemption in the event some outsider has made the purchase, or by an original purchase at the sale itself, then the statutory right of redemption as such may no longer function, but all pre-existing rights of parties entitled to redeem then remain open, or reattach to the property as liens, in the same manner as though no sale under the mortgage had ever occurred. In other words, appellant argues that if the judgment debtor or his successor in interest purchase at the sale, this is the same or has the effect of a statutory redemption, and therefore is attended with the statutory consequences, to wit, the termination of the effect of the sale and restoration of the estate, with the resulting conclusion that any right of redemption is thereby terminated. The statute, section 700a et seq., (Code Civ. Proc., admits of no such interpretation. Nowhere therein is it declared or even intimated that a purchase at execution or foreclosure sale amounts to a statutory redemption, with the resulting statutory consequences. The distinction between a purchase at an execution or judicial sale and a statutory redemption from such sale is fundamentally different.

The contention of appellant would seem to be a departure from its position under its pleading. The complaint alleges that it purchased at the foreclosure sale and is the owner of both lots, and that Wagner's statutory redemption was ineffective for the reason that in redeeming she did not deposit with the sheriff the \$3,000 paid at its own execution sale for John Eustace's undivided interest in lot 37. The prayer asks for a decree establishing plaintiff's title to both lots, denying any interest whatever in Wagner, canceling the certificate of redemption and sheriff's deed issued to her, and requiring the sheriff to issue a sheriff's deed to plaintiff. There is no suggestion in the pleading that plaintiff was not the purchaser and owner of both lots, or that the purchase was in effect a redemption under the statute.

The court found as a fact, as stated, that the Bank of America purchased at the foreclosure sale and thereafter assigned the certificate of purchase to plaintiff, and that Wagner was the owner of the property. This finding is fully supported by the facts. As above pointed out, there is nothing contained in the statute that in any manner indicates that a purchase by the owner or his successor at execution or foreclosure sale amounts in effect to a statutory redemption, with the resulting statutory consequences. The statute gives a positive right to lienholders to purchase at a sale or to redeem. The redemption specified therein is not the sale spoken of. The purchase or the acquirement of the certificate of

purchase, by one who has both the right to purchase and redeem, whether he be the debtor or a junior lienholder, is not a redemption and is not attended with the legal consequences of a redemption. Purchase and redemption are distinct and different in their nature and consequences.

[4-9] One who elects to purchase is bound by his election. An incumbrancer cannot be permitted to play fast and loose as his interest may appear. What is done must determine whether it amounts to a redemption or not. The debtor and other incumbrancer have a right to know with absolute certainty whether there has been a redemption, so that they can act accordingly. *Streeter v. First National Bank*, 53 Iowa, 177, 4 N. W. 915. One holding a certificate of sale and claiming title thereunder is in no position to resist redemption by a creditor. *Martin v. Sprague*, 29 Minn. 53, 11 N. W. 143. Purchasing at a sale and receiving a certificate is a transaction wholly different in its nature and legal consequences from a redemption, and one should not be permitted, both against the fact and the allegations of his complaint, to claim the benefit of a transaction of an essentially different nature. *Shroeder v. Bauer*, 140 Ill. 135, 29 N. E. 560. A certificate of purchase is no evidence of a redemption and cannot perform that office, but is authority merely to demand a deed if the property be not redeemed, and a purchaser cannot transmute such a certificate into a certificate of redemption and thus acquire other and different rights under it. *Lloyd v. Karnes*, 45 Ill. 62.

[10-12] Wagner, having redeemed as she had a right to do, acquired the complete title, and the trial court rightfully so held. *Chauvin v. American State Bank*, 242 Mich. 269, 218 N. W. 788. Under all these circumstances it cannot be said that the facts and circumstances show the transaction to be one other than it purported to be. Wagner had the statutory right to redeem, and, in making such redemption, she was bound to redeem the property as a whole, or not at all. She exercised such right, and thereby acquired full title to both parcels. *Eldridge v. Wright*, 55 Cal. 531. Nor could the sheriff increase her burden by demanding the \$3,000 above referred to as a condition of her right to redeem. *Doerhoefer v. Farrell*, 29 Or. 304, 43 P. 797.

[13] Considerable is said in the briefs of both parties concerning the equitable rule as to purchase by cotenants. Lotta Wagner was not a cotenant with the bank or any one else in any property. She was a mere lienholder, and the principle of proportionate contribution has no bearing on her statutory right to redeem, concluding, as we do, that the transaction constituted a sale.

The judgment is affirmed.

217 Cal. 201

SIMMONS v. RATTERREE LAND CO. et al.
L. A. 12823.

Supreme Court of California.
Dec. 30, 1932.

1. Evidence $\S$ 434(1).

Vendor cannot escape liability for his own fraud or misrepresentations by statements in contract that purchaser relies on no representations except those mentioned therein (Civ. Code, $\S$ 1668).

Vendor cannot escape liability for his own fraud or false representations by inserting in contract provisions to effect that purchaser has viewed and investigated property and does not rely on any representations of vendor or its agents except those mentioned in contract, and that contract contains all representations, promises, and statements made by vendor or its agents which have induced purchaser to enter into contract.

2. Contracts $\S$ 94(1).

Fraud in inducement vitiates entire agreement and destroys consent indispensable to valid contract (Code Civ. Proc. $\S$ 1856).

3. Vendor and purchaser $\S$ 31.

Purchaser's failure to read contract, unless due to fraud or trickery of vendor or his agent, is no defense against provisions thereof.

4. Vendor and purchaser $\S$ 44.

Evidence warranted conclusion that vendor's agents prevented purchaser from giving fair consideration to contract, justifying rescission for agents' misrepresentations.

It appeared that vendor's agent, having taken purchaser and her aged aunt to see property, and after making false representations, took them to vendor's office, where a second agent joined the first in falsely representing that lot in question was last lot zoned for business purposes which remained unsold; that purchaser pointed out provisions in contract requiring property to be used for residence purposes only, but was assured that contract was merely standard form, and that lot was nevertheless business property; that hour approached 9 o'clock, and purchaser and her aunt were tired and had eaten no dinner; and that agent represented that immediate decision was necessary, and as final inducement made reduction in price.

5. Appeal and error $\S$ 931(1).

Findings and judgment being in plaintiff's favor, appellate court must adopt view of evidence most favorable to plaintiff.

6. Corporations $\S$ 425(6).

Vendor corporation, by retaining agents known by vice president and general manager to be using fraudulent practices, becomes guilty party to fraud, justifying rescission of contract for agents' misrepresentations.

Guilty participation or acquiescence in fraud by managing officers of vendor corporation would be equivalent to such knowledge or participation by individual vendor and principal in so far as liability for agents' acts and representations is concerned.

7. Vendor and purchaser $\S$ 44.

\$11,000 for lot in unimproved and unsettled district held so manifestly exorbitant that vendor's officers were charged with knowledge that lot could be sold only by unfair dealing with inexperienced persons, justifying rescission.

In Bank.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Verna Wilbur Simmons against the Ratterree Land Company and others. From a judgment against defendant named, such defendant appeals.

Affirmed.

Harley Riggins and Schweitzer & Hutton, all of Los Angeles, for appellant.

Rollin L. McNitt, of Los Angeles (Edythe Jacobs, of Los Angeles, of counsel), for respondent.

SEAWELL, J.

Plaintiff, Verna Wilbur Simmons, brought this action to rescind a conditional sales contract whereby she agreed to purchase a lot situate in the city of Los Angeles from defendant Ratterree Land Company, a corporation, and to recover the sum of \$3,582.37 paid by her on the agreed purchase price of \$11,000. As grounds for rescission plaintiff relied on false and fraudulent representations alleged to have been made to her by defendants Grace Gunderson and George D. Lane, as agents for said land company. The court entered judgment against defendant Ratterree Land Company in the amount prayed for, from which said company prosecutes this appeal. Judgment was not entered against the defendant agents for the reason that they had received no part of the price previously paid which plaintiff sought to recover herein.

The contract rescinded is dated March 8, 1928. Plaintiff gave notice of rescission on April 5, 1929, and filed her complaint herein on April 26, 1929. By the terms of said contract plaintiff was required to pay, and did in fact pay, \$2,750, or one-fourth of the agreed

purchase price of \$11,000, within three months from the date of the execution of the contract, and thereafter paid \$90 a month, as by the terms of said contract provided. The lot, purchased at a price of \$11,000, is situate in an outlying district of the city of Los Angeles known as the Westwood district, in a tract subdivided by appellant. Said tract was the fourth to be subdivided and offered for sale by appellant in the immediate vicinity. At the time of plaintiff's purchase, it was unsettled and unimproved, save that on certain streets curbs and gravel roadways had been installed. At the time of trial, over two and one-half years later, only one building had been erected in said tract. On March 8, 1928, the date of the contract, construction had been commenced on the buildings of the University of California at Los Angeles on the new site of said University, located about a mile and a half distant from plaintiff's lot, but said University did not move to its new location until September, 1929. The property between defendant's subdivision and the University site, also unsettled, had been purchased by other subdividers in anticipation of the growth and development which was expected with the coming of the university to the district.

Upon this appeal defendant and appellant Ratterree Land Company expressly concedes that the false representations which the court found induced plaintiff's purchase are sufficiently established by the evidence. As grounds for reversal, it relies on certain provisions in the contract of sale and in the deposit receipt and agreement signed by plaintiff, which, it is claimed, relieve it from liability for any fraudulent representations made by Mrs. Gunderson and Mr. Lane as its agents. These provisions are to the effect that the buyer has viewed and investigated the property, and does not rely on any representations of the seller or its agents except those mentioned in the contract, and that the contract contains all the representations, promises, and statements made by the seller or its agents which have induced the buyer to enter into the agreement of purchase.

[1, 2] As authority for the proposition that these provisions relieve it from liability, appellant relies on *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322, 323. Respondent contends that the law as announced in said decision does not compel a judgment for appellant on the facts of the instant case. It is settled beyond doubt, manifestly on sound grounds of justice, that a seller cannot escape liability for his own fraud or false representations by the insertion of provisions such as are embodied in the contract of sale herein. *Hunt v. L. M. Field, Inc.*, 202 Cal. 701, 262 P. 730; *Ferguson v. Koch*, 204 Cal. 342, 268 P. 342, 53 A. L. R. 1176; *Blackwell v. Thomasson*, 84 Cal. App. 784, 258 P. 724; *Long v. Los Altos Country Club Properties*, 122 Cal. App. 116,

9 P.(2d) 600; *Palladine v. Imperial Valley, etc., Ass'n*, 65 Cal. App. 727, 225 P. 291; *Ganley Bros., Inc., v. Butler Bros. Bldg. Co.*, 170 Minn. 373, 212 N. W. 602, 56 A. L. R. 1, with extensive annotation, 56 A. L. R. 13; also, annotations, 75 A. L. R. 1024, 1032, and 10 A. L. R. 1472. Section 1668, Civil Code, provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility from his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or neglect, are against the policy of the law." Fraud in the inducement of a contract vitiates the entire agreement, and destroys that consent which is essential to the existence of a valid contract. Section 1856, Code Civ. Proc.

It is the doctrine of *Gridley v. Tilson*, supra, that in certain circumstances the honest principal may protect himself from his agent's fraud by inserting in the contract a provision the effect of which is to inform the purchaser of "the limitation on the agent's authority to make representations" not embodied in the written contract. In that case, involving a sale of corporate stock at \$1 a share, the agent, with the object of enhancing the value of the stock, represented that the corporation had obtained a permit from the corporation commissioner to sell the stock at \$1.50 a share, and that it would be sold subsequently for that price. On the back of the subscription contract which the purchaser signed was a copy of the permit received from the corporation commissioner, from which it appeared that the corporation was authorized to sell at \$1 a share. The subscription contract recited that the purchaser had read the permit on the back of the contract. The plain language of the permit, by reference made a part of the written contract, as well as the provision in the contract limiting the agent's authority, placed the purchaser on notice that the agent was without authority to represent that the corporation was authorized to sell at \$1.50 a share, when the only permit exhibited to him was for a sale at \$1 a share. Similarly, in *Pease v. Fitzgerald*, 31 Cal. App. 727, 161 P. 506, also a stock subscription case, cited in *Gridley v. Tilson*, supra, the written contract issuing from the principal gave notice that the contract was based "upon the printed literature and printed statements" of the corporation, and of the agent's want of authority to make representations "not in accordance therewith." In *Fidelity, etc., Co. v. Fresno Flume, etc., Co.*, 161 Cal. 466, 119 P. 646, 37 L. R. A. (N. S.) 322, where a policy of insurance provided for payment of a certain premium, the insured was not permitted to rely on an oral agreement had between himself and the agent for payment of a different premium.

[3] Before considering the application of the principles discussed above to the facts of

the instant case, we wish to comment upon another principle expressly recognized in *Gridley v. Tilson*, supra. Although a purchaser may not offer as a defense against the provisions of a contract that he failed to read it, if his failure to read is due to fraud or trickery of the seller or his agent, the rule is otherwise.

In the case herein, the false representations which induced the sale to plaintiff were made by Mrs. Gunderson and Mr. Lane. Mrs. Gunderson was also employed as a full-time teacher in a Los Angeles public high school, and seems to have conducted her real estate activities as a side line. By stipulation made at the opening of the trial, appellant's counsel relieved plaintiff of the necessity of proving existence of the principal-agency relationship between appellant and Mrs. Gunderson and Lane. While we are not disposed to agree with respondent that the stipulation in question should be construed as an absolute waiver by appellant of any defense it would otherwise have under the terms of the contract, it is nevertheless true that upon the trial appellant relied only half-heartedly on the written contract as an exemption from liability, and did not make said provisions the crux of its case, as it has done on this appeal.

Plaintiff alleged, and the court found on conflicting evidence, that it was represented to her by defendant corporation that the single lot which she contracted to buy for \$11,000 was the last lot zoned for business purposes which remained unsold on Sepulveda boulevard; that said lot was located in the only district zoned for business between the city of Beverly Hills and the city of Santa Monica, and, except for said area, the nearest business district to serve those attending the University and families living in the vicinity thereof was in Beverly Hills. It was further represented to plaintiff that the contract for the improvement of Sepulveda boulevard, upon which her lot fronted, and which was to be a main arterial in the city's traffic system, had already been let, when in fact preliminary steps for said improvement were not taken by the municipal authorities until just before the trial, over two and one-half years later, and that work on a tunnel to connect one end of the boulevard with the San Fernando Valley had already been started, when in fact said work was not started until August, 1929. The representation that the lot was zoned for business purposes was false. In fact, said lot was not zoned for business, but was in Zone B, where single family residences and multiple residence buildings, such as apartments, flats, and duplexes are permitted, and not only were there other business districts already in existence, but portions of the tracts of other subdividers contained business zone property much nearer to the University.

In so far as the representations as to the lot being restricted for business purposes are concerned, the contract issued by appellant land company and signed by plaintiff gave notice that said lot was not, as represented by appellant's agents, business property, by express statements therein contained that the deed which plaintiff should receive upon full payment should contain a condition that said property be used for residence purposes only, and that "no lodging house, hotel, bill board or other structure, other than one or more family residences, double bungalows, duplex houses or flat buildings," should be erected thereon, with a provision for forfeiture upon breach. The doctrine of *Gridley v. Tilson*, supra, would preclude plaintiff from relying on representations of the agents, contrary to the express provisions of the written contract, were it not for additional circumstances which operate in plaintiff's favor.

[4, 5] Plaintiff admitted that she read the contract, including the residence restrictions, before signing it, but, under the circumstances shown by the record, it appears that by deliberate acts of the selling agents she was prevented from giving a full and fair consideration to the provisions of said written contract, and in legal effect coerced into signing it. By reason of the findings and judgment in favor of plaintiff, the view of the evidence most favorable to her must be adopted. She testified that Mrs. Gunderson called for her late on the afternoon of March 8, 1928. Plaintiff's aged aunt accompanied them in Mrs. Gunderson's automobile. After showing the property and making the false representations found by the court, Mrs. Gunderson drove plaintiff to the land company's office, where Lane, known in real estate parlance as a "closer," joined Mrs. Gunderson in urging the purchase upon plaintiff. Lane emphasized Mrs. Gunderson's selling point that the lot was the only business purpose lot in the tract which remained unsold. The hour approached 9 o'clock, and plaintiff and her aged aunt were tired and had eaten no dinner. Lane and Mrs. Gunderson represented that it was necessary for plaintiff to make her decision immediately, as they were momentarily expecting a telephone call from another buyer who desired the lot. As a final inducement, Mrs. Gunderson, who had quoted the lot to plaintiff at \$11,400, said that, in order for plaintiff to obtain the lot for \$11,000, she would waive payment of \$400 of her commission. Plaintiff signed the memorandum and receipt agreeing to buy the property before leaving the office. There is some uncertainty as to whether or not she also signed the sales contract on said night of March 8, 1928. She herself seems to have been of the impression that she may have signed it on a later date. It bears date March 8, 1928, and a writing is presumed to be truly dated. Section 1963, subd. 23, Code Civ. Proc. However this may

be, she read the contract hurriedly on the night of March 8, while at appellant's office, with said agents representing that quick action was necessary to obtain said lot, and, in answer to objections which she raised as to the residence restrictions, appellant's agents assured her that it was a standard form used for all lots in the tract, and the lot was nevertheless business property. Said contract contains the following unusual and unjustified provision, typed into the contract, the body of which is printed:

"Buyer's copy of contract to be retained by Seller for Buyer until the sum of Two Thousand Seven Hundred Fifty Dollars (\$2,750.00) has been paid on the principal by the Buyer to the Seller." (One-fourth of purchase price.)

A principal who would escape liability for his agent's fraudulent representations on the ground that the provisions of the written contract issuing from the principal afford notice of the falsity thereof, or of the agent's want of authority, cannot succeed where the evidence clearly shows that his agent has unfairly prevented the purchaser from giving a free and full consideration to the contract as written by coercive tactics calculated to destroy the free will and better judgment of an inexperienced person. The situation herein is analogous to the case where the agent by trickery or fraud actually induces the purchaser not to read the contract. In either case there is fraud in the actual execution of the written contract. In *Gridley v. Tilson*, supra, the fraud was not in the execution of the contract, but antecedent thereto and in the inducement of the contract.

[6] It may be noted further that, although the vice president and general manager of appellant land company denied any guilty participation or acquiescence in the fraud perpetrated on plaintiff, in view of the fact that several persons testified to have purchased lots in 1926 and 1927 through Mrs. Gunderson and Lane in reliance on false representations and to have become dissatisfied, it seems scarcely possible that it should not have been brought to the notice of the managing officers of appellant that sales persons were selling lots on its behalf who over a period of time continued to indulge in unfair and fraudulent practices. By retaining said agents, the corporation would become a guilty party to the fraud. Guilty participation or acquiescence in the fraud by the managing officers of appellant corporation would be equivalent to such knowledge or participation by the individual seller and principal in so far as liability for the agent's acts and representations is concerned. There is evidence in the record which inferentially would justify the court in finding that the corporation acquiesced in the fraudulent representations.

[7] Although no evidence of actual value of plaintiff's lot was introduced, the price of \$11,000 asked by appellant for a single lot in an unimproved and unsettled district is so manifestly exorbitant that said officers must be deemed to have known that said lot would lend itself to sale only to inexperienced persons and with the practice of unfair dealing. Another purchaser testified that she contracted to buy a lot for \$10,600. Most of the other purchasers who testified were connected with the public school department of the city of Los Angeles and had reposed confidence in Mrs. Gunderson as a teacher in said schools.

The judgment is fully supported by the evidence and the law.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; TYLER, Justice pro tem.; PRESTON, J.; CURTIS, J.

217 Cal. 176

PEOPLE v. GREEN et al.

Cr. 3551.

Supreme Court of California.

Dec. 30, 1932.

Rehearing Denied Jan. 27, 1933.

1. Homicide $\S$ 282½.

If jury believed defendants' statements that third person planned burglary in which policeman was killed, and that this was sufficient to mitigate punishment they could have relieved defendants of extreme penalty of law.

2. Homicide $\S$ 18(3).

Defendant, admittedly confederate and principal in burglary in which codefendant shot policeman, held guilty of murder in first degree (Pen. Code, §§ 31, 189).

3. Criminal law $\S$ 377.

Trial court has wide discretion in admitting character evidence in behalf of accused.

4. Criminal law $\S$ 377.

Exclusion of testimony of character witnesses for accused in homicide and burglary case as being too remote held not abuse of discretion.

The exclusion of such testimony was not abuse of discretion, in view of fact that witnesses stated they had known accused at a time over five years preceding commission of offenses involved, and that truth of charges was admitted by accused; only question raised in his behalf being application of law to the situation. Furthermore, evidence offered was weak as to accused's good character, and other

witnesses gave testimony as to his character, and court instructed on importance of such testimony.

5. Criminal law ☞377.

Character evidence is admissible to rebut testimony tending to establish truth of charge against accused.

6. Criminal law ☞878(4).

Contention that conviction on two counts, respectively, for murder with death penalty and for burglary with prison sentence, was invalid because conviction on each count was antagonistic to other, *held* without merit.

In Bank.

Appeals from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Jack D. Green and another were convicted of murder in the first degree and of burglary in the first degree, and they appeal.

Affirmed.

P. E. Keeler and R. Lee Bagbey, both of Los Angeles, for appellant Jack Green.

Samuel Rummel, of Los Angeles, for appellant Joseph Francis Regan.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SEAWELL, J.

The indictment upon which the defendants Jack D. Green and John Francis Regan were jointly tried and convicted in the Superior Court of the state of California, in and for the county of Los Angeles, was in two counts. The first count charged both jointly with having willfully and feloniously murdered, on or about January 11, 1932, in said county of Los Angeles, Hugh A. Crowley, a police officer of the city of Los Angeles. The second count charged said defendants with a different offense of the same class of crime and connected in its commission with said murder charge, to wit, the crime of burglary. The homicide was committed by said defendants while engaged in a conspiracy to compel by force and fear the manager of the Fox Westwood Village theater, situate in an outlying district of the city of Los Angeles, in which they were lying in wait, upon his arrival at said theater, to open the safe of said theater, which contained about \$600, which they had conspired to steal. This is an admitted fact in the case.

Separate verdicts were returned by the jury against each of the defendants. On the first count, which charged murder, the verdict of the jury was murder in the first degree, and with the express determination of the jury "that, as punishment therefor," the defendant, naming him, "shall suffer death." On

the second count each was separately found guilty of burglary of the first degree.

Judgment was pronounced upon each separate count. Upon the first count the death penalty was pronounced against each defendant, and upon the second count each defendant was sentenced to imprisonment in the state prison, as provided by law. From the order denying motions for a new trial and from said judgments this appeal is taken.

As above stated, the participation of the defendants in the crime which resulted in the homicide was related by the defendants in their attempt to extenuate the punishment, as shown by the testimony of defendant Green given at the coroner's inquest to determine the cause of the death of officer Crowley, by extrajudicial statements, and by corroborating facts. The evidence in this respect is conclusive.

The record does not satisfactorily disclose the background of the defendants. Their story was that they were strangers to each other until brought together the day before the homicide in Regan's room, at 1609 North Normandie avenue, by Tom Conway, a reputed designing and cunning criminal, who, it was claimed by defendants, had occasionally served the authorities as a stool pigeon, and upon some sort of reciprocity plan enjoyed certain police protection. Both defendants bring Conway into the conspiracy as being the person who planned, encouraged, and assisted in the commission of the crime. They claim that Conway furnished Regan with the pistol from which the shots were fired which killed Officer Crowley, and that he drove them in his car to the scene of the crime, where he was afterwards to pick them up. What Conway's part in the crime was rests entirely upon the statements of the defendants, although it appears beyond doubt that Conway worked for a bail bond company, and it was there that he became acquainted with defendant Green. He also had an acquaintance with Regan. Conway was taken into custody immediately after the murder and held in detention for a period, but was subsequently released, and, although damaging statements were made and incriminatory testimony was given against him by both defendants, he did not appear to refute the same at the trial. However, his participation, if it be a fact that he did participate in the planning of the crime, cannot mitigate the willfulness of the criminal purpose of the defendants.

To the time that Paul Barry, assistant manager at the Fox Rosemary theater at Ocean Park, with Bud Brewer, a film distributor of Venice, entered the theater on a matter of business, and thereupon summoned the janitor to unlock the manager's room, whereupon they were surprised by the presence of the defendants, who stood before them

with drawn arms and compelled them to submit to being bound, hand and foot, the evidence comes entirely from the defendants. From that point forward it comes from independent sources.

According to the story related by the defendants, they left Regan's room at about 1 o'clock a. m., January 11, which was Sunday morning, and were driven near to the scene of the crime by Conway. Upon alighting, they made sure all lights in the theater were extinguished. Green had reconnoitered the theater before. They entered the front door of the theater with the aid of a master key, which Green had made some months before. He was by trade a locksmith, and upon solicitation had been given the job of making a master key for the theater doors. His excuse for having the key was that it was not a perfect key and he threw it aside. Upon mentioning it to Conway some time before, the latter took possession of it and gave it back to him for the purpose of committing the burglary. After entering the lobby or foyer, the door leading to the manager's private room was unlocked by Green with the aid of the master key, and from there a closet which contained the safe was entered. In this room a tin money box was kept. It was broken open and \$32 which it contained were appropriated and divided between the defendants.

The defendants knew that the manager arrived some time between 9 and 10 o'clock a. m., and their purpose was to await his arrival and force him to open the safe. The three men above named were bound by wire used in hanging pictures, which was furnished by Green. Obedience to the orders of the defendants was enforced by the menace of the revolvers held in their hands. Barry, who for a time was mistaken for the manager of the theater, was the last to be bound and compelled to lie side by side on the floor with his companions. He had been on the floor but a few minutes when the click of the lock attracted the attention of the defendants. Both prepared themselves for the entrance of the expected manager. When the door opened, it proved to be Officer Crowley, dressed in citizens' clothes, who carried a key to the doors of the theater. He had entered through the front door. Upon suddenly being confronted by the armed burglars, he stepped back, and started hurriedly for the front door. He was commanded to halt, and, after some hesitation, he did so. Both defendants had hurried to his side, and each laid hands upon him and started to usher him into the room where the other men lay bound. The three men upon the floor said they heard no word spoken, but immediately two or three shots were fired in rapid succession, followed by an interval, and then two or three more shots were fired. The story of the defendants was that, after Officer Crowley had consented to go with them to the room oc-

cupied by the other men, and after he had taken several steps, he suddenly swerved and broke away, assumed a stooped or crouched position, drew his revolver and shot first at Green, barely missing his face, and then at Regan, the bullet hitting him in the lower chest and passing out at the back, a few inches from the spinal cord. This shot, so Regan testified, knocked him backward several feet, and he explained that he surrendered, but, when Crowley uttered an oath and expressed his intention of killing them both, he then shot at Crowley, with the result that Crowley was instantly killed. Green claims that he fired no shot, and in the excitement he dropped to the floor and was unable to see clearly, by reason of the smoke caused by the pistol fire. He also claimed that, when he left the room, Crowley was still in a stooping position, and Regan, who was actually wounded, had preceded him in flight. Three bullets, apparently all from Regan's pistol, struck Crowley. One creased his arm, making a flesh wound; another entered the abdomen, and the third penetrated several vital organs, including the heart. Death was instantaneous. Both defendants fled through the rear exit of the theater to the street. On the way out, Regan dropped his pistol, which held three empty shells, and two loaded cartridges. The handkerchief and muffler used as masks by the defendants were recovered in their course of flight. The rubber glove fingertips worn by Regan to baffle fingerprint detection, Regan's cap, and other articles of apparel carried by them for the purpose of enabling them to disguise their appearance, were found en route of their flight. Green wore gloves. Regan's wound slowed him up quite a bit, and Green assisted him from the theater to a place about a block away, where he discovered a parked automobile, with the keys left in the lock. He helped Regan into the machine, and just as he was about to start the car the lady who owned it appeared and protested his right to use the car. He told her that the man in the car, who was Regan, was badly hurt, and that he was taking him to a hospital, and he would return the car. On the way to Regan's apartment the car gave considerable trouble, and it was abandoned and a taxi commandeered to take Regan to his room. On the journey Green cached his loaded pistol and cartridge clip in an oleander tree, where they were afterwards found. He explained to the taxi man and to the garage man at the apartment house where Regan lived that Regan, who was unable to handle himself without assistance, was intoxicated. Green took Regan to his room, destroyed his blood-stained clothing, called a physician and a friend of Regan both of whom responded to the call, and left for his own apartment. On the following day he was arrested. He first denied any participation in the crime, but, as the proofs began to overwhelm him, he admitted that Or-

ficer Crowley was killed in the perpetration of the burglary and planned robbery, as herein related.

[1] Green, in his first statements incriminating himself, did not name Tom Conway as the third party whom he later claimed was the person who planned the crime, but named a person whom he called Bill, as the participants criminis. Both he and Regan latterly laid the blame of the crime upon Conway, whom they claimed brought them together. This issue was before the jury upon their statements, and it was within the province of the jury to have relieved them of the extreme penalty of the law if the jury believed their statement and felt that it was a sufficient cause to mitigate their punishment. It may be said, however, that the preparation of the crime and the precautions taken by them against detection and the plan of its execution very strongly indicate that neither of the defendants was without criminal experience. Their main purpose was balked only by an unexpected or fortuitous circumstance.

Regan's room was visited by the officers on the same day that Green was arrested, but he had fled. In all probability he had been transported by airplane to San Francisco, where he was arrested two weeks later. He had then substantially recovered from all ill effects of the gunshot.

[2] Regan admittedly fired the shot that took the life of officer Crowley. Green, who was admittedly his confederate, indeed a principal in the commission of the burglary (section 31, Pen. Code), is brought squarely within the provisions of section 189, Penal Code, which expressly provides that all murder which is committed in the perpetration, or attempt to perpetrate, robbery or burglary is murder of the first degree. The effect of this section has been so often and uniformly declared by this court that no doubt as to its meaning can longer reasonably exist. However, the court in this case instructed the jury meticulously and fully as to the right of the defendants to resist a deadly assault made upon them in the circumstances claimed by the defendants to have existed at the time the homicide was committed in the following most favorable instructions:

"If you believe from the evidence beyond a reasonable doubt that Regan with defendant Jack Green entered upon the premises of the Fox Village theater in Westwood for the purpose of committing a robbery, and while the defendant Regan was in the act of committing a robbery the deceased interfered and shot defendant Regan, whereupon the defendant Regan offered in good faith to surrender, and in good faith gave himself up to the officer, it then became the duty of such officer to have accepted such surrender and not to wilfully and unnecessarily attempt to shoot thereafter.

"It is not every criminal act of a defendant which cuts off his right of self-defense. The right may in the first instance be cut off; and later by an act or offer on his part in good faith to surrender or give himself up, the right of self-defense may be restored to him.

"If an officer or other person, who attempts to prevent another from committing a felony wilfully uses more force than is apparently reasonably necessary, he becomes a wrongdoer and the person so sought to be prevented may resist said wilful excess of force by force, even to the killing of the officer so seeking to prevent the felony, if necessary, to preserve his own life from such wilfully excessive use of force, or to save himself from great bodily harm."

Again: "If you believe from the evidence in this case that defendant Regan entered upon the premises of the Fox Village theater in Westwood for the purpose of committing a robbery and while on said premises the deceased officer shot and wounded the defendant Regan, whereupon said Regan surrendered and informed the deceased of this fact, and in good faith endeavored to decline any further struggle before the fatal shot was fired, and that the deceased declined to allow him to give up or surrender, but continued wilfully and unnecessarily to fire at him, and that the circumstances were sufficient to excite the fears of the defendant as a reasonable man that his life was in danger and that he became terrified and in a state of excitement he shot and killed the deceased, then under such circumstances the defendants would not be guilty of murder."

[3-5] Objection was sustained to the proffered testimony of two of the character witnesses produced by appellant Green. Said witnesses had known Green in Denver, Colo., during the year 1926. Their testimony was weak at the best, and the court ruled it out on the ground that the time was too remote. The trial court has a wide discretion in the admission of this class of evidence, and it cannot be said that it abused its discretion in this particular instance. Character evidence is admissible under all the authorities to rebut the testimony of an incriminatory character tending to establish the truth of the charge. In the instant case the truth of the charge was admitted by the testimony of said appellant. The only question raised in his behalf is the application of the law to his situation. Appellant expressly admitted that the homicide was committed in the perpetration of a burglary in which he was an active participant. The reason of the rule in such circumstances disappears from the case. Beside, four or five witnesses gave testimony, weak it is true, as to the good character of said appellant. Besides, the court fully and fairly instructed the jury as to the importance and effect of such evidence as bearing upon the question

of the guilt or innocence of the person charged. He suffered no prejudice from the court's ruling.

[6] Appellants insist that, inasmuch as they were convicted on two counts, one of which is murder with death penalty imposed and the other burglary, with a prison sentence attaching, both are invalid as each is antagonistic to the other, and neither is enforceable. There is no merit whatsoever in this contention. The enforcement of the judgment under count 1 will leave no one upon whom the judgment under count 2 could operate. The greater would, so to speak, swallow up the lesser.

We have read the entire transcript of testimony in this case, and examined the instructions. The record is exceptionally free from error. The trial court was liberal in its rulings, and commendably fair and clear in its charge.

We find nothing that would warrant this court in disturbing the verdicts of the jury or the judgments of the trial court.

The judgments and orders must therefore be, and they are, affirmed.

We concur: WASTE, C. J.; SHENK, J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.; PRESTON, J.

217 Cal. 109

SAN DIEGO COUNTY v. CHILDS, County Surveyor (GROSSMONT PARK CO. et al., Interveners).

S. F. 14619.

Supreme Court of California.

Dec. 28, 1932.

Rehearing Denied Jan. 27, 1933.

1. Counties ⇨22.

Bonds of improvement district created under Acquisition and Improvement Act are not specific lien upon realty in district, and bondholder must look to special fund maintained by annual assessments (St. 1925, p. 890, § 41, as amended).

2. Municipal corporations ⇨437.

As basis for special assessment, improvement must confer special benefit upon property assessed.

3. Municipal corporations ⇨460.

Special assessment can be levied only for actual cost of improvement, not including expense other than necessary to complete improvement.

4. Municipal corporations ⇨405.

Imposition of special assessment to pay cost of local improvement is exercise of power of taxation.

5. Constitutional law ⇨93(1).

Property owner, in course of tax and special assessment proceeding, acquires certain vested rights protected by Constitution.

6. Taxation ⇨696.

Law in force at time of sale for nonpayment of taxes governs right of redemption.

7. Constitutional law ⇨143.

When valid proceedings for improvements by special assessment have been completed, and bonds have been issued to represent assessments, contractual relation between property owner and bondholder exists within constitutional provision prohibiting laws impairing obligation of contracts (Const. art. 1, § 16).

8. Courts ⇨93(1).

Former decisions, which constitute rule of property, should not be set aside except for cogent reasons.

9. Counties ⇨22.

Reassessment and Refunding Act held inapplicable to proceedings taken in improvement district under Acquisition and Improvement Act on theory that, if applicable, act would impair obligation of contract between bondholders and property owners (St. 1925, p. 849, as amended; St. 1931, p. 1861; Const. art. 1, § 16).

Refunding and Reassessment Act of 1931 (St. 1931, p. 1861), providing for the refunding of indebtedness and the retirement of bonds of district established under the Acquisition and Improvement Act of 1925 (St. 1925, p. 849 as amended), was inapplicable to improvement district organized under 1925 act, where proceedings for creation of district had long been completed, assessments levied thereunder, and land in district sold to state for delinquent assessments, and where refunding of indebtedness was undertaking without consent and against protests of landowners in district, because to permit refunding of indebtedness and retirement of bonds and issuance of new bonds would operate to impair obligation of contract between bondholders and property owners in district on theory that burdens and obligations not included under original bond issue and assessment plan were included under new bond issue and assessment plan.

In Bank.

Original proceeding in mandamus by the County of San Diego against Ernest R. Childs, County Surveyor of the County of San Diego, wherein the Grossmont Park Company and others intervened.

Peremptory writ of mandamus denied, and alternative writ discharged.

Thomas Whelan, Dist. Atty., and Frank T. Dunn, Chief Deputy Dist. Atty., both of San Diego, and O'Melveny, Tuller & Myers, James L. Beebe, and Pierce Works, all of Los Angeles, for petitioner.

Roscoe R. Hess, of Los Angeles, for respondent.

Herbert C. Kelly, of San Diego, for interveners.

Marshall Stimson and Noel Edwards, both of Los Angeles, amici curiæ in support of interveners.

SHENK, J.

This is an application for a writ of mandate to compel the respondent as county surveyor of San Diego county to prepare the diagram and to make the reassessment described in the petition, and in accordance with the Refunding and Reassessment Act approved June 15, 1931 (Stat. 1931, p. 1861).

Some time prior to October 7, 1929, the board of supervisors instituted proceedings for extensive public improvements in certain unincorporated territory in said county pursuant to the Acquisition and Improvement Act of 1925 (St. 1925, p. 849, as amended). The lands declared to be benefited specifically by the improvement were designated "Improvement Dist. No. 19." Bonds in the sum of \$516,631.83 were issued by the board to cover the cost of the improvements. The work was completed, and on November 8, 1929, the bonds were delivered to the contractor in payment of the contract price. These bonds are now owned by Municipal Bond Company. It is conceded by all parties that the proceedings leading up to the issuance and delivery of the bonds were regular and valid in every respect. Thereafter the board of supervisors proceeded to levy the annual assessment to pay interest and principal on said bonds. On the assessment levied in 1930 the sum of \$44.82, and no more, was collected. On the 1931 assessment only the sum of \$41.60 was collected.

The Legislature, at its 1931 session, passed an act to provide for the refunding of indebtedness and the retirement of bonds of districts established under the Acquisition and Improvement Act of 1925. The refunding statute is framed to apply in the following contingencies: First, where it is accomplished with the consent of all parties concerned, namely, the holders of all outstanding bonds and all of the property owners in the district. Secondly, where 20 per cent. or more of the principal or interest payable in any one year remains unpaid for the period of thirty days, because of delinquency on the part of property owners to pay their assessments, the board of supervisors, in its discretion, may declare that public interest, convenience, and necessity require that proceedings to refund the outstanding bonds be tak-

en. Thirdly, when 50 per cent. or more of the special assessment in any one year is delinquent at least ninety days, the board, likewise in its discretion, may make the declaration and proceed as indicated in the second contingency. Fourthly, when 75 per cent. or more of the special assessment is unpaid and delinquent for ninety days, the act provides that the board "shall proceed" to refund the outstanding bonds and to levy the reassessment therefor. In all cases the consent of all of the bondholders is required. In no case, except the first, is the consent of the property owners required or provided for. More than 90 per cent. of the assessments for the years 1930 and 1931 are delinquent.

In January, 1932, the auditor and the treasurer of said county issued their certificates notifying the board of supervisors of the delinquency; whereupon the board found the same to be true and by resolution declared that "the public interest, convenience and necessity requires the refunding of the unpaid bonds" of said district No. 19, and that it is the intention of said board to refund the same and that a reassessment for said refunding be levied as provided in the act of 1931, the refunding bonds to extend over a period of nineteen years. The owner of the unpaid bonds filed with the board an agreement in writing assenting to the refunding of said bonds. Thereupon the board directed the respondent county surveyor to prepare a diagram of said district and to proceed with the making of the reassessment provided for in the act of 1931. The county surveyor refused to proceed and the present proceeding was commenced to compel him to do so.

The respondent filed a return to the alternative writ, admitting the facts alleged in the petition, but bases his refusal to prepare the diagram and reassessment on the ground that the Refunding Act of 1931 is unconstitutional in numerous respects as applied to owners of property in the district on whose lands the assessment had become established under the act of 1925. Leave to intervene was granted to Grossmont Park Company, a corporation, Morse Construction Company, a corporation, and M. Hall Company, a corporation, and Carl A. G. Frisius. A stipulation of facts in connection with the complaint in intervention has been filed, wherein it is stipulated that the interveners were at all times mentioned in the petition, and now are, the owners in possession and entitled to the possession of a majority both in area and in assessment valuation of the lands included in said district 19, and have an interest in the success of the respondent; that the proposed reassessment will change the entire plan of assessing said lands from the ad valorem to a specific assessment plan and will change the time at which the assessments are pay-

able, the penalties in case of default, the time within which a sale of the property on foreclosure for default may be made, and the amounts to be paid by each parcel of property within the district; that the special assessment taxes for the fiscal year 1930-1931 upon and against most of the lands of interveners were unpaid and that by reason of such delinquencies said lands were declared sold to the state of California by the tax collector of San Diego county in the month of June, 1931, and have not since been redeemed; that none of the interveners, nor any landowners within the district, have joined in or consented to any proceedings whatsoever for the reassessment of land within said district or for the refunding of any bonds issued for improvements in said district.

The principal question presented is the applicability of the 1931 act to the prior and completed proceedings and transactions under the 1925 act. There is much discussion in the briefs with reference to the basis for the declaration of the board that public interest, convenience, and necessity require the refunding and reassessment. The petitioner states that there are in the county of San Diego some thirty-three districts on which bonds have been issued under the provisions of the Acquisition and Improvement Act of 1925; that the principal sum of these bonds totals several million dollars, and a considerable number of said improvement district ventures were speculative; that such speculation has failed, but that the assessments to pay for the improvements go on; that the lands in said districts are also taxed for county and school purposes and to support other public corporations; that the lands in said districts are so overburdened with taxation and assessments that the owners thereof refuse or neglect to pay said assessments and general taxes; that especially the county and school districts are injured by the failure to collect the general taxes; that rates of taxation for general purposes must be increased because no taxes can be expected from said delinquent improvement districts; that owners of property in said districts fail to improve their property because they are hopeless of making a redemption under the heavy penalties provided by the general taxing laws, and the property in said districts is therefore in a "frozen" condition.

The respondent and interveners contend that there is no basis for the conclusion of the board of supervisors that public interest, convenience, and necessity require the refunding of said bonds and a reassessment; that the contemplated proceeding is contrary to the interests of the property owners in the district and is in defiance of their constitutional rights and solely in the interest of the bondholders. As we view the problem

presented, the question whether there is a sufficient basis for the declaration of public interest, convenience, and necessity by the board is beside the mark for the reason that the board is here proceeding under the mandatory provisions of the fourth contingency of the statute above mentioned and the real question presented is whether it is within the constitutional power of the Legislature to require or provide for the refunding and reassessment as outlined in the 1931 statute and make the same applicable to valid proceedings under the 1925 act, notwithstanding the latter have long since been completed, assessments been levied thereunder, and lands in the district been sold to the state for delinquent assessments, and without the consent and against the protest of the landowners in the district.

[1] The Acquisition and Improvement Act of 1925 provides for a determination by the board of supervisors of the extent of the district to be benefited by the proposed improvement and that bonds be issued to the contractor in payment of the contract price. Said bonds are issued by the county, when, as in this case, the district is in unincorporated territory, payable exclusively from the special fund levied and collected upon the lands in the special assessment district. The county is not bound for the payment of the bonds, and the credit of the county is not directly affected by the nonpayment thereof. The obligation of the county is limited to the annual levy of a sufficient special assessment tax to satisfy the payments of principal and interest on said bonds as the same mature. This special assessment tax is levied on the taxable lands in the district "according to their respective valuations in the current assessment for county taxation" and "shall be levied, computed, entered, collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes for county purposes * * * and all laws applicable to the levy, collection and enforcement of taxes for county purposes * * * are hereby made applicable to said special assessment tax." St. 1925, p. 890, § 41 (as amended by St. 1927, p. 1375, and St. 1931, p. 1554). Under this plan the bonds are not a specific lien upon the lots and parcels of land in the district. The bondholder must look for payment from the special fund maintained by the annual assessments. If the fund becomes depleted and is insufficient to pay the interest or principal on the bonds it is the duty of the board of supervisors to provide for the deficiency in the subsequent levy. If the assessment becomes delinquent the land assessed is sold to the state as in the case of general taxes. The property owner has five years within which to redeem and his total obligation is met by the payment of the redemption money. If redemption be

not made the property is finally sold in the manner and form provided for the sale of property for nonpayment of county taxes. The bondholder acquires his bond in the light of these statutory provisions.

The plan of the refunding act of 1931 contemplates the cancellation of the special assessment ad valorem tax under the 1925 act and the imposition of a special assessment tax lien on each and every parcel of land in the district, substantially as provided in the Improvement Act of 1911 (St. 1911, p. 730). The amount of the specific assessment is to be determined by the board of supervisors after the notice provided for in the act. Under this plan the future assessed valuation of land within the district ceased to be determinative of the proportion of the annual payments to be made by the individual landowners, as provided for in the 1925 act. Under the new act the valuation of said lands, as shown by the last equalized assessment roll of the county, fixes for all time the proportionate amount of the bond obligation allocated to each lot or parcel of land in the district. This proportionate part of the total indebtedness of the district thus becomes a specific lien on each parcel of land in the district. A new bond is then to be issued to represent the amount of this lien. In computing the amount to be covered by the reassessment and the issue of new bonds there shall be included the total amount of the principal of the bonds issued on the original proceedings with interest thereon as provided for in the bonds, the estimated expenses of the reassessment and refunding proceedings which shall include the expense of making the reassessment and of issuing the refunding bonds. Credit is allowed on each assessment to the extent of prior payment on the ad valorem basis. Upon delinquency in the payment of any installment of the principal or interest of the new bond, the bondholder has two remedies. He may require the treasurer of the county to advertise and sell the property described in the bond, in which event there shall be added to the amount necessary to redeem, the cost of advertising and one dollar for a certificate of sale. Or the bondholder may file and maintain a suit to foreclose the bond. The court in which the suit is brought is vested with power to adjudge a lien against the property and to order the same sold under execution to satisfy the demand. The property owner is also charged with the costs of the action, attorney fees for the plaintiff to be fixed by the court, and not to exceed \$5 for search of title. A redemption may be made by the owner of the property within twelve months from the date of sale, upon payment of the amount due and 50 cents for service of the notice of expiration of the period of redemption.

[2, 3] It is obvious that the added cost of the refunding and reassessment proceedings

under the 1931 act, including the cost of advertising, the cost of preparing the diagram and of making the reassessment and of printing and issuing the new bonds, confers no additional benefit on the lands in the district. Those lands were assessed for the full amount of the cost of the improvement under the 1925 act. The added costs were not and could not be included in the amount of the bonds issued in the original proceeding. They did not in any way enter into the consideration for the improvement for which the original bonds were issued. The compensating benefit to the property owner is the warrant, and the sole warrant, for the Legislature to impose the burden of a special assessment. *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 P. 217, L. R. A. 1918E, 197. The improvement must confer a special benefit upon the property assessed. *Irish v. Hahn*, 208 Cal. 339, 281 P. 385, 66 A. L. R. 1382. The assessment can be levied only for the actual cost of the improvement "and the local authorities cannot include in the assessment the expense of any other work than such as is necessary to complete the particular improvement in a reasonable and fair mode." 2 *Elliot on Roads & Streets* (4th Ed.) p. 892. Authorities to the same effect could be multiplied without number, and there appears to be none to the contrary. This is not a case of a reassessment for benefits made necessary by an irregular, defective or void prior assessment proceeding, and in which all the property benefited may be charged with the cost of imposing a valid assessment. Here the property is legally assessed and assessable for the total amount of money expended in constructing the improvement and no more. The petitioner asserts that the landowner will be benefited by proceedings taken under the refunding plan because he may then safely pay his assessment, as the delinquency of other parcels in the district cannot increase his burden temporarily or permanently. It is argued that if he is the owner of several parcels, he may pay on such as he is able to pay and permit the others to become delinquent, or he can pay on some parcels lightly assessed and permit those heavily burdened to go delinquent. This would seem to be grim consolation. It is also insisted that under the new plan building loans can be made more safely, as there would then be no possibility of the delinquency of other parcels lessening the margin of security. This may or may not be true, but in any event it would be far to go to say that the cost of bringing about this result could be made the subject of a special assessment for public improvements.

There are many considerations which would appear to render it conclusive that the rights of the property owner are infringed by proceedings under the 1931 statute as applied to the present district. Upon delinquency in pay-

ment of the assessment under that act, the property owner is subjected to the following burdens and obligations not included under the 1925 bond issue and assessment plan: (1) After sale by the treasurer or under execution the time allowed him for redemption is cut down from five years to one year. (2) If the sale be made by the treasurer the landowner is required to pay on redemption the sum of \$1 on account of the issuance of a certificate of sale, and a further sum of 50 cents for the service of the notice of the expiration of the period of redemption. (3) If suit be brought against him, at the option of the bondholder, the property owner is chargeable with the costs of suit, with \$5 as the cost of a search of title, and the bondholders' attorney fees.

[4, 5] The respondent and interveners insist that the foregoing change in the period of redemption and the additional burdens placed upon the property owner by the 1931 statute, if made applicable to the landowners in said district 19, are contrary to the provisions of the state and federal Constitutions, and particularly the provisions thereof prohibiting the impairment of the obligations of contracts. In this connection the petitioner contends that the levying of a special assessment is in the exercise of the sovereign power of taxation which is continuing and may not be bargained away; therefore, it is claimed, no contractual rights have arisen. It is true that in this state the imposition of a special assessment is an exercise of the power of taxation (*Inglewood v. County of Los Angeles*, 207 Cal. 697, 280 P. 360), and the petitioner has cited numerous authorities from other jurisdictions in support of its position. But it is not true, under the law of this state, that in the course of tax and special assessment proceedings the property owner does not acquire certain vested rights which are protected by the Constitution.

[6] It has been held by a long and unbroken line of decisions in this state that the law in force at the time of a sale for nonpayment of taxes governs the right of redemption. The question presented in *Teralta Land, etc., Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 615, 58 Am. St. Rep. 194, was: "Can the legislature, after a tax sale, lawfully amend the law so as to apply new and more onerous conditions to the right to redeem than those which existed when the sale was made?" The question was answered in the negative on the authority of text-writers and the adjudicated cases. This court quoted with approval from *Black on Tax Titles*, § 175, as follows: "The right of redemption from a tax sale must be governed by the law in force at the time of sale. It cannot be affected by subsequent legislation," and the following from *Blackwell on Tax Titles* (5th Ed.) § 729: "The law in being at the time of sale governs the right of redemption. The

time can be neither lengthened nor shortened by subsequent legislation. * * * The right to redeem is a condition attached to the sale, and the legislature cannot defeat it by a subsequent act. A provision affecting the period of redemption can only apply to sales after the day on which the act took effect." The following is quoted from *Merrill v. Dearing*, 32 Minn. 479, 21 N. W. 721, in support of the rule with the citation of numerous other cases: "The right of property acquired by the purchaser at this sale, and the right of redemption remaining to the owner, must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor." This court continued, at page 525 of 116 Cal., 48 P. 613, 615: "The enforced sale of property on execution, or for the nonpayment of taxes, institutes a contract with the purchaser which cannot be materially altered without his consent. The right of the owner to redeem is perhaps, strictly speaking, one not resting in contract, but is a right vested in him under the law,—a right pertaining to the contract itself, and which, in reason and justice, is not more open to attack than that of the purchaser." This rule has consistently been followed in this state. See *Collier v. Shaffer*, 137 Cal. 319, 70 P. 177; *Johnson v. Taylor*, 150 Cal. 201, 88 P. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181; *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892; *Main v. Thornton*, 20 Cal. App. 194, 128 P. 766; 24 Cal. Jur., p. 334.

[7] It is likewise the well-settled law of this state that when valid proceedings for improvements by special assessment have been completed and bonds have been issued to represent the assessments, a contractual relation between the property owner and the bondholder has been established. In *Chapman v. Jocelyn*, 182 Cal. 294, 187 P. 962, 963, it was said: "A street assessment is a contract, and the provisions of the statute in force at the time providing the manner of its enforcement are a part of such contract. *Creighton v. Pragg*, 21 Cal. 115; *Houston v. McKenna*, 22 Cal. 550, 553. * * * The Constitution forbids the passage of a law impairing the obligation of a contract. Article 1, § 16. It follows that a law enacted after such contract is made, and which materially alters the remedy of the bondholder to enforce his lien by means of a sale, or the rights of the owner under the law existing at the time the bond was issued, cannot apply to previous contracts, and can have only a prospective effect."

The same rule was applied and was deemed controlling in *Jeffreys v. Point Richmond Canal, etc., Co.*, 202 Cal. 290, 260 P. 548. In that case the holder of street assessment bonds issued under the Improvement Act of 1911 sued to foreclose the bonds. At the time the bonds were issued the law did not provide for foreclosure by suit on the part of the bondholder. After the bonds were issued the statute was amended (St. 1921, p. 297, § 10) to authorize such a suit as "a separate, distinct and cumulative remedy" available to the bondholder. It was held that the rights of property owners against whose property assessments had been levied and bonds issued therefor under the 1911 act became vested prior to the amendment and could not constitutionally be affected thereby, even under the guise of an additional remedy, as it adversely affected a substantial right of the property owner.

In *Warden v. Barnes*, 111 Cal. App. 287, 295 P. 569, it was held that a deed issued following proceedings to foreclose a street bond which included a charge of \$1 for a certificate of sale provided for by an amendment to the street law, but not provided for in the law in effect when the bond was issued, was invalid for the reason stated in *Chapman v. Jocelyn*, supra, and other like cases. To the same effect, see *Oakland S. I. Bond Co. v. Fitzmaurice*, 47 Cal. App. 258, 259, 190 P. 499, *Sammon v. Wing*, 105 Cal. App. 689, 288 P. 711. In *Security Trust & Savings Bank v. City of Los Angeles*, 120 Cal. App. 518, 7 P.(2d) 1061, 1064, it was said with reference to bonds issued on property in an improvement district under the 1915 act (St. 1915, p. 99), to pay the cost of construction of certain public improvements, and where the question of the applicability of the law in effect at the time of the issuance thereof was directly involved: "The bonds constitute a contract between the bondholders and the taxpayers of the district. Among other things, the contract (bond) contains the provision that 'the principal and interest of this bond are payable exclusively out of taxes levied upon the taxable property in said Municipal Improvement District No. 27,' and to substitute any other method for the payment of the bond would be to change the express terms of the contract, which is not permissible. [Citing cases.]"

[8] The petitioner necessarily concedes that if it prevail the cases of *Chapman v. Jocelyn*, supra, *Jeffreys v. Point Richmond Canal Co.*, supra, and other cases in this state to the same effect, must be overruled. It is insisted that they be not followed for the stated reason that they are ill considered, are contrary to the doctrine of other cases in this state, and contrary to decisions in other jurisdictions. The California cases cited as authority for the statement are not in point. Three of them correctly hold that the proper-

ty owner is not a party to the improvement contract and the others are not inconsistent with the declared doctrine that when the special assessment proceedings are completed a contractual relation arises as between the bondholder and the property owner to such an extent that the substantial rights of either may not be impaired by subsequent legislation. It may be conceded that cases in other jurisdictions are in support of the petitioner's position, but we cannot agree that those against its contentions in this state are ill considered. They are based on sound principles of public policy for the protection of both the bondholder and the property owner. In any event they are the established law of this state and as they constitute a rule of property they should not be set aside except for cogent reason not now made to appear.

Two additional cases relied upon by the petitioner require mention. The first is *La Mesa, etc., Irr. Dist. v. Halley*, 197 Cal. 50, 239 P. 719, 724. That case involved the right of the Legislature to change the general powers of irrigation districts, the method of their management and the manner of issuing bonds for carrying out the purposes of the district. It was contended therein that the terms of the statute in force at the time of the organization of an irrigation district constituted a contract between the state and the individual landowners in the district who as electors voted to create the district, which could not be changed or impaired by subsequent legislation. The contention was rejected and this court very properly pointed out the distinction between the contractual relation existing after a completed election proceeding, as in *Peery v. City of Los Angeles*, 187 Cal. 753, 203 P. 902, 19 A. L. R. 1044, and the absence of such relation before an election for the issuance of bonds had taken place, stating in that connection, "that the doctrine that the Legislature may not change the law governing the issue and terms of disposition of bonds by cities was given application to a condition wherein certain bonds of the city of Los Angeles had already been voted and issued prior to the making of a change in the law permitting such bonds to be disposed of below par in contravention of the terms of the law in existence at the time of the election, whereby the electors voted to issue and sell the bonds of the city at par and not otherwise."

The second case to be noticed is *Palo Verde Irr. Dist. v. Seeley*, 198 Cal. 477, 245 P. 1092. That case involved the validity of refunding bonds of the irrigation district. The Legislature by special act established the boundaries of the irrigation district and thereby found that all of the territory therein would be benefited by the organization of the district and by any works and improvements undertaken and carried out thereby. Included

within this territory were the lands within an old levee district, an old drainage district, and a mutual water company. It was declared by the statute that all of the improvements constructed by the old districts and the water company would be advantageous and beneficial to all of the lands within the new district, including lands therein not within any of the old districts. The question whether the new district should be organized was submitted to the vote of the property owners of the district and was carried. The question whether the refunding bonds should be issued was also submitted to a vote and was overwhelmingly carried. The purpose of the refunding bonds was to retire in part the bonds of the old districts and the water company. The contention was made, as here, that the issuance of the refunding bonds would be an impairment of alleged contract rights of the taxpayers in the levee district by reason of the fact that the personal property in that district would be relieved from the burden of paying general taxes to satisfy the levee district bonds. It was held that no such rights were impaired, and the fact that the Legislature had seen fit to lighten partially the burden of the taxpayers in that district did not make it obligatory on the Legislature permanently to lessen it. The organization of the irrigation district and the issuance of the refunding bonds having been authorized by the voters in the district, it was declared that the voice of the required number must be deemed the consent of the whole. In the case at bar the consent of those required to bear the added burdens imposed by the statute under attack has not been obtained. These two cases cannot serve to support the petitioner's position.

Stress is laid upon the fact that the bonds issued and imposed on the lands in district No. 9 have reached the channels of trade and that unless the holders thereof are given relief under the proposed reassessment and refunding plan there is little hope of realization upon their investments. Their plight, under such a situation, is unfortunate, but they must be held to the terms of their contract when the rights of the property owners would otherwise be violated.

It is insisted that unless the proposed refunding plan is made effective the property owners in the district cannot separately pay their county and school taxes because they may not under the law be paid separate and apart from the special assessment tax. The answer is that the Legislature has so provided. It is assumed that it would be competent for the Legislature to provide for separate tax bills to represent the special assessments. This might have been done, but instead thereof the Legislature, at its last session, made doubly sure that it should not be done by amending section 41 of the act of

1925 (St. 1931, p. 1554) and providing that "such special assessment taxes shall be collected and enforced together with, and not separately from, taxes for county purposes or for municipal purposes, as the case may be."

[9] It follows from what has been said that the Reassessment and Refunding Act of 1931 is not applicable to the proceedings heretofore taken in Acquisition and Improvement District No. 19 in San Diego county under which the ad valorem assessments were provided to satisfy the obligation of the bonds sought to be refunded.

The peremptory writ is denied, and the alternative writ is discharged.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.; TYLER, Justice pro tem.

217 Cal. 96

BEE et al. v. COOPER et al.

L. A. 12842.

Supreme Court of California.

Dec. 27, 1932.

1. Release ☞29(1).

Release of one of two or more joint tortfeasors releases all.

2. Release ☞29(4).

Where settlement agreement dismissed as to several defendant directors action for alleged fraudulent conspiracy to divert corporate assets, provision reserving plaintiffs' right against remaining directors *held* invalid.

3. Release ☞29(2).

Statutes providing that release of one of two or more joint debtors does not extinguish obligation of others applies only to contractual obligations, and not to obligations of joint tortfeasors (Civ. Code, § 1543).

4. Release ☞29(1).

Action for director's collusion and fraudulent conspiracy to divert corporate assets *held* action in tort as regards release of joint tortfeasors.

5. Release ☞29(1).

In action for fraudulent conspiracy to divert corporate assets, release of several defendant directors in consideration for payment of money *held* to release all.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Emily Maria Bee and others against C. C. Cooper and others. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

B. A. Mason, of Hollywood, and Norman T. Mason, of Los Angeles, for appellants.

A. A. Rezac, of Omaha, Neb., for respondents C. C. Cooper and Grace A. Nowlan.

Cruickshank, Brooke & Evans, of Pasadena, for respondent R. R. Bush.

Owen C. Emery, of Glendale, for respondent L. E. Tripp.

WASTE, C. J.

Plaintiffs appeal from a judgment entered in favor of the defendants upon the granting of a motion for nonsuit.

The cause went to trial on plaintiffs' second amended complaint, wherein it is alleged, in substance, that the plaintiffs are stockholders of the Federal Building & Finance Company, a corporation; that, prior to the filing of this action, they had, without avail, made demand on the corporation to take the necessary steps to recover certain of its assets alleged to have been wrongfully disposed of by its seven former directors named, among others, as defendants herein; that in March, 1927, said seven directors "conceived and undertook to carry out a plan" to dispose of their personal stock in the corporation, together with that of their friends (defendants Bush, Nowlan and Yaussi), and whereby they should secure the sum of \$196,000; that the defendants Wright and Downing co-operated with them and aided the defendant directors in the conception and execution of the plan; that the defendants Federal Mortgage Company, Bush, Nowlan, and Yaussi also knew of the plan; that, in pursuance of such plan, and without the knowledge, consent, or authority of the other stockholders of the corporation, the said seven former directors, defendants herein, transferred to one L. S. Farmer, a dummy or intermediary, approximately one-half of the assets of the corporation, having a value of \$196,000, in exchange for rights to purchase 18,000 shares of the common stock of the National Mortgage Company at \$5 a share; that these rights were valueless, as the defendant directors well knew, or should have known; that these rights were never exercised; that, in accordance with said plan and in execution thereof, the defendant Farmer, the intermediary, transferred said \$196,000 in assets to the defendant Federal Mortgage Company, which latter company distributed such assets, or their equivalent in cash, to the defendant directors and their friends in proportion to their stock ownership in the defendant Federal Building & Finance Company, whereupon their stock and voting control in the latter corporation was transferred to the de-

fendants Wright and Downing and Wright, Alexander & Co.; that the defendant members of the board of directors thereupon resigned, and a new board was elected, which has since sought to dissolve the corporation; that the former directors conceived and carried out the unauthorized and illegal transfer of the corporate assets to themselves through an intermediary, with full knowledge of their want of authority so to do, and of the illegal and fraudulent character thereof; and that the parties defendant to whom the stock was transferred and those defendants who received, retained, and used the diverted assets of the corporation "had notice and knowledge of the plan in pursuance of which said stock and said assets were received and acquired, as well as notice and knowledge of the official position of the said defendants as directors of the Federal Building & Finance Company, and had notice and knowledge of the ownership of the assets of the Federal Building & Finance Company and of the disposition made and to be made thereof." The complaint then prays for judgment against all of the defendants in the sum of \$450,000.

The cause went to trial on the issues raised by the second amended complaint and the answers thereto. At the conclusion of the plaintiffs' case, the plaintiffs stipulated to a dismissal as to the defendants Mary S. Cooper and Julia A. Smith. As to the remaining defendants, the plaintiffs were nonsuited. This appeal followed.

Inspection of the record discloses that the trial court was of the opinion that the evidence failed to establish the cause of action alleged in the complaint. Upon an examination of the evidence, we are satisfied that the court below was correct in this regard. The evidence falls far short of establishing the illegal and fraudulent conspiracy charged in the complaint to have been conceived and executed for the purpose of improperly diverting the assets of the corporation. However, we need not rest our decision on this ground alone. In addition to the allegations above set forth, the complaint alleged that, subsequent to the institution of this action, five of the seven defendant directors had returned or delivered "to a trustee for the benefit of these plaintiffs and on account of the conversion or misappropriation of assets hereinbefore alleged, the sum of \$41,465.64, which amount should be credited upon any judgment rendered herein." The defendants, in their respective answers, alleged that the plaintiffs, in consideration of such payment, had fully compromised, settled, and dismissed the action as to said five defendant directors. Such release is thereupon pleaded as a release of all the defendants and a complete settlement of the cause of action alleged.

[1] The evidence shows that, subsequent to the commencement of this action, the plaintiffs and five of the defendant directors enter-

ed into a written "Settlement Agreement" whereby, in consideration of said five defendants paying over to a trustee the respective portions or percentage of the money and other property received by them as the result of the alleged illegal and fraudulent conspiracy, the plaintiffs agreed to settle and dismiss this action as to said defendants. Thereafter, and pursuant to this agreement, five of the defendant directors did pay over said moneys to a trustee, and this action, at the request of the plaintiffs, was dismissed as to them. The agreement was not a mere covenant not to sue, as appellants would have us construe it. A reading of the instrument very definitely discloses that it was the intention of the parties thereto to fully settle, compromise, and dismiss the cause of action here sued on, in so far as certain defendants are concerned. *Hawber v. Raley*, 92 Cal. App. 701, 704, 268 P. 943. The dismissal was on the merits, and intended to settle the differences and obligations between the parties growing out of the cause of action set forth in the complaint. It is well settled that a release of one of two or more joint tort-feasors operates as a release of all. *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 P. 704, 707; *Tompkins v. Clay St. R. Co.*, 66 Cal. 163, 4 P. 1165; *Johnson v. Pickwick Stages System*, 108 Cal. App. 279, 283-285, 291 P. 611; *Bogardus v. O'Dea*, 105 Cal. App. 189, 192, 193, 287 P. 149; *Hawber v. Raley*, 92 Cal. App. 701, 702-706, 268 P. 943; *Flynn v. Manson*, 19 Cal. App. 400-406, 126 P. 181. The reason for the rule is well stated in the case first above cited, wherein it is declared: "While plaintiff may sue one or all of joint tort feors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feors, his right to proceed further against the others is at an end. Where several joint tort feors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not either whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against them all."

[2] The "settlement agreement" here involved contains, among others, the following clause: "Seventh. As and when any of said parties of the second part [defendants] shall pay or deliver to said trustee that which is required of him hereunder this action shall be dismissed as to such party, but nothing here-

in contained shall in any manner prejudice the prosecution of said pending action or of any other action against any other defendant herein or against any other person who may be liable on account of the matters therein complained of." This purported reservation of plaintiffs' rights against the remaining defendants herein is nugatory and of no effect. *Flynn v. Manson*, supra, pages 402-406 of 19 Cal. App., 126 P. 181. Such a provision is void as being repugnant to the legal effect and operation of the release itself. *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504. In *Ruble v. Turner*, 12 Va. (2 Hen. & M.) 38, cited with approval in *Flynn v. Manson*, supra, it is held that: "The law says, that if one joint trespasser be released, or make accord and satisfaction, it shall bar a recovery against all the others. The plaintiff can no more change the law, in this particular, by any subsequent proviso or condition, than he could, after a grant in fee-simple, by deed, restrain his grantee from selling the lands. * * * The proviso then is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the defendants."

Appellants concede that, "when a release is given to one of several joint tort-feors in consideration of complete satisfaction for the injury, but reserving the releasor's claim against the others, the reservation is void; because in that case there is nothing to reserve." This principle is peculiarly applicable to the present case, for a reading of the evidence and the "settlement agreement" readily discloses that the moneys paid by five of the defendants, and the release and dismissal given in consideration thereof, were in complete satisfaction and in full settlement of the cause of action so far as said five defendants were concerned. This being so, the purported reservation as to the remaining defendants is void, for "there is nothing to reserve."

[3-5] Appellants cite section 1543 of the Civil Code to the effect that "a release of one of two or more joint debtors does not extinguish the obligations of any of the others. * * *" That section, by its very language, has application only to contractual obligations and not to the obligations of joint tort-feors. *Aigeltinger v. Whelan*, 133 Cal. 110, 113, 65 P. 125. There is no room for argument upon the question as to whether this complaint is upon a cause of action ex contractu or upon one sounding in tort. While the appellants describe the action as one in equity to recover certain corporate assets alleged to have been improperly transferred by the board of directors, the action contains nothing more than a charge ex delicto against the directors and their codefendants for fraudulently conspiring to divert the corporate assets. Applying to this case the reasoning employed in *Chetwood v. California Nat. Bank*, supra, there can be no doubt but that the cause of action here alleged sounds

in tort, and that the several defendants are charged as joint tort-feasors. The gravamen of the complaint is the alleged collusion and fraudulent plan asserted to have been conceived and executed by the defendants for the purpose of diverting the corporate assets. It necessarily follows, therefore, that the release and discharge of some of the joint tort-feasors, in consideration of their payment to appellants of certain moneys for the loss and damage suffered by reason of the tort complained of, works a release of the remaining joint tort-feasors. This being so, appellants were properly nonsuited.

The judgment is affirmed.

We concur: PRESTON, J.; LANGDON, J.; SHENK, J.; TYLER, Justice pro tem.; SEAWELL, J.

ROLLER et ux. v. DALEYS, Inc., et al.*
Civ. 587.

District Court of Appeal, Fourth District,
California.

Dec. 23, 1932.

Rehearing Denied Jan. 20, 1933.

Hearing Granted by Supreme Court Feb. 20,
1933.

1. Automobiles ⇨244(32).

Evidence showed that truck which collided with automobile driven by plaintiff belonged to defendant.

2. Appeal and error ⇨1002.

On conflicting evidence, jury's finding is conclusive.

3. Automobiles ⇨245(80).

Whether motorist was guilty of contributory negligence which contributed proximately to collision, in that she failed to see truck approaching street intersection, held for jury.

4. Trial ⇨296(3).

Instruction that driver was not required before proceeding across street intersection, to ascertain that there were no vehicles traveling over intersecting street other than that portion over which vehicles would "legally" travel, held not misleading, in view of other instructions (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540).

5. Appeal and error ⇨1064(1).

To warrant reversal of judgment, appellant must have been prejudiced by formula instructions.

6. Appeal and error ⇨1064(1).

Instruction that, if driver was not driving truck on right half of street, and it was practicable to travel there, and street was not one-way street, he was negligent as matter of

law, held not prejudicial (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540).

7. Appeal and error ⇨1064(1).

Instruction that, if street intersection was clear when automobile entered it, then driver could assume that no truck would enter intersection from wrong side of intersecting street, held not prejudicial (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540).

8. Trial ⇨252(8).

Instruction based on hypothesis, unsupported by evidence, that driver failed to stop at boulevard stop sign held properly refused.

9. New trial ⇨74.

Amount of damages in personal injury action is committed first to jury's sound discretion, and next to discretion of trial judge, who, on application for new trial, may set aside verdict, if unjust.

10. Appeal and error ⇨1004(1).

On appeal, verdict awarding damages may not be set aside, unless so plainly excessive as to suggest passion, prejudice, or corruption.

11. Damages ⇨132(7).

\$30,000 award to 33 year old woman, \$28,400 of which was for painful injuries, consisting chiefly of wounds in knee, and resulting in shortening of leg which produced noticeable limp, held excessive.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Henry W. Roller and wife against Daleys, Inc., and another. From a judgment in favor of plaintiffs, named defendant appeals.

Reversed and remanded, with directions.

Joe Crider, Jr., of Los Angeles, Fred A. Wilson, of San Bernardino, and Clive W. Johnson, and Gibson, Dunn & Crutcher, by Norman S. Sterry, all of Los Angeles, for appellant.

O'Connor & Findlay, of Colton, for respondents.

JENNINGS, J.

This action was instituted by plaintiffs, who are husband and wife, to recover damages for personal injuries sustained by the plaintiff, Emma F. Roller, in a collision between a Ford automobile which she was driving and a truck which was owned by defendant Daleys, Inc., and which was being driven by defendant Frank A. Hamilton. The accident which gave rise to this action occurred at approximately 1 o'clock in the morning of December 11, 1929, in the intersection of D street and Highland avenue in the city of San Bernardino. D street runs in a general

north-south direction and Highland avenue in a general east-west direction. During the trial it was stipulated that the portion of D street which lies immediately north of Highland avenue is 30 feet in width from curb to curb, and the portion of Highland avenue which lies immediately west of D street is 60 feet wide from curb to curb. Plaintiffs resided in the city of Colton. During the evening of December 10, 1929, plaintiff Emma F. Roller drove from Colton to San Bernardino for the purpose of attending a ladies' bridge party. Upon the conclusion of the party, and at some time past midnight she set out alone on the return journey to her home in Colton. She proceeded south on D street in San Bernardino until she arrived at the intersection of this street with Highland avenue. Near the northwest corner of this intersection there is a boulevard stop sign. The object of this sign is to require south-bound traffic on D street to come to a stop before proceeding into the intersection. The witness Emma F. Roller testified that as she approached the intersection she was traveling along the west side of D street at the rate of approximately 25 miles per hour; that, when she arrived at a point about the length of her car north of the boulevard stop sign, she saw an automobile which had been proceeding in an easterly direction on Highland avenue turn north into D street, and noted that the driver of it swung over in her direction, for which reason she drew her car further to her right; that she came to a full stop before proceeding into the intersection and looked to the east and west; that she saw no vehicles in either direction, and thereupon she drove into the intersection, continuing southerly in a straight line; that she again looked to the east after she had traveled about 15 feet and had arrived at the north curb line of Highland avenue, at which point she could see from three-fourths of a block to a block to the east and saw nothing; that she then entered the intersection, and without again looking to the east proceeded at a speed of approximately 8 to 10 miles per hour to a point that was south of the medial line of Highland avenue where her car was struck by the truck and was turned over.

[1] Appellant insists that the judgment in favor of respondents is not supported by the evidence. In this connection it is first suggested that there is an entire absence of proof that the truck whose collision with the automobile driven by respondent Emma F. Roller caused the injuries complained of was in fact appellant's truck. Appellant's answer specifically admits that defendant Frank A. Hamilton, at the time and place alleged in the complaint, was the agent and employee of appellant, and was then and there driving the truck which was the property of appellant in and about the business and affairs of appellant. There is no admission in the answer that appellant's truck which was being

driven by Frank A. Hamilton actually collided with the Ford automobile. However, respondent Emma F. Roller testified that her automobile was struck by a truck, and, in response to a question as to who was present when she was in the house where she was taken immediately following the collision, gave the following testimony: "Mr. and Mrs. Harris and the man that hit me was there. Q. Mr. Hamilton? A. Yes, sir." Two other witnesses testified that they observed a truck near the center of the intersection shortly after they arrived at the scene of the accident. It is apparent that there was ample identification of the truck, which the answer admitted was appellant's truck, and was "then and there" driven by Frank A. Hamilton, appellant's agent, "in and about the business and affairs of the said defendant Daleys Incorporated."

[2] It is, however, further contended that, even though it be held that there was sufficient identification of the truck which collided with the automobile as appellant's truck, nevertheless the evidence produced at the trial was insufficient to support the verdict, in that it demonstrated that respondent Emma F. Roller was herself guilty of negligence which contributed to the happening of the accident. Respondent Emma F. Roller was the only witness who was present when the collision occurred who testified in regard to it. So far as appears, there was one other eyewitness who might have testified. This was the defendant Frank A. Hamilton, the truck driver. He made no appearance in the action, and was not called to testify by either respondents or appellant. The testimony of Emma F. Roller showed that, after making a complete stop and looking both east and west, and seeing no vehicle approaching from either direction, she drove on for a distance of 15 feet when she arrived at the north curb line of Highland avenue, at which point she again looked to the east and saw nothing "in the northeast traffic lane," and "nothing in Highland Avenue within range of my vision," and that she saw nothing in the intersection; that she thereupon entered the intersection and drove through it on her right-hand side at a speed of from 8 to 10 miles per hour, hearing no sound until she arrived at a point a few feet south of the center of the intersection, where her automobile was struck by the truck. It is vigorously contended by appellant, first, that this testimony entirely fails to show that the truck driver was negligent in driving on the south side, his left-hand side, of Highland avenue, since, it is urged, there is an entire lack of evidence that he did so drive, and, second, that it conclusively indicates that respondent Emma F. Roller was herself guilty of negligence which contributed to the happening of the accident, inasmuch as she testified that she could see for a distance of at least three-fourths of a block, approximately 450 feet, when she look-

ed to the east at the north curve line of Highland avenue, and if she did so look she must have seen the truck. With respect to the first of these contentions, it must be conceded that there is no direct evidence showing that the truck driver drove the truck on the south side of Highland avenue as he approached the intersection. However, there is the positive testimony of the witness, Emma F. Roller, that she had arrived at a point south of the center of the intersection when the collision occurred and the physical fact which appears in evidence that the Ford automobile was struck on its left side. This evidence, while it is by no means conclusive proof of the fact that the truck driver negligently drove the truck westerly on the wrong side of Highland avenue, is evidence from which the jury was justified in drawing an inference to that effect. Appellant points out that another witness, who testified in behalf of respondents, when asked to designate the position of the truck on a diagram representing the intersection where the collision occurred, drew a parallelogram placing it directly west of the intersection of the center line of D street with the center line of Highland avenue, the front portion of the figure pointing in a general southwesterly direction well to the south of the center line of Highland avenue, and the rear part being located on the north side of the center line of Highland avenue as represented on the diagram. From this it is argued that the only evidence produced which in any way indicated the course of the truck prior to the collision showed that immediately prior to the accident the truck was proceeding on the north side of Highland avenue. The most that can be said for this evidence, which was furnished by one who was not an eyewitness of the collision, is that it conflicted with the testimony of respondent Emma F. Roller, who, as above noted, testified positively that her automobile had reached a point south of the center line of Highland avenue before the collision occurred. It is hardly necessary to cite the familiar rule as to the duty of a reviewing court where the record presents a case of conflicting evidence.

[3] With respect to the contention that the evidence which was produced during the trial of the action showed that respondent Emma F. Roller was herself guilty of negligence which contributed to the happening of the accident, in that she failed to see the truck which was approaching the intersection when, as it is argued, it must have been visible to her, it is enough to say that this was a question of fact to be resolved by the jury. The rule which imposes upon one the duty to see that which is visible necessarily implies that the object to be seen shall be visible. The facts here presented do not fairly warrant an inference that the truck was visible to respondent. The record contains no evidence as to the position of the truck at

the time respondent looked to the east prior to entering the intersection. There is not an iota of evidence with respect to the speed at which the truck was proceeding. There is not a syllable of testimony regarding the presence of lights upon the truck. To sustain appellant's contention in this regard, we should have to declare that the only inference that could be drawn by reasonable men from the facts presented was that appellant's truck was visible to respondent Emma F. Roller when she looked to the east on Highland avenue. *Moss v. H. R. Boynton Co.*, 44 Cal. App. 474, 186 P. 631; *White v. Davis*, 103 Cal. App. 531, 284 P. 1086. Nor would this be sufficient. We would also be required to say that her failure to see the truck contributed proximately to the happening of the accident from which her injuries resulted. We are by no means prepared to say that the truck was visible, and there is no evidence whatever that would justify the latter declaration.

[4-7] Complaint is also made that the court erred in giving to the jury certain instructions. These instructions are three in number, and are in the following language:

"You are instructed that the duty devolving upon plaintiff Emma F. Roller as an ordinarily prudent woman to look in the direction from which danger was to be anticipated did not require that before proceeding across Highland Avenue on the night of the accident she first ascertain that there were no vehicles traveling westerly over and along any portion of Highland Avenue east of D Street other than that portion over which vehicles would ordinarily and legally travel while going in a westerly direction."

"IV. If you find from the evidence in this case that Frank A. Hamilton was not at the time of and immediately prior to the accident driving the truck of defendant Daley's Incorporated upon the right half of the street and that it was practicable to travel upon the right half of said street, and that such street was not a one way street, then you are instructed that he was guilty of negligence as a matter of law."

"VII. If you find from the evidence that the accident and collision, if any, occurred south of the middle line of Highland avenue, and you find from the evidence that the intersection of Highland avenue and D street was clear at the time Mrs. Roller entered it, then I instruct you that she had a right to assume that no car or truck would enter the intersection from the east and south of the medial or middle line of Highland avenue and collide with her south of such line in the intersection, and if you find from the evidence that Frank A. Hamilton entered the intersection from the east and south of the middle line of Highland avenue, then you are instructed that the defendant Daley's Incorporated was guilty of negligence as a matter of law, and if you find that such negligence, if

any, was the proximate cause of Mrs. Roller's injuries and that she was not guilty of negligence contributing proximately thereto, your verdict must be for the plaintiffs."

The first of the above-quoted instructions is the object of especial criticism, since it is argued that it advised the jury that respondent Emma F. Roller was not negligent if appellant's truck was traveling on the south side of Highland avenue and she failed to see it, and it is contended that the vice of the instruction is emphasized by the two other instructions which charged the jury that, if it found that the truck driver, Hamilton, was driving on the south side of Highland avenue, he was negligent as a matter of law. It is urged that by these instructions respondent Emma F. Roller was entirely absolved from any duty of discovering the truck or of taking any care to avoid colliding with it, if it should be found that the truck driver was driving the truck along the south side of Highland avenue without reference to the condition of the north side of said avenue. It is again argued that there is no evidence that the truck driver was on the wrong side of the street and that respondent was clearly negligent in not observing the truck. This latter contention has heretofore received consideration. It is also particularly urged that the first instruction is fatally erroneous in failing to incorporate any reference to the condition of the north half of Highland avenue. Section 122 of the California Vehicle Act (St. 1929, p. 540), as it read on December 11, 1929, the date of the accident, was in the following language: "Upon all highways of sufficient width except upon one way streets, the driver of a vehicle shall drive the same upon the right half of the highway and close to the right hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway, and except when overtaking and passing other vehicles, in which event the overtaking vehicle may be driven on the left side of the highway, if such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety; and providing that such overtaking vehicle shall return to the right hand side of the highway before coming within one hundred feet of any vehicle approaching from the opposite direction."

In another instruction the court so advised the jury and further instructed the jury that section 122 of the California Vehicle Act required that the drivers of vehicles, in crossing intersections of highways, should travel on the right half of the highway, unless such right side is obstructed or impassable. From the fact that the jury was thus fully informed as to the duty of drivers to keep to the right, and the additional fact that the criticized instruction specifically advised the jury that the respondent was not required to ascertain what there were no vehicles traveling

westerly on any portion of Highland avenue other than that portion over which vehicles would ordinarily and *legally* (italics ours) travel while going in a westerly direction, it seems impossible that the jury could have been misled by the instruction. Furthermore, it is to be observed that the record contains not a scintilla of evidence that the north half of Highland avenue was in any manner obstructed or rendered impassable. Appellant could not therefore have been prejudiced by the giving of the instruction if it be conceded that it was incorrect for the reason urged. In this connection, it must be observed that in the second of the above instructions the element which it is urged is lacking in the first instruction is incorporated, and the jury was plainly told that before it could find the truck driver guilty of negligence as a matter of law it would have to appear from the evidence that he was not driving the truck on the right half of the street, and "that it was practicable to travel upon the right half of said street and that such street was not a one way street." Thus the practicability of traveling upon the north half of Highland avenue was specifically called to the jury's attention. The second and third of the above-quoted instructions are criticized because it is said by them the jury was advised that respondent Emma F. Roller was not negligent in failing to see appellant's truck if it was traveling along the south side of Highland avenue. It is again urged that no evidence was produced showing that the truck was in fact traveling on the south side of Highland avenue. The answer to this argument is, as above noted, that there was evidence from which the jury may well have inferred that the truck was proceeding along the south side of Highland avenue prior to entering the intersection. The second and third instructions are also criticized as being argumentative. While the giving of formula instructions is not to be commended, it should appear that an appellant was prejudiced thereby in order to warrant a reversal of the judgment. *Elsey v. Domecq*, 114 Cal. App. 42, 51, 299 P. 794. Careful examination of the record herein has failed to produce the conviction that the giving of the criticized instructions was prejudicial to appellant. The court, at the request of respondents, gave seven instructions, and gave thirteen of the fifteen instructions offered by appellant. By the instructions which were given at the request of appellant, the jury was fully and thoroughly advised of the vigilance required of respondent Emma F. Roller, of the necessity that it should find that appellant was guilty of some act of negligence and the injured respondent free from any negligence that contributed to the happening of the accident in order to permit recovery by respondents. We are impelled to the conclusion that the giving of the instructions of which complaint is made was not prejudicial

to appellant, and did not constitute reversible error. It is further objected that the court refused to give two of the instructions offered by appellant. It is conceded that one of the instructions was so phrased that the court was justified in its refusal. The second instruction which it is contended should have been given is in the following language: "If you find from the evidence that plaintiff Emma F. Roller failed to stop before entering or crossing Highland Avenue and you further find that at the intersection of Highland Avenue there was on D street a boulevard or through highway stop sign, then you must find plaintiff Emma F. Roller guilty of negligence, and if you find that said negligence was the proximate cause of the injuries received by her, if any you so find, then your verdict must be for defendant."

[8, 9] It is sufficient to say that the record contains not an iota of evidence that the respondent Emma F. Roller failed to bring her automobile to a stop before entering the intersection where the collision occurred. She testified positively that she did bring her car to a complete stop, and her testimony was uncontradicted. The refusal by the court to give an instruction based on a hypothesis entirely unsupported by evidence was not error.

[10, 11] Appellant's final contention is that the verdict in favor of respondents is for an excessive amount. The jury awarded to respondents the sum of \$30,000 as compensation for the injuries sustained by respondent Emma F. Roller as a result of the collision. The evidence showed that the sum of \$1,545.25 had been expended by respondents for drugs and surgical supplies, hospital and ambulance charges, charges for nursing and charges of physicians. It was also shown that the reasonable value of the Ford automobile prior to the accident was \$50, and that it had no value thereafter. The remainder of the award, amounting to approximately \$28,400, must therefore have been allowed as general damages. The uncontradicted testimony of the injured respondent and of the witnesses who testified in her behalf showed that at the time of the accident Emma F. Roller was 33 years of age; that prior to sustaining the injuries which resulted from the collision she was a vivacious young woman, fond of outdoor sports; that after the accident she became moody, nervous, and irritable. The physician who was called to furnish medical attention to the injured respondent at the hospital where she was taken immediately after the accident testified that she was conscious and was suffering considerable pain; that the principal injury was in the right knee, though there were numerous scratches, cuts, and bruises in other parts of her body; that he inspected the wounds, cleaned out the cuts, and administered a narcotic hypodermically to relieve the pain from which she was suffering; that four hours later a general anæ-

thetic was administered and her wounds were again dressed, thoroughly cleaned, and inspected for the purpose of discovering the presence therein of foreign matter such as dirt and bits of clothing, which were removed. The chief injury sustained consisted of wounds in the right knee. Inspection showed that there were two wounds of the knee approximately four or five inches in length extending to the bone, and that, because of them, the kneejoint was opened, and that, by reason of the joint being opened without opportunity of sterilization, infection ensued, and pus and joint fluid drained from the wound for about six weeks. It was also found that the tendon which serves to straighten the knee was entirely severed. This tendon was sewed together. The patient remained in the hospital for about ten days. After being removed to her home, she was confined to her bed for three and one-half months. The result of the knee wounds has been to produce a stiffening of the kneejoint. The kneejoint was set in a partially bent position, which the physicians testified they considered most comfortable for both sitting and walking. This, however, resulted in the right leg being slightly shortened, the effect of which is a noticeable tilting of the trunk and a noticeable limp. It was the opinion of the physicians who testified that increased mobility of the kneejoint might be accomplished by an operation which, in the terminology of a layman, would amount to making a new knee joint. This operation could not be safely performed within two years after the accident and the prospect of improving the injured knee thereby is problematical, "not more than 50%," as the physician testified. From the above recital it is apparent that, as a result of the collision, respondent suffered painful and serious injuries; the principal injury being one that will, in all probability, be permanent. The rule is settled in California by a long line of decisions that the amount of damages in actions of this character is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, upon application for a new trial, may consider the evidence anew and set aside the verdict, if it is not just, and that upon appeal the decision of the trial court and the jury on the subject may not be set aside, unless the verdict is so plainly excessive as to suggest, at first blush, that it was the result of passion, prejudice, or corruption on the part of the jury. *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100; *Connor v. Henderson*, 108 Cal. App. 237, 291 P. 641. It is proper to observe that a motion for new trial was presented to the trial court herein and was denied. We have here, therefore, a situation where, under the very strong language of the above-mentioned rule, we are required to declare that the verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or

corruption on the part of the jury, if we are to sustain appellant's contention that the verdict is excessive. The only test that may properly be applied to the award for the purpose of discovering whether it was the result of passion or prejudice on the part of the jury is to compare the sum allowed by the verdict with the evidence presented during the trial of the action, since the declaration that a verdict has been influenced by prejudice or passion is equivalent to a declaration that the verdict exceeds any amount justified by the evidence. *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 254, 116 P. 513; *Barrett v. Harman*, 115 Cal. App. 283, 288, 1 P.(2d) 458. When this test is applied, we are impelled to the conclusion that the verdict is excessive.

As we have heretofore indicated, the record herein presents ample evidence to support a verdict in favor of respondents. The sole issue which demands a retrial is the issue of damages. *Pretzer v. Cal. Transit Co.*, 211 Cal. 202, 209, 294 P. 382.

The judgment is therefore reversed and the cause is remanded for a new trial of the single issue of the amount of damages and the trial court is directed to render judgment in favor of respondents for the amount of damages which shall be so found upon a determination of that issue.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 487

HARLOW v. MOTOR COACH CO. et al.
Civ. 7246.

District Court of Appeal, Second District,
Division 2, California.
Dec. 30, 1932.

1. Damages ⚡46.

Where difference in value of automobile before and after accident was established, liability for repairs need not be incurred to authorize recovery for damages.

2. Judgment ⚡256(6).

Omitting from judgment compensation for damages to automobile established by uncontroverted evidence and found by court held reversible error.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by H. I. Harlow against the Motor Coach Company and another. From the judgment, plaintiff appeals.

Reversed and remanded.

Ivan Kelso, Alfred T. Hutchins, and Maynard Garrison, all of Los Angeles, for appellant.

B. P. Gibbs, and Walter W. Little, both of Los Angeles, for respondents.

CRAIG, J.

[1, 2] In an action for damages arising from alleged negligence in the operation of a motor vehicle, findings of fact, conclusions of law, and judgment rendered in favor of the plaintiff on account of personal injuries was affirmed. (Cal. App.) 16 P.(2d) 779. By the same findings of fact it is recited that the plaintiff's automobile was damaged in the sum of \$211.30 by the same negligent acts of the defendants, and "that the plaintiff did not pay the cost of said repairs nor incur any liability by reason thereof." Compensation for such damage having been omitted from said judgment, the plaintiff appealed therefrom upon that ground. Since the difference in value of the car before and following the occurrence was established by competent evidence, and was so found by the trial court, the rule requiring payment or the incurring of actual liability as in actions founded upon personal injuries does not apply, and the portion of the findings above quoted is surplusage. *Kincaid v. Dunn*, 26 Cal. App. 686, 148 P. 235. The evidence tending to show such damage was not controverted, and the omission thereof from the judgment was obviously error requiring a reversal in this respect.

The judgment is reversed, and the case remanded for appropriate proceedings in conformity with the foregoing observations.

We concur: WORK, P. J.; STEPHENS, Justice pro tem.

SCHNERR v. SCHNERR.

Civ. 7891.

District Court of Appeal, First District,
Division 1, California.

Dec. 24, 1932.

Hearing Denied by Supreme Court Feb. 20,
1933.**1. Divorce ☞243.**

"Decree for alimony" is court order compelling husband to support wife by paying certain sum and thus perform public as well as marital duty.

Such a decree is more than ordinary debt or judgment for money, it is a personal order to husband similar to any order to one of court's officers, and purpose of imprisonment for contempt based thereon is not alone to enforce payment of money, but to punish party for disobedience of order.

[Ed. Note.—For other definitions of "Decree for Alimony," see Words and Phrases.]

2. Divorce ☞269(2).

Interlocutory and final divorce decrees not mentioning alimony, but merely ratifying property settlement between parties, *held* insufficient to support contempt proceedings against husband for failure to pay alimony.

Such decrees did not support contempt proceeding for failure to pay alimony, because, though property settlement agreement providing that husband should make certain monthly payments to wife for life was ratified and confirmed by court, neither decree expressly or otherwise made agreement a part thereof.

3. Divorce ☞234.

Interlocutory and final divorce decrees being insufficient to support contempt proceedings for failure to pay alimony, trial court was without jurisdiction, after lapse of five years, to remedy defect by making order requiring certain payments, in absence of reservation in original decrees respecting alimony.

4. Divorce ☞269(13).

Annulment of order committing divorced husband for contempt for failure to pay alimony *held* not to affect wife's right to enforce property settlement agreement by civil action.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Rose Schnerr against Joseph J. Schnerr. From an order committing defendant for contempt for failure to pay alimony, defendant appeals.

Reversed, with directions.

Joseph A. Brown, of San Francisco, for appellant.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent.

PER CURIAM.

As the result of contempt proceedings instituted by plaintiff some four years after the entry of the final decree of divorce in the above action, the trial court made an order relating to the payment of alimony; and defendant has appealed from said order.

The divorce action was instituted in October, 1924, upon the ground of extreme cruelty. There were no children, and no claim was made in the complaint either by allegation or prayer for alimony, temporary or permanent. With respect to property rights it was alleged "that the property rights of plaintiff and defendant have heretofore been settled by written agreement, and there is now no community property of said marriage of plaintiff and defendant." The relief sought was a divorce, that plaintiff be permitted to resume her maiden name, and general relief. The answer consisted of a general denial. An interlocutory decree was granted November 5, 1924, and on November 6, 1925, the final decree was entered. Both decrees were silent upon the subject of alimony, but with reference to property rights each contained the following provision: "It is further ordered, adjudged and decreed, and this court does hereby order, adjudge and decree that the agreement between the parties hereto made and entered into under date of October 21, 1924, settling the respective property rights of said parties be and the same is hereby confirmed, ratified and approved, and the property rights of the said parties established as in said agreement set forth." No appeal was taken from either decree. In June, 1930, more than four years after the entry of the final decree, plaintiff instituted contempt proceedings, pursuant to which a citation was issued directing the defendant to show cause on August 8, 1930, "why he should not be punished for contempt of court in disobeying the order and judgment of this court heretofore made and entered * * * requiring him to pay the sum of \$75.00 per month on the 1st day of each and every month commencing January 1st, 1925, to the plaintiff in said action. * * *" Some time afterwards the contempt proceeding came on for hearing, but there being no mention whatever in the complaint or in either decree, or elsewhere in the judgment roll, of the subject of alimony, it was necessary to take evidence as to the contents of the property settlement agreement referred to in said decrees, and thereupon said agreement was admitted in evidence, from which it appeared that besides transferring to plaintiff a number of shares of corporate stock and certain real

property, defendant paid a list of outstanding bills and agreed to pay to plaintiff \$60 a month until January, 1925, and thereafter \$75 a month during her life, or as long as she remained unmarried. Other evidence, oral and documentary, was taken, and thereafter, to wit, on January 14, 1931, the court made the order from which this appeal was taken. It was thereby "ordered, adjudged and decreed: 1st: That the court has jurisdiction to issue and enforce the said order to show cause and that the above entitled court, both in the said interlocutory decree of divorce and in the final decree of divorce heretofore ordered that the property rights of the parties hereto be established as provided in said agreement of October 21, 1924, and that thereby the court ordered the defendant to pay to the plaintiff the said sum of \$75.00 per month on the first day of January, 1925, and on the first day of each and every month thereafter during the lifetime of plaintiff and while she shall remain unmarried, and that by reason of such order of the court said court now has jurisdiction to punish defendant for contempt of court on his failure to make the payments in accordance with said order; 2nd: That the evidence shows that defendant is able to pay the plaintiff toward her maintenance and support the sum of \$17.50 per month, and until the further order of this court defendant shall pay to plaintiff the sum of \$17.50 per month, commencing January 19, 1931, and on failure of defendant to make said payment on January 19, 1931, and on the 19th day of each and every month thereafter defendant be adjudged guilty of contempt of this court and be punished therefor in accordance with the further order of this court; 3rd: That this court retain jurisdiction of this proceeding for the purpose hereafter, on motion of either party, to increase or decrease the amount of said monthly payment as the facts to be presented to the court may warrant; 4th: That the court withhold at this time any order punishing defendant for contempt of court for failing to make the payments required by said agreement and the order of this court during the period since the last payment made by defendant, but the court retains jurisdiction for the purpose of making such an order adjudging defendant in contempt of this court at such time hereafter as the financial ability of defendant to make all or any of such delinquent payments should be made to appear."

[1, 2] As stated in *Nelson on Divorce and Separation* (vol. 2, p. 904), a decree for alimony is an order of the court to the husband compelling him to support his wife by paying certain sums, and thus perform a public as well as a marital duty. And continuing, the author goes on to say that such a decree is something more than an ordinary debt or judgment for money; that it is a personal order to the husband similar to any order to one of its officers; and that the purpose

of imprisonment for contempt based thereon is not alone to enforce the payment of money, but to punish the party for disobedience to the order. In other words, as pointed out in *Schouler on Marriage, Divorce, etc.* (vol. 2, 6th Ed., p. 1998), a judgment for alimony differs from an ordinary judgment at law in this, that the latter does not order the defendant to pay anything, it simply adjudicates the amount owing; while the former, though partaking of the nature of a judgment, goes further and is a direct command to the defendant to pay the sums therein mentioned. The case of *Andrews v. Superior Court*, 103 Cal. App. 360, 284 P. 494, restates the same doctrine. In the present case, as will be seen, the interlocutory and final decrees do not mention the subject of alimony; they simply ratify, confirm, and approve a property settlement agreement entered into on a certain date; therefore, in the form in which they were rendered, said decrees are not only legally insufficient to warrant the docketing of any money judgment against defendant, but they are wholly insufficient to support contempt proceedings because no duty whatever is imposed thereby upon the defendant. Evidently such was the view taken by the trial court; otherwise it would not have found it necessary to take additional evidence to judicially ascertain and determine the contents of the agreement referred to in said decrees, and its order threatening an adjudication of contempt would not have been based, as it was, on the subsequent order of January 14, 1930, but would have been founded on the decrees themselves.

In support of the order appealed from plaintiff relies mainly on the case of *Tripp v. Superior Court*, 61 Cal. App. 64, 214 P. 252, 253. But in that case, unlike the present one, the agreement between the parties was set out in full in both decrees, and by express provision was made a part thereof. The duty imposed upon the defendant was, therefore, readily ascertainable from the decrees themselves. Furthermore, the agreement in that case provided that, if approved, the same should be embodied in the decree; and therefore in this connection the court said: "This stipulation surely contemplated that the terms of the agreement, when it should be embodied in the decree, should have the compelling power of the court behind its every covenant." Here there was no such stipulation. Plaintiff also cites *Ex parte Weller*, 106 Cal. App. 485, 289 P. 645. So far as the opinion therein discloses, the property settlement agreement was not set out in either of the decrees, but the case is essentially different from the present one in the following particulars: There the agreement itself expressly provided that it should be made part of the judgment of divorce, and in accordance therewith plaintiff in her complaint expressly requested the court to approve and confirm said agreement; and pursuant to such re-

quest it was expressly declared in both decrees that said agreement was made part thereof; all of which shows a clear intention on the part of the parties themselves as well as the court to place "the compelling power of the court behind its every covenant" (Tripp v. Superior Court, supra); while in the present case the agreement contained no such provision, the complaint made no such request, and although the agreement was ratified and confirmed by the court, neither decree by express provision or otherwise made the agreement a part thereof.

[3] It follows, therefore, that if the decrees themselves were legally insufficient to support contempt proceedings, the trial court was without jurisdiction, after a lapse of five years, to remedy the defects or to amplify or supplement the same by the order in question, because no reservation, express or implied, was made therein of the subject of allmomy, and said decrees had long since become final. Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am. St. Rep. 70; O'Brien v. O'Brien, 130 Cal. 409, 62 P. 598; McCaleb v. McCaleb, 177 Cal. 147, 169 P. 1023; London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 184 P. 864.

[4] The order appealed from is accordingly reversed, with directions to dismiss the contempt proceedings. The annulment of said order does not, of course, affect plaintiff's right to enforce said agreement by civil action. Roberts v. Roberts, 83 Cal. App. 345, 256 P. 826.

PEOPLE v. BENDER et al.*
Cr. 2196.

District Court of Appeal, Second District,
Division 2, California.
Dec. 28, 1932.

Rehearing Granted Jan. 12, 1933.

1. Embezzlement §44(1).

Evidence held to support conviction on two of three counts of indictment for embezzling public money.

2. Criminal law §372(8).

Defendant's admissions of knowledge of and participation in plan to divert public moneys held not inadmissible in embezzlement trial as confession of separate felony.

3. Criminal law §517(4).

Evidence of payment of checks to discharge taxes and payees' diversion of funds sufficiently established corpus delicti to warrant admission of defendant's admissions in embezzlement trial.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Harrie W. Bender and W. W. McCandless were indicted, and the latter convicted after a separate trial, for embezzling public money, and he appeals.

Reversed in part, and affirmed in part.

Henry G. Bodkin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts and John Barnes, both of Los Angeles, for the People.

IRA F. THOMPSON, J.

The defendants were indicted by the grand jury of Los Angeles county and charged with three distinct offenses of embezzling public money. McCandless demanded and was granted a separate trial. He was found guilty of all three counts and presents this appeal from the judgment and from an order denying his motion for a new trial. He insists that there is not sufficient testimony to support the verdict on any of the charges, and further that a statement made by him to the district attorney was improperly received in evidence.

In the interests of clarity we have concluded that we ought first of all to direct attention to certain general testimony and then set down the evidence applying specifically to the separate counts.

With regard to the general evidence, it appears that appellant had been a deputy assessor of Los Angeles county since 1918 until some time after the occasions charged in the indictment, and that Bender had also been a deputy and chief clerk for many years. Commencing on the first Monday in March in each year, deputy assessors are sent to the taxpayers for the purpose of securing statements of their taxable personal property. These statements are returned to the office—numbered, indexed, and filed in what is termed a statement case. Thereafter tax notices or bills, on white paper, are sent to the taxpayer informing him of the amount of the unsecured personal property tax. In the meantime the county auditor furnishes the assessor with numbered receipt books, each containing fifty original and fifty duplicate receipts. Each deputy assessor making collections receives from the auditing department of the assessor's office sufficient of these books for his purposes and gives his receipt therefor. When a taxpayer appears for the purpose of paying unsecured personal property taxes, the deputy obtains his statement from the case, accepts the tax shown, and issues his receipt which contains the name of the taxpayer, the amount of tax, the kind of property, and the districts entitled to portions of the sum paid. The number of the receipt is then recorded

upon the tax statement. Each day the deputy is required to turn in the amount collected. For his convenience he might deposit with the cashier's office the checks and cash taken in and receive in return a memorandum receipt. When he is ready to settle for a receipt book or books, he takes the duplicates therein, together with the tax statements, and a sheet made out by himself showing the name of the taxpayer, the amount of tax, and the district, i. e., the information already noted on the receipts, to the auditing department of the assessor's office, together with such money as he has collected (the memorandum theretofore received being used in lieu of money), and a deposit slip, and if they are found to be correct receives in exchange a settlement slip or receipt for each book of receipts. The tax statements and settlement sheets, which as heretofore indicated, contain the same information as the receipts, are then delivered to what is termed the roll department for the purpose of making up the assessment roll.

The foregoing sufficiently indicates the manner of handling the business of the assessor's office so far as unsecured personal property taxes are concerned. At this juncture we ought to note the substance of certain admissions of the appellant, which, it should be stated, were admitted over his objection and the reception into evidence of which constitutes the basis for appellant's second claim of error. Preliminarily it ought also to be observed that all three charges arise out of dealings with a taxpayer named Spalding, and the Spalding transactions were not specifically under discussion at the time the appellant answered the questions of the district attorney, which answers constitute the admissions mentioned. Responding to the interrogations the appellant answered in effect as follows: That he had been writing receipts for several years, until the last two, when he had charge of the deputies collecting taxes at the counter; that many times Mr. Bender had collected money for taxes over his desk and handed the check to him; that his arrangement with Bender, which had "sort of worked up gradually," was that he was to get half and Bender was to get half; that when Bender gave him a check he deposited it in his bank or cashed it and gave Bender half; that Bender would pull a statement out of the files and keep it in his desk until the season was over—until he figured it was all over—"and then he would drag them out and tell me to go down and get the cash from this—get the check from this fellow"; that very often Bender would have "the statement in his desk for weeks"; that he thought the matter of splitting started late in 1929; that at the time it started Bender said to him, "Here is the check; I got to get it cashed," and he knew that Bender wanted him "to give him half the money, sometimes more and sometimes less"; that when he saw "how easy it had been done for years" he "sort of fell" himself "the last year

or two"; that he had split with Bender four or five times; that the last year he (the appellant) may have taken statements from the files a couple of times to protect himself, and some before that, and that if there was a check payable to Hopkins, as assessor, Bender would take it to a new deputy who was not suspicious and get the cash, and that the check then would go through the office bearing the stamp of indorsement.

After these answers had been given by appellant and he was given permission to leave the district attorney's office, he expressed his surprise that they would let him go home.

[1] We are now at the point where we can set down the testimony applying to the separate counts. It was first charged that on May 14, 1931, the defendant and appellant diverted and appropriated the sum of \$90.50. The testimony discloses that one Leon P. Scammon was employed by S. M. Spalding; that prior to May 9, 1931, a deputy assessor had secured a statement from Spalding of his personal property for the purposes of taxation; that subsequently Mr. Spalding received a bill for unsecured personal property taxes, exclusive, however, of three boats owned by him and previously listed, which bill was paid. Some time before May 9 Scammon talked to Bender, but the nature of the conversation is not disclosed by the evidence. On that day he mailed a check for \$90.50 to the assessor's office, made out in appellant's name. On the day the check arrived Bender inquired of the clerk in charge of correspondence several times about the check, telling her that the same was being sent to pay some real estate taxes and that they were going to slip it through to escape a penalty. When the check arrived the deputy took it to the assessor, who called Bender and appellant before him. Bender again said the check was sent for the purpose of paying some real estate taxes. The appellant said nothing, but, in the words of the witness, the deputy who had called the assessor's attention to the irregularity, "fixed a very severe gaze upon me" during the entire interview. The assessor returned the check to Mr. Spalding with a letter. On May 14 Scammon took the letter to Bender for an explanation. The latter consigned it to the waste basket and accepted another check for the same amount, made payable to appellant, which check was understood by Scammon to be in payment of the taxes on the boat Westward, owned by Spalding. This check reached one Louis Nathan at the hands of a man named Max Priver. In fact, Nathan identified the endorsement of appellant's name as being in Priver's handwriting and stated that he had seen appellant in Priver's place of business. Mr. Priver testified that he had known appellant for about ten years and that McCandless had been in his office several times during the past three or four years, but declined to answer any questions

concerning the check on the ground that it might tend to incriminate him.

The evidence shows that a tax statement for unsecured personal property taxes was returned by Spalding in 1931 showing property of the value of \$2,610, the tax amount being \$109.09, and also a valuation of \$389,890, with a tax of \$779.78. The records also indicate that the sum of \$779.78 was paid. However, the tax statement, concerning which the above seems only to have been a memorandum made from a work sheet accompanying the statement, the extensions on which were completed by a department of the office different from the collection department, was not to be found in the records of the office. On June 4, 1931, the appellant obtained the tax statement from another employee in the office, saying he was going to take it to "McDevitt's department," in which last-mentioned place the memorandum already outlined was found. At that time the statement was designated by the number B-17831, which number also is referred to in the foregoing memorandum. The tax statement itself was never seen again. The tax upon the boat Westward was charged against real estate belonging to Caroline C. Spalding in the year 1931. One further fact must be mentioned: Scammon testified that Bender gave him no receipt for the check in the sum of \$90.50.

The evidence wholly fails to sustain the verdict on this count. While the admissions of appellant indicate that he and Bender co-operated at times, they also disclose that there were instances when Bender acted by himself and on occasions took advantage of the unsuspecting new deputy. We cannot say that the testimony showing that appellant withdrew the tax statement for the purpose, as he said, of taking it to McDevitt's department, indicates a guilty participation by him. As a matter of fact the extensions upon the work sheet were actually made in that department. We have no way of telling how the check came into the possession of Max Priver. We may guess that McCandless handed it to him, but when hazarding such a conjecture we must assume that Bender passed the instrument to appellant and also indulge in further speculation to the effect that McCandless did not endorse it for fear of detection. The Attorney General stresses the fact that appellant had nothing to say when he and Bender were called before the assessor but sat glaring at the deputy who called the incident to the assessor's attention. Isn't it just as reasonable to assume that he was angry that she didn't give him an opportunity to correct it, inasmuch as the check was made to him, as it is to imagine that the glare was one indicating guilty knowledge? It is also asserted that because appellant deposited a check in his bank account from the same taxpayer the year before

it is safe to assume that he was again the recipient. We confess that the fact alluded to, together with the admissions, raise a general suspicion, but they are not sufficient to constitute any evidence of guilt of the offense charged.

We therefore turn to examine the evidence respecting the second count. Some time subsequent to March 1, 1930, and prior to June 20th of the same year, Leon P. Scammon, acting for Mr. Spalding, gave to a deputy assessor the information with which to fill out the statement of taxable personal property, including two boats, the Westward and Debra, with the request that the tax thereon be charged against 1.7 acres of land then owned by Spalding. In the statement the Westward was first valued at \$15,000 and the Debra at \$15,000, but for some reason which does not appear the valuation of the Westward was changed to \$6,000. Bender this year had called a Mr. Goodin, who had previously handled Mr. Spalding's tax matters, and told Goodin to have Scammon see him. Scammon then prepared a check for \$82.75, made out in the name of appellant, which he delivered to Bender in payment, as he testified, of taxes on the Westward. Scammon received no receipt. However, a larger sum was collected by the tax collector on the same boat in December of the same year, which tax had been made a lien on certain real estate. The check was then indorsed by appellant and deposited in his bank on June 21st.

The appellant claims that there is no evidence that he knew the purpose for which the check was received or that it was received in other than the due course of business, and further that it is not shown that he knew that the money was received as public funds. These contentions of appellant can only be upheld if we exclude from the evidence his admissions which we have heretofore recited. Assuming at this time that the reception of the admissions was proper, the jury was justified in concluding that the check involved in this count was one of those turned over to him by Bender the proceeds from which were to be and were divided.

The evidence concerning the third and last count shows that a tax notice, on white paper, was received by Mr. Goodin covering taxes on personal property for the year 1928. On July 17th Goodin issued and sent forward Spalding's check in the sum of \$702, made payable to E. W. Hopkins, county assessor. He had previously talked to Bender, but we are not informed by the record of what that conversation consisted. On July 23d or 24th the check passed through the assessor's office and was in fact turned in to the cashier's office along with other funds for which appellant obtained a memorandum receipt for \$1,570.76. Later he used the memorandum together with others and cash to settle for six

receipt books, making a total deposit of \$8,787.73. At the time of the trial the duplicate receipts had been destroyed, but from an examination of the assessment rolls and a reconstruction of the six receipt books it was made to appear that Spalding's name was not included in any of the receipts settled for as above indicated, nor was there a record on the rolls of personal property assessments that he was a taxpayer in the year 1928, although the testimony discloses that until July or August of that year he owned three yachts, the Westward and Debra, heretofore mentioned, and Padariya 2. There was testimony indicating that the checks of another concern had been used in the same manner by appellant.

It will be seen from the testimony that it may reasonably be deduced that appellant received \$2,290.76, including the check for \$720, but subtracted the last-named sum from the cash, settling only for \$1,570.76. It will be recalled that appellant told how, when a check was payable to Hopkins as assessor, Bender would take it to a new deputy who was not suspicious, get the cash, and that the check would go through the office bearing the stamp of indorsement. It will also be remembered that he admitted that he had taken some statements from the files to protect himself. His explanation of how the statements were taken and how the check was cashed furnish the basis for the jury to conclude, inasmuch as he was the one who had returned this check into the cashier's office, that appellant was simply carrying out the plan or system for diverting the tax money of the county.

[2] There yet remains the claim of appellant that the admissions were improperly received in evidence. In this particular it is insisted that the statements of appellant constitute a confession of a separate and distinct felony, and hence under the authority of *People v. Canfield*, 173 Cal. 309, 159 P. 1046, were inadmissible. It was pointed out in the case of *People v. Morales*, 91 Cal. App. 731, 267 P. 570, that, "In the Canfield Case the confession did not in any way pertain to the charge upon which the defendant was being tried." But as in the *Morales* Case, so here, the evidence was admitted, not for the purpose of proving another and different offense, but as tending to prove a fact pertinent to the crime charged. It is said in *People v. Sanders*, 114 Cal. 216, 46 P. 153, 157: "The commonest instance of the admission of evidence of another crime is where it becomes pertinent to prove the scienter or guilty knowledge under the particular charge. Thus where a man is charged with passing counterfeit coin, it is allowable, in order to prove his knowledge that the coin was counterfeit, to show that upon other occasions, with knowledge of the false character of the money, he has passed similar coins." While it cannot be said that the admissions here in question constitute evidence of a separate and distinct offense (it being

entirely possible and consistent with reason and logic that at least some of the instances alluded to were the particular charges under consideration), yet they do tend to prove guilty knowledge and participation by the appellant in a general plan, system or scheme for diverting public moneys.

[3] It is also asserted that the corpus delicti was not sufficiently established to warrant the admission into evidence of the statements of appellant. It cannot be denied that as to the last two counts the evidence fairly establishes, if believed by the jury, that Spalding paid both the checks in the sums of \$82.75 and \$702 for the purpose of discharging taxes levied against property owned by him, and further that the funds were diverted from their purpose by those to whom they were paid. Under the authority of *People v. Selby*, 198 Cal. 426, 245 P. 426, the point is not open to appellant.

Judgment and order as to the first count reversed. Judgment and order as to the second and third counts affirmed.

We concur: WORKS, P. J.; CRAIG, J.

128 Cal.App. 496
GULINO v. FINOCCHIARO.
Civ. 8479.

District Court of Appeal, First District,
Division 2, California.

Dec. 31, 1932.

1. Automobiles §244(50).

Evidence that pedestrian, after pausing at side of thoroughfare, suddenly, without looking, stepped in front of on-coming automobile, sustained finding of pedestrian's contributory negligence.

2. Automobiles §245(91).

Evidence in action for injuries to pedestrian struck by automobile held insufficient to make issue of driver's negligence under last clear chance doctrine.

Plaintiff's own testimony merely indicated that he was continuously walking along street with his back to the car when he was struck, and the testimony of an eyewitness indicated that the defendant driver was looking in another direction and did not see plaintiff, while the driver's own testimony was that plaintiff stepped directly in front of automobile from position of safety.

3. Automobiles §245(90).

Whether pedestrian's negligence in stepping into path of moving automobile was proximate cause of accident held question of fact.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Salvatore Gulino against Leonardo Finocchiario. Judgment for defendant, and plaintiff appeals.

Affirmed.

Harry J. Neubarth and Aaron Rucker, both of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondent.

STURTEVANT, J.

This is an action to recover damages for injuries sustained in an automobile collision. The action was tried before the trial court sitting without a jury, it made findings in favor of the defendant, and from the judgment entered thereon the plaintiff has appealed.

On the 19th day of October, 1930, the plaintiff drove his truck to the grape market in San Francisco for the purpose of transacting the business of hauling and delivering grapes. The grape market is located at the eastern end of Vallejo street and Broadway and several blocks north of Market street. The expression "grape market" applies to the temporary arrangement for selling grapes on the freight cars. On the east side of Front street the space is gridironed with railroad tracks. Tracks 16-23, inclusive, extend across Vallejo street to Broadway. Loaded cars are placed on the tracks completely occupying all track space except the streets. At the streets the trains are so separated that the ends of the cars abut the sides of the streets. The space thus left makes an alley of such width that two lines of automobiles can be operated in opposite directions. People pass on the sides of the traffic and gather about the loaded cars making their purchases. When the plaintiff arrived at the market, he located a customer who wanted a delivery made in Oakland. The plaintiff left his customer standing between tracks numbered 17 and 18, near the grapes that had been purchased, and went to get his truck. He entered Vallejo street and started to travel westerly along his right-hand side, that is, on the north side of Vallejo street.

Testifying in his own behalf the plaintiff stated that he was walking a foot and a half or two feet distant from the ends of the cars. People were walking in that neighborhood examining the grapes. His hearing and sight were both good. He had proceeded to track 19 when he saw cars coming from the right and coming from the left. At that point he looked both right and left. He expected cars might come from the rear but that they would watch out for a man in front. He was walking alone. At track 19

he stopped for just a second. He saw trucks going up and down. The defendant did not blow a horn. There were no vehicles or automobiles in front of plaintiff at the time. He continued on his way to track 20. At that point he was hit in the back. At that instant he was a foot and a half from the car spotted on the track. When he was hit he started to fall, but a man grabbed him and prevented him from hitting his head on the car. That man was standing near track 21. When the plaintiff was hit he was knocked forward. The knocking tended to spin the plaintiff around. At track 20 the plaintiff could not see to his right on account of the freight cars. Immediately before being hit the plaintiff was looking straight ahead. There were box cars on tracks 20 and 21—on both sides. Between tracks 20 and 21 there was no traffic and plaintiff knew that any traffic would come from the rear.

The plaintiff also called Frank Bertillino. At the time of the accident he was walking east on Vallejo. He had stopped and was looking straight ahead. While standing in that position he saw an automobile pass him and hit a man in front. At that instant Gulino was coming toward the witness. When he saw the automobile hit Gulino he went to Gulino's assistance. At the time the automobile hit Gulino the driver was looking toward his left. Immediately after the accident the driver spoke to the witness in Italian and said, "No worry, I got insurance, I can fix it up with the insurance company, it was my fault." When the witness first saw the automobile the front end was six or seven feet from Gulino. The automobile was going 25 miles an hour. When the plaintiff was hit he fell to the side. The right front wheel ran over the plaintiff's left foot.

The defendant took the stand in his own behalf. He testified that he was traveling up Vallejo street. That he was traveling very slowly in second gear. There were people all around the cars, right and left. The street was rough, it was made of cobblestones, and one had to drive over the rails. He was looking ahead. Just before the accident the witness was going up Vallejo street. There were lots of people to his left, some to his right. He saw those on his left move out of the way; he saw some on the right that did not move. He traveled along slowly, noticing the people on his right who did not move and there were not so many on that side. On his left there were more cars and more people. He did not look more to the right because those people were standing still, but directed his attention to the left. When he was about to pass them they started to move. He heard some one say "Ayee," and he saw a person drop by the side of the machine. He stopped to see what had happened.

"Q. When you came up to pass the man was his back to you? A. Yes, slightly turned toward me—to me.

"Q. And if he had stood still did you have sufficient space to pass? A. Sure.

"Q. How many feet between the right side of your automobile and the man? A. About four feet.

"Q. Where was your machine when he began to move? A. I was passing right along there slowly.

"Q. Did you bring your machine to a stop as soon as you saw him moving? A. No, because as soon as he moved then immediately he dropped.

"Q. When he dropped was he facing your automobile? A. No, his back was to me."

Afterwards the witness took the plaintiff to the hospital and still later took him to his home. On the way the plaintiff stated that it was not the fault of the witness nor the fault of the plaintiff. It was an accident. As the witness drove along the street he saw a number of people to his left. They were moving. He was looking at all of them. He was looking straight ahead and to his right and to his left. The people to his left were moving and he was looking all around. His car was moving straight ahead toward Front street.

It was stipulated that the spot where the accident happened is not sign-posted in accordance with section 115 of the California Vehicle Act (as amended by St. 1927, p. 1438, § 32). The plaintiff attacks the findings and makes the following points:

[1] The plaintiff contends that the evidence is insufficient to establish any negligence on the part of plaintiff, Salvatore Gulino. We think he is mistaken. If the trial court believed the testimony given by the defendant, and from its ruling we must assume that it did, then it would appear that the plaintiff walked westerly on the right-hand side of Vallejo street at a time when the street was occupied by traffic and when he reached the point where the accident happened he paused for a moment and then, without looking in either direction, he stepped out into the line of traffic, a distance of four feet, and immediately in front of the oncoming automobile driven by the defendant. There was therefore some evidence to sustain the finding against the plaintiff.

[2] In his next point he contends that the defendant had the last clear chance to avoid the accident. That point is not sustained by any of the evidence. If we take the plaintiff's own testimony, it throws no light on the subject, as he claims he was continually walking toward the west with his back to the defendant. If we take the testimony of Frank Bertillino, it is his contention that

the accident occurred because the defendant was looking to his left and did not see the plaintiff in a position of danger, or at all. If we take the testimony given by the defendant, it is to the effect that he saw the plaintiff in a position of safety and did not see him change that position until the plaintiff stepped directly in front of his machine. Under that theory the defendant was not shown to have discovered the position of the plaintiff within time to avoid the injury.

[3] His last point is that his negligence, if any, was not the proximate cause of the accident. Whether it was or was not was a question of fact addressed to the determination of the trier of the facts, in this case the trial court. It found the fact against the plaintiff. We may not say the finding on that issue was not sustained by the evidence.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCER, J.

GENTNER v. BOARD OF EDUCATION OF LOS ANGELES CITY SCHOOL DIST. et al.*

Civ. 7252.

District Court of Appeal, Second District,
Division 2, California.

Dec. 23, 1932.

Rehearing Denied Jan. 21, 1933.

Hearing Granted by Supreme Court Feb. 20,
1933.

1. Pleading $\S$ 404.

Where trial proceeded on issues, defects in pleadings is no ground for reversal, except where no cause of action is alleged.

2. Pleading $\S$ 192(3).

In proceeding to oust public school teacher, allegations of teacher's incompetence and evident unfitness for service held sufficient as against general demurrer.

3. Appeal and error $\S$ 907(2).

Trial court's decision ousting school teacher for acts, some of which occurred within limitation period, held presumptively supported, where evidence was not furnished appellate court.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Mandamus by John Gentner against the Board of Education of Los Angeles City School District and others to compel restoration to position as teacher in a public school. From the judgment discharging the alternative writ, relator appeals.

Affirmed.

W. A. Alderson and Miller & Ellis, all of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondents.

CRAIG, J.

The appellant, a teacher in the public schools of the Los Angeles City school district, having been dismissed by the board of education upon charges filed in October, 1927, obtained an alternative writ of mandamus which, after a hearing before the Superior Court, was discharged. He thereafter appealed from such judgment.

[1, 2] It is appellant's contention here that charges before the board of "incompetence and evident unfitness for service" were not sufficiently pleaded in the Superior Court, that the judgment rendered thereon was not supported by sufficient substantial evidence, and that the proof offered by the respondents tended only to show acts committed more than three years prior to the filing of said charges and was barred by the statute of limitations. No demurrer to the return of respondents embodying the charges nor objection to the evidence offered below was interposed. None of the evidence adduced during a trial of several days' duration accompanied the appeal, that its sufficiency might be reviewed. Having proceeded to a trial of the issues, defects in the pleadings, except in the absence of any cause of action being alleged, may not thereafter be made grounds for reversal of the judgment. We are not impelled to hold that a general demurrer if presented could have been sustained. *Jacks v. Taylor*, 24 Cal. App. 667, 142 P. 121; *Builders' Realty Co. v. Bigelow*, 3 N. J. Misc. 540, 128 A. 887; *Labby v. York Shore Water Co.*, 125 Me. 144, 131 A. 862; *Board of Education v. State*, 222 Ala. 70, 131 So. 239.

[3] The appellant contends that a major portion of the specific acts tending to show the alleged incompetence and unfitness for service in the public schools were shown to have occurred more than three years previous to the filing of charges against him. However, since it is conceded that some of such conduct was within said period, and since we have not been supplied with the evidence, it is obviously impossible for us to determine whether such acts, not barred by the statute of limitations, would in themselves warrant the decision of the trial court. No authority is needed for the proposition that under such circumstances the presumption is indulged that the trial court's findings in that behalf are supported. In arriving at this conclusion we express no opin-

ion as to whether or not the statute of limitations is applicable to a case of this character.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

128 Cal.App. 386

S. W. STRAUS & CO. v. LOS ANGELES
COUNTY et al.

Civ. 7270.

District Court of Appeal, Second District,
Division 2, California.

Dec. 27, 1932.

Hearing Denied by Supreme Court Feb. 24,
1933.

Taxation $\hookrightarrow$ 331.

Where agent in possession of securities deposited by owners with agent for safe-keeping refused to furnish assessor with sufficient information to enable assessor to assess owners, assessment held properly made against agent (Pol. Code, § 3629).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by S. W. Straus & Co. against Los Angeles County and another. From an adverse judgment, plaintiff appeals.

Affirmed.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This action was commenced to recover \$14,607.96, being the amount of taxes paid under protest. Judgment went for the defendants, and this is an appeal therefrom.

The facts giving rise to the question may be recited as follows: On the first Monday in March, 1926, the appellant had in its possession certain bonds and interim certificates which had been deposited with it for safe-keeping by patrons residing in the county of Los Angeles. Shortly after that date a deputy assessor called at appellant's office, and, upon an examination of its books, noticed an item "Bonds in safe keeping." Straus & Co. gave a statement of its own taxable property and a description of the bonds deposited with it, as already mentioned, but, in response to the request of the deputy for the names and addresses of the owners of the particular

bonds, the tax upon which is herein involved, it declined to give the information, and told the deputy "they could not afford to give the names of the customers because if they did it would 'bust them up in business.'" The deputy assessor told the representatives of the appellant that, if they failed or refused to furnish the names of the owners of the bonds, he would be obliged to assess them to appellant as agents or trustees, having the property in possession. He accordingly placed a value upon the bonds and interim certificates in the sum of \$394,810, designating that they were "bonds in possession belonging to others." It is not argued that the valuation placed upon the bonds is other than a reasonable cash value.

The appellant insists that the assessment of the bonds and interim certificates was illegal and void for the reason that the assessor had no right to tax upon the theory of possession when it was made clear to him that possession was not accompanied by ownership. It relies in particular upon the case of *Weyse v. Crawford*, 85 Cal. 196, 24 P. 735, a case which it is said "is in all essentials controlling as to the law applicable to the facts" of the instant case. *Weyse* and the other plaintiffs were the owners of a warehouse, and, in response to the demand of the assessor, they gave him a statement of the taxable property belonging to them and a description of the quantity and character of the property stored with them so far as the quantity and character was known, but the plaintiffs explained that they had issued negotiable warehouse receipts, and they could not give him the names of the persons to whom the stored property belonged, for the reason that they had no way of determining the owners. The assessor then assessed "Miscellaneous merchandise and grain in Naud's warehouse, fifty thousand dollars," and opposite the item the deputy made the following notation: "Neglected to return statement as required by section 3633." The tax upon the foregoing property was charged against the real property of plaintiffs, and they brought an action to enjoin its sale on the theory that the assessment was void. The court upheld the plaintiffs in their contention, determining that it was the duty of the assessor under the particular facts of that case to assess the property to the unknown owners; that it was not true that the plaintiffs had refused to give a statement; that their possession of the property was not accompanied by "the usual marks and indications of ownership" and therefore was not assessable to them. In *People v. Nat. Bank of D. O. Mills & Co.*, 123 Cal. 53, at page 58, 55 P. 685, 687, 45 L. R. A. 747, 69 Am. St. Rep. 32, it is said with reference to *Weyse v. Crawford*, supra, "It holds that the assessor cannot make an assessment which shall not be revisable by the board of equalization, unless the taxpayer has refused to make out

his list under oath, or has refused to comply with some other requirement of the law." This interpretation of *Weyse v. Crawford* received approval in the case of *Rosasco v. County of Tuolumne*, 143 Cal. 430, at page 435, 77 P. 148. In an earlier case, that of *Bode v. Holtz*, 65 Cal. 106, 3 P. 495, the owners of a warehouse not only refused to disclose the description of the property, but also the names of the owners. The assessor estimated the value of the property and assessed it to the owners of the warehouse, the plaintiffs in that action. The court says: "The law made it the duty of the plaintiffs to furnish the assessor with a statement of the property in their possession. Pol. Code, § 3629. Failing in that regard, the assessor was authorized and required by section 3633 of the same Code to note such refusal on the assessment book and to make an estimate of the value of the property." An action to enjoin the threatened acts of the assessor was determined in his favor upon a general demurrer to the complaint. At this juncture it is well to note that section 3629 of the Political Code makes it the duty of the person in possession of property to file a statement of his assessable property with the assessor between the first Mondays in March and July of each year, and also "at any time during, before or after such dates furnish such information or records for examination as may be required by the assessor to make a proper assessment"; and, with this thought in mind, we are brought to a consideration of the case of *Title Guaranty, etc., Co. v. County of Los Angeles*, 3 Cal. App. 619, 86 P. 844, 845. There the plaintiff had in its possession or rather on deposit in a bank \$55,000, which sum had been placed with the plaintiff for the owners and purchasers of various tracts of land whose titles it had been employed to pass upon, and which sum was to be paid to the owners or returned to the purchasers with deduction of the charges of the plaintiff according to the result of the search. The trial court determined, in an action to recover taxes, that the fund was improperly assessed to the plaintiff as "Escrow money in Merchants' National Bank, \$55,000," but the judgment was reversed, the court saying: "The money was undoubtedly in the possession and control of the plaintiff as agent or trustee of the various parties interested in it. It was, therefore the duty of the plaintiff to return it in its statement, and the duty of the assessor to assess it to the plaintiff, or the equitable owners, if accessible. Pol. Code, §§ 3639, 3628 [sic]; *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 45 L. R. A. 747, 69 Am. St. Rep. 32, 55 P. 685; *Bode v. Holtz*, 65 Cal. 106, 3 P. 495." In its opinion the court also said: "Nor was the property taxed subject to any deduction on account of debts due from the plaintiff. Its obligation to the various parties interested in the fund was not that

TONG v. SUN REALTY CO. et al.
Civ. 8076.

District Court of Appeal, Second District,
Division 2, California.
Dec. 19, 1932.

Appeal and error ~~C~~237(5).

Appellant *held* entitled on appeal to review of evidence, where court refused requested instruction which in effect directed verdict for appellant.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Roy Tong against the Sun Realty Company and others. From an adverse judgment, named defendant appeals. On motion to affirm judgment.

Motion denied.

For prior opinion, see 14 P.(2d) 127.

See, also, 120 Cal. App. 477, 7 P.(2d) 1101.

George L. Greer, of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

Heretofore the respondent made a motion to dismiss this appeal, which motion was denied. See (Cal. App.) 14 P.(2d) 127. He has now moved for an affirmance of the judgment upon the ground that the appellant has failed to print sufficient of the record to justify a reversal, and in particular he points to the fact that the only point raised by appellant is that the court erred in its refusal to direct a verdict in its favor. This claimed error is founded upon an instruction requested by appellant and refused by the court directing the jury to return a verdict for the defendant and against the plaintiff. The respondent argues that appellant cannot predicate his claim of error upon a refusal to give the instruction, but must have made a motion for a directed verdict, and, if that were denied, to have taken an exception to the order of the court. He cites in support of his contention *Estate of Easton*, 118 Cal. App. 659, 5 P.(2d) 635, but that case is only authority for the proposition that a motion for a directed verdict is a necessary prerequisite to a subsequent motion for a judgment non obstante veredicto. There is good reason for the rule of law there announced. That is quite a different thing, however, from saying that the appellant is not entitled on an appeal to a review of the evidence where the court refuses to give a requested instruction which in effect tells the jury that there is no substantial evidence to support a verdict for the plaintiff. The sub-

of debtor, but of agent or trustee. Hence, had the facts been disclosed to the assessor by the plaintiff, as under the provisions of section 3629 they should have been, the assessment should have been made to it as agent or trustee of the various parties interested in the fund. Pol. Code, § 3639 [sic]. But in the absence of this information, the assessor had no other resource than to assess the property to the plaintiff, as required by section 3628, as agent or trustee of parties unknown to him which he in effect did. Nor are we prepared to hold that, under the circumstances, the failure of the assessor to designate the plaintiff's principals or beneficiaries was sufficient to invalidate the assessment. It had the opportunity of correcting the defect, if in any way harmful to it, by application to the assessor while the assessment roll was still under his control, or afterwards by application to the board of equalization, which had power to correct the plaintiff's assessment, either by adding the names of the parties ultimately liable or by transferring the whole amount taxed to the assessments of the several parties interested in the fund. Pol. Code, § 3681; *Henne v. County of Los Angeles*, 129 Cal. 297, 61 P. 1081. Nor do we think it material that the plaintiff had no opportunity of applying to the board of supervisors until after its property was levied upon and the tax paid under protest. All the relief it was entitled to was to have the assessment corrected so as to show the parties ultimately liable, and this could have been done by the supervisors as effectually after payment as before."

While it is true that the case from which we have just quoted is distinguishable from the present one in this, that the legal title to the money in the former was actually in the plaintiff, nevertheless the assessment to the plaintiff was sustained upon the broad principle that it was the duty of the plaintiff to furnish the assessor with sufficient information in its possession to enable the assessor "to designate the plaintiff's principals or beneficiaries." So here, as we have already observed, it was the duty of the plaintiff under section 3629 to furnish the assessor with information in its possession, failing which the assessor might properly assess the property to the plaintiff as agent for unknown parties which he in effect did by adding the clause "bonds in possession belonging to others."

It is well to note that the duty upon the person in possession to furnish the assessor with all the required information is imposed by section 3629, and is not dependent upon the issuance of a subpoena under section 3632 of the Political Code.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

stance of appellant's claim of error is that the evidence is insufficient to support the verdict, and we ought not to be supercritical of the letter in which the specification of error is couched, where the real question on the appeal is patent.

Motion denied.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

128 Cal.App. 485

Mc CARTNEY v. SIEBE.

Civ. 8197.

District Court of Appeal, First District,
Division 2, California.

Dec. 30, 1932.

Appeal and error ☞ 1071 (6).

Where finding, if made on affirmative allegations of answer, must have been against defendant, failure to make finding *held* not reversible error.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by S. A. McCartney against W. A. Siebe, also known as William A. Siebe. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas W. Firby, of San Francisco (Molkenbuhr & Molkenbuhr, of San Francisco, of counsel), for appellant.

Ivan N. Maroevich, of San Francisco, for respondent.

STURTEVANT, J.

On December 17, 1928, the defendant and his wife owned certain parcels of land adjacent to San Rafael. At that time they were using the land as an amusement park. They entered into a written contract with the plaintiff under the terms of which the plaintiff would be permitted to install certain amusement devices. It was further provided that the plaintiff should operate the said devices and out of the proceeds that he should pay to the defendant 50 per cent. and retain the balance for his own use. The term of the contract was ten years. The instrument was acknowledged on the day of its date and thereafter the parties entered upon the performance of the contract. On or about the 1st day of April, 1929, the defendant was in need of money. He applied to the plaintiff for a loan of \$400. Under the agreement of the parties

no interest was to be charged and the moneys were thereafter to be deducted from the receipts of the above-mentioned amusement devices. A little later another loan in the sum of \$200 was made under a similar agreement.

Claiming that the defendant breached the agreement dated December 17, 1928, the plaintiff commenced an action to recover damages for the breach. In the complaint he also set forth a count to recover the \$600 hereinabove mentioned. The defendant answered both counts of the complaint, putting every material averment thereof in issue and inserting some allegations of affirmative matter. A trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff on both counts and from the judgment entered thereon the defendant has appealed. As to the judgment on the first count he makes no attack. As to the judgment on the second count he claims that the trial court committed error in failing to make findings in response to certain affirmative matter which the defendant had inserted in his answer. He also claims that the finding that the moneys were due and owing was not sustained by the evidence. Both attacks are but different methods of presenting the same point. As stated above, the plaintiff pleaded a common count for money loaned. The defendant pleaded specific denials, denying every material allegation. Then he pleaded that the moneys were to be repaid out of the receipts of the amusement devices and that he had paid and was continuing to pay in that method. Of course, this was an attempt to plead a formal contract of and regarding the loan. However, it should be noted at this point that there was no attempt to plead a consideration for the alleged contract. The pleader alleged it was an executed oral agreement. On that allegation there is no conflict in the testimony. Both parties testified the moneys were to be repaid out of the proceeds received from the amusement devices. Neither one testified the entire moneys had been repaid, but, on the other hand, that \$208.25 only had been repaid. Such being the fact, it is perfectly clear that the oral agreement was not executed except to the extent of \$208.25. There was no testimony whatever that, when the defendant borrowed the moneys from the plaintiff, any consideration passed from the defendant supporting a promise on the part of the plaintiff to forbear. It follows that, if a finding had been made on the affirmative allegations of the answer, such finding must have been against the defendant. Under such circumstances the failure to make a finding on such an issue is not reversible error.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

TROUT v. TAYLOR et al. (two cases).*
Civ. 992, 993.

District Court of Appeal, Fourth District,
California.

Dec. 23, 1932.

Rehearing Denied Jan. 20, 1933.

Hearing Granted by Supreme Court Feb. 20,
1933.

1. Deeds ⇨32.

Deed executed without filling in grantee's name *held* not merely voidable, but void.

The facts disclosed that, in scheme to defraud grantor, grantor was induced to exchange realty for 110 shares of certain corporation represented to have a value of \$30,000, but which in fact were valueless, and that she believed that the name of corporation, whose agent induced the exchange, was inserted as grantee in deed when she signed and acknowledged it, and was not aware that it was blank as to grantee.

2. Equity ⇨66.

One asking equity must be willing to do equity.

3. Estoppel ⇨72.

Persons in good faith lending money secured by trust deeds in reliance on record title based on deeds which were void because grantee's name was inserted after execution thereof *held* entitled to liens for money loaned, as against grantor's right to rescind (Civ. Code, § 3543).

Though the grant deeds were void because when executed blank for grantee's name was left blank, rule prescribed by Civ. Code, § 3543, that where one of two innocent persons must suffer by act of third, he by whose negligence it happened must be sufferer, applied, because grantor's act in executing deeds after only slight investigation of deal started a chain of circumstances in motion enabling sale and giving of trust deeds to the innocent purchasers.

4. Action ⇨65.

Pleading ⇨277.

Relief administered in equity is such as nature of case and facts existing at close of litigation demand, and supplemental complaints are not required.

Appeals from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Two actions by Kate C. Trout against R. H. Taylor, A. H. Taylor and wife, and others, and against R. H. Taylor, R. P. Archer, A. H. Taylor and wife, and others. From the judg-

ments, plaintiff appeals in the first case, and plaintiff and defendants appeal in second case.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for plaintiff Trout.

Tobias R. Archer, of Los Angeles, for defendant Archer.

Sherman & Sherman, of Los Angeles, for defendants Taylor et al.

MORTON, Justice pro tem.

Plaintiff, an elderly woman, without business experience, and of very limited schooling and education, was induced by an agent of R. H. Taylor Corporation on April 18, 1927, to exchange her two acres located in Sawtelle, Los Angeles county, of a reasonable market value of \$12,500, for 110 shares of Running Springs Park, Inc., having property in San Bernardino county. This stock was represented to her as having a value of \$30,000, and she was assured that it would pay her \$5,000 every six months commencing September 1, 1927, and until she had received \$30,000. The stock was in fact of no value whatever, and paid no returns. The deed signed and acknowledged by plaintiff to her lots was in blank as to a grantee, which was not discovered by her at the time. Subsequently the names of A. H. Taylor and Mae Taylor were inserted as grantees pursuant to certain alleged transactions with the R. H. Taylor Corporation, Inc. After recording the deed, a trust deed was placed on lot 1 securing a promissory note for \$4,000 in favor of the notary who took the acknowledgment of plaintiff's deed, and a trust deed was placed on lot 2 securing a promissory note for \$3,000 in favor of the agent who induced plaintiff to enter into the deal. Both notes were sold to defendant R. P. Archer for \$6,660. A. H. Taylor and wife defaulted on the \$4,000 note secured by a trust deed on lot 1, and at the foreclosure sale defendant R. P. Archer bid in the property. They paid off the \$3,000 note secured by the trust deed on lot 2, and thereafter executed a new note for \$2,500, payable to L. E. Arnold, secured by a trust deed on this lot. Since bidding in lot 1 defendant Archer has expended for assessments and taxes \$521.51. On November 5, 1928, plaintiff served notice of rescission; she did not discover, however, that the deed executed by her was in blank until the taking of the deposition of R. H. Taylor on March 23, 1929. The trial court decreed the deed executed by plaintiff to be null and void and canceled, and held that no interest or title passed thereby. Defendant R. P. Archer was adjudged to be entitled in equity to the return of his \$521.51, together with interest, and also \$4,611.16, with interest at 7 per cent. from June 23,

1928; that being the amount due at the foreclosure sale of that date. To secure the payment of these amounts, defendant R. P. Archer was awarded a lien against lot 1. Defendant L. E. Arnold was declared by the judgment to have a lien on lot 2 in the sum of \$2,500, together with interest, less any amounts paid to him on principal or interest. Plaintiff is willing to repay to defendant Archer the \$521.51, together with interest, but appeals on the judgment roll from the Archer judgment for \$4,611.16, with 7 per cent. interest from June 23, 1928, and also the Arnold judgment of \$2,500, plus interest. The court found that R. P. Archer and L. E. Arnold acted in good faith and relied on the record title. Because the grant deed to A. H. Taylor and wife was a nullity, plaintiff contends that neither R. P. Archer nor L. E. Arnold acquired any title or lien on the property, even though they acted in good faith, without knowledge of the fraud perpetrated, and relied on the record title. Instead of giving plaintiff judgment against all the defendants except Archer and Arnold for the amounts evidenced by the trust deeds, plaintiff maintains that this judgment should be in favor of Archer and Arnold, and plaintiff's property decreed free of the two liens.

Defendant Archer, claiming to be an innocent purchaser, files a separate appeal from the judgment denying his title to lot 1 and allowing him only a lien thereon. In this appeal the clerk's and reporter's transcripts bring before us the entire evidence. The two appeals have been consolidated, and therefore they will be considered jointly here.

[1] The fraud of the defendants, excluding Archer and Arnold, has not been challenged, so we turn our attention at once to the law of this state dealing with deeds executed in blank. In *Jones v. Coulter*, 75 Cal. App. 540, at page 547, 243 P. 487, 490, the court held: "There can be no doubt as to the utter invalidity of the instruments under which appellant's grantor, Meng, deraigned his purported title. The blank deeds signed by respondent and subsequently filled out under Neilson's direction, with Meng's name inserted as the purported grantee, were mere nullities. According to the great weight of authority, a deed executed in blank is void and passes no title. *Wunderlin v. Cadogan*, 50 Cal. 613, and cases cited *infra*. As was said in *Whitaker v. Miller*, 83 Ill. 381: 'There must be, in every grant, a grantor, a grantee and a thing granted, and a deed wanting in either essential is absolutely void.' In the instant case each of the instruments signed by respondent was wanting in all three of these essentials to a valid deed. Though the decisions of other jurisdictions are not in entire harmony upon the question, it has been definitely decided in this state that under our statute of frauds the name of the grantor or grantee or a description of the property can-

not be inserted by an agent for the grantor, in the absence of the latter, unless the agent's authority be in writing. If the authority of the agent be not in writing, his insertion of the name of grantor or grantee or description of the property does not pass the title. *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Vaca Valley, etc., R. R. v. Mansfield* [84 Cal. 560, 24 P. 145], *supra*; *Harris v. Barlow*, 180 Cal. 142, 179 P. 682. See, also, *Lund v. Thackery*, 18 S. D. 113, 99 N. W. 856. In *Upton v. Archer*, *supra*, the court says: '* * * As it could not become the plaintiff's deed until the name of a grantee was inserted, that act could not be performed by an agent, in the absence of the plaintiff, unless his authority was in writing.' *Videau v. Griffin et al.*, 21 Cal. 390, 392; *Tannahill v. Greening*, 85 Cal. App. 714, 259 P. 1017; *Barden v. Grace*, 167 Ala. 453, 52 So. 425, Ann. Cas. 1912A, 537.

In view of these authorities, the conclusion is inescapable that the deed in question was not voidable, but was void in toto; a nullity. The record shows no agency, and no authority, express or implied given by plaintiff to defendant R. H. Taylor. The findings state that she believed the name of R. H. Taylor Corporation as grantee was written in the deed when she signed and acknowledged it, and that she was not aware it was blank as to the grantee. The question of agency is therefore not involved.

[2, 3] We next consider the equity questions involved here. Plaintiff comes to a court of equity asking relief from liens on her real property given to two innocent purchasers. One who asks equity must be willing to do equity. All three were the victims of the conspirators. Many times the method employed by the defrauder has a material effect on the result. If plaintiff had executed a valid deed and subsequently the property had reached innocent hands, her only recourse would have been against her defrauders. It was her act of executing the deed after only a slight investigation of the deal which started the chain of circumstances in motion that enabled the sale and the giving of the trust deeds to the innocent purchasers. Her act was the basis of the record title which was relied upon, in the subsequent transactions. "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ. Code, § 3543.

[4] Confronted with the conflicting legal and equitable rights of plaintiff and defendants Archer and Arnold, the rule in equity set forth in *Collins v. Sargent*, 89 Cal. App. 107 at page 112, 264 P. 776, 779, applies: "The general rule, to which there are exceptions, is that in actions at law the right to judgment depends upon the facts as they exist at the commencement of the action, but such is not the rule in equity. The relief administered

in equity is such as the nature of the case, and the facts as they exist at the close of the litigation, demand; and supplemental complaints are not required in actions in equity in order to bring before the court those facts and circumstances occurring since the filing of the original complaint, which bear as evidence upon the facts in issue in the original cause."

After an examination of the record in both appeals, and a careful consideration of the evidence, we are convinced that the decision of the trial court was fair and equitable.

The judgment rendered is therefore affirmed; each party to pay his own costs.

We concur: BARNARD, P. J.; MARKS, J.

PEOPLE v. MacMULLEN.*
Cr. 1686.

District Court of Appeal, First District, Division 2, California.
Dec. 30, 1932.

Hearing Granted by Supreme Court Jan. 27, 1933.

1. Criminal law §200(6).

Dismissal, after impanelment of jury, of count for conspiracy to commit grand theft, charging certain overt act, *held* not bar to prosecution for overt act as substantive offense (Pen. Code, § 654).

2. Criminal law §1159(3).

Verdict based on conflicting evidence could not be disturbed.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Florence B. MacMullen was convicted of grand theft by means of false pretenses, and she appeals.

Affirmed.

William F. Herron and Edward McDonald, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., for the People.

STURTEVANT, J.

[1] The defendant was charged in an indictment returned by the grand jury of the city and county of San Francisco with certain violations of the Corporate Securities Act (St. 1917, p. 673, as amended) and with grand theft. She pleaded not guilty, and she also pleaded once in jeopardy and former acquittal. The indictment contained ten

counts. The odd numbers pleaded violations of the Corporate Securities Act and the even numbers pleaded grand theft. On the first trial she was put on trial as to counts 9 and 10 and she was acquitted. In the instant case she was put on trial as to counts one, two, three and four. The jury returned a verdict of not guilty on counts 1 and 3 but guilty on counts 2 and 4. From the judgment entered on counts 2 and 4 and from an order denying a new trial, the defendant has appealed. During the trial it was shown by proof, or the stipulation of the parties, that on February 19, 1932, the grand jury returned an indictment, No. 21880, charging this defendant, Florence B. MacMullen, Thomas B. MacMullen, Pansy B. Connor, and Herschel M. Connor with conspiracy to commit grand theft. By count 1 of indictment No. 21880, the defendants were charged with having formed a criminal conspiracy to commit grand theft of a certain \$500, and, as one of the overt acts, it was alleged that said sum was actually so taken. On the trial of that count of that indictment, No. 21880, after the jury had been impaneled and sworn, the district attorney dismissed said charge. That identical \$500 is the same \$500 specified in the indictment in the instant case.

Having called the foregoing facts to our attention, the defendant claims that, since the overt act of obtaining the said \$500 by false pretenses was an integral and essential part of each of the first two counts of indictment No. 21880, the dismissal of those two counts after the impanelment of the jury on the trial of that indictment operated as an acquittal of the overt act when, as in this case, it is alleged as the substantive offense. She cites and relies on *Oliver v. Superior Court*, 92 Cal. App. 94, 267 P. 764; *In re Berman*, 104 Cal. App. 259, 286 P. 1043; *In re Getzoff*, 104 Cal. App. 261, 286 P. 1044; *People v. Preciado*, 31 Cal. App. 519, 530, 160 P. 1090; *In re Harron*, 191 Cal. 457, 217 P. 728; *Ex parte Nielsen*, 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118; *People v. Warden*, 202 N. Y. 138, 95 N. E. 729. No one of those cases is authority for the contention made by the defendant. In 16 California Jurisprudence, p. 280, it is said: "Where a conspiracy to commit a crime is a substantive offense, as is generally the case, neither an acquittal nor a conviction of a conspiracy to commit a crime is a bar to a prosecution for the commission of that crime, or for aiding and abetting another to commit it." One *Bens* was tried and acquitted on a charge of conspiracy with one *Hanse* to violate the Selective Service Act (50 USCA § 226 note). Thereafter he was charged with having aided one *Gitter* to evade the same statute. He claimed, as this defendant claims, that he had been once in

jeopardy. The District Court of the United States for the Northern District of New York ruled against him. He appealed to the Circuit Court of Appeals. In an exhaustive opinion, that court affirmed the judgment. *Bens v. United States*, 266 F. 152. At page 159 the court said: "The crime for which Bens was tried and acquitted was, as we have seen, that of conspiracy. The conspiracy is the gist of the crime. It is the entering into the conspiracy to commit the crime which constitutes the offense, without reference to whether the crime which it was conspired to commit is consummated, or even agreed upon by the conspirators in all its details. [Citation.] A conspiracy to commit a crime is one offense, and the commission of the crime is another and a distinct offense. The power exists to separate the conspiracy from the act itself, and to affix distinct and independent penalties to each. [Citation.] The prohibition of the Constitution is against a second jeopardy for the '*same offense*'; that is, for the identical crime. The offenses charged in the two prosecutions must be *the same in law and in fact*. [Citations.] If the facts which would convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction. [Citations.] And where a conspiracy to commit a crime is a substantive offense, neither an acquittal nor a conviction of a conspiracy to commit a crime is a bar to a prosecution for the commission of that crime, or for aiding and abetting another to commit it. [Citations.]" (Italics ours.)

The same rule is declared in section 654 of the Penal Code of this state. That section is as follows: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the *same act* or omission under any other." That the two offenses are not the same, and that the defendant could have been legally convicted of both has been held in this state. *People v. Martin*, 114 Cal. App. 392, 396, 300 P. 130. The contention of the defendant may not be sustained.

[2] The defendant further contends that the evidence was insufficient to justify the verdict of the jury which found appellant guilty of grand theft by means of false pretenses, because it affirmatively appears that the persons who parted with their money did not rely upon any statements made by the defendant. The defendant quotes evidence which sustains her contention. The Attorney General quotes evidence which sustains

the judgment. In other words, there was a conflict in the evidence on the subject. That conflict was for the jury's solution. This court may not disturb the verdict.

The order and judgment appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

128 Cal.App. 444

HUSBAND v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(two cases).

Civ. 8642, 8643.

District Court of Appeal, Second District,
Division 2, California.

Dec. 28, 1932.

Hearing Denied by Supreme Court Feb. 24, 1933.

1. Grand Jury ⇨39.

Grand jury auditor's presence before grand jury during hearing violated statute providing no person except witnesses and persons specified should be present during sessions of grand jury, and invalidated indictments (Pen. Code, § 925).

2. Indictment and Information ⇨11(1).

Provisions of statute providing indictment must be set aside where not found, indorsed, and presented as prescribed by Penal Code, *held* mandatory (Pen. Code, § 995).

3. Courts ⇨209(2).

Under petition alleging proper facts, appellate court may order writ of mandate instead of prohibition, where writ of prohibition is prayed.

Proceedings by Charles J. Husband for writs of prohibition to be directed to the Superior Court in and for Los Angeles County, and Elliott Craig and Charles W. Fricke, Judges.

Writ of mandate granted.

Richard H. Cantillon and W. Torrence Stockman, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Buron Pitts, Dist. Atty., all of Los Angeles, for respondents.

WORKS, P. J.

These two proceedings present an identical question of law, and they may therefore be treated in a single opinion.

[1] Certain indictments were found by the grand jury against petitioner. During the taking of testimony at hearings before that

body, which resulted in the indictments, there was present the county grand jury auditor, an officer appointed pursuant to the provisions of section 928 of the Penal Code. It is contended by petitioner that the presence of that functionary in the grand jury room invalidates the indictments, and that therefore respondent court has no jurisdiction to try petitioner under them. Respondent insists that the auditor was properly present at the sessions, but we think he was not. Section 925 of the Penal Code is partially to the effect that "No person other than those specified in this and the succeeding section [italics ours] is permitted to be present during the session of the grand jury except the members and witnesses actually under examination." The section also designates persons who may be present in addition to the members of the jury and the witnesses, but the auditor is not among them. Neither section 926 nor 927 of the Code contains matter pertinent to the language quoted above which ends with the three italicized words. Section 928, however, reads in part as follows: "It shall be the duty of the grand jury annually to make a careful and complete examination of the books, records and accounts of all the officers of the county, and of every city board of education within the county, and especially those pertaining to the revenue, and report as to the facts they have found, with such recommendations as they may deem proper and fit; and if, in their judgment, the services of an expert are necessary, they shall have power to employ one, at an agreed compensation, to be first approved by the court. * * * " If this latter section provided for the presence of the expert, or auditor, at sessions of the grand jury held for the purpose of taking testimony preliminary to the possible finding of an indictment for the commission of crime, we think, under well-known rules of statutory interpretation and construction, that the interposition of sections 926 and 927 between sections 925 and 928 would not interfere with a consideration of section 928 as the one pointed to by the words we have italicized above. But section 928 does not provide for the presence of the auditor during criminal investigations, either directly or by proper implication. This appears, we think, from the portion of the section above set forth, and the view is strengthened by a perusal of the remainder of the enactment, which we do not quote in full because of its length. We think, then, that the presence of the auditor was in violation of the provisions of section 925.

[2] Section 995 of the Penal Code provides, among other things, that an indictment "must be set aside: * * * Where it is not found, indorsed and presented as prescribed in this code." Before petitioner instituted the present proceeding, he moved respondent court, pursuant to this section, to set aside the indictments presented against him on the ground

of the unlawful presence of the auditor during the grand jury investigation into his alleged delinquencies, and the motion was denied.

It has been settled, as must appear obvious, that the provisions of section 995 are mandatory. In *People v. Brown*, 81 Cal. App. 226, 253 P. 735, 745, we observed: "As was said in *People v. Bright*, 157 Cal. 663, 667, 109 P. 33, 35, the only capacity in which an unauthorized person may be called before or attend upon the grand jury session is that 'of witness during the actual taking of his own testimony.' And the Supreme Court concluded by announcing the rule as follows: 'We may question the wisdom of some of our statutory provisions relative to grand jurors and the grounds upon which an indictment shall be set aside, but it is our duty to comply with their mandatory requirements. * * *' The consensus of all authority with which we are familiar is in complete harmony with this rule. In *State v. Wetzel*, 75 W. Va. 7, Ann. Cas. 1918A, 1074, 83 S. E. 68, it appeared that a grand jury adjourned to other premises, where four persons not witnesses discussed certain facts whereupon they returned to their juryroom. It was there said: 'The law holds inviolate the secrecy of proceedings before the grand jury.

* * * Quoting from the opinion of Judge Bynum, in *Lewis v. Board of Com'rs*, 74 N. C. 199: "None but witnesses have any business before them. * * * The examination of witnesses is conducted by them, without the advice or interference of others. Their findings must be their own, uninfluenced by the promptings or suggestions of others, or the opportunity thereof." Many other authorities are quoted with approval in *State v. Wetzel*, supra, wherein all informal appearances before grand juries, and unauthorized participation in their inquiries, are condemned. In *State v. Fasset*, 16 Conn. 457, it was said: 'It is the peculiar policy of the law, in the furtherance of justice, that this preliminary inquiry should be conducted in secret.' " We are of the opinion that the presence of the auditor at the grand jury sessions required that the indictments against petitioner be quashed by respondent court, for the reason that, because of his presence the bills were not "found * * * as prescribed in this code," to quote again the language of section 995. *People v. Brown* and some of the cases cited in the opinion there rendered are authority upon this point. It will be observed that the Supreme Court, in a short opinion denying a transfer of *People v. Brown*, indicated its "accord with the decision of the District Court of Appeal" upon the questions here considered.

Notwithstanding the view thus expressed by our highest tribunal, we should take some notice of *People v. Delhantie*, 163 Cal. 461, 125 P. 1066, 1068, as that case was not cited in *People v. Brown*. The Supreme Court

said in its opinion: "It is insisted that by reason of the facts we have stated, the superior court was without jurisdiction to proceed with the trial of defendant upon this indictment. We are unable to perceive any merit in this claim. The *jurisdiction* of the superior court was not dependent upon compliance with the provisions of section 925, Penal Code. It obtained jurisdiction of the cause for all purposes by reason of the presentation by the grand jury of the indictment charging defendant with the crime of murder, alleged to have been committed in Marin county. If any substantial right given defendant by section 925, Penal Code, was denied him, it could amount at most simply to error, reviewable in such manner as the law provides." This language is both general and strong, but it is tempered by the statement of facts which precedes it. When the facts are considered, it plainly appears that what inspired the language of the court was merely the failure of a duly appointed stenographer to transcribe and serve on the defendant a copy of the testimony taken before the grand jury *after* indictment found. A very different question was considered in *People v. Brown*, and a different one is presented in this proceeding. Here the infraction of the terms of section 925 occurred *before* indictment. It is thus that the presence of the auditor in the grand jury room during the examination of witnesses becomes of moment.

[3] Petitioner here seeks the writ of prohibition. It is well settled, however, that, under a petition alleging proper facts, we may order the writ of mandate instead of the writ of prohibition, where the latter is prayed. The facts necessary to such a departure are made to appear in the petition before us.

In yielding obedience to the mandate about to be ordered, respondent court will naturally consider whether, under all the circumstances of the controversy, petitioner's case should be resubmitted to the grand jury.

A peremptory writ of mandate will issue, directing respondent court to dismiss the assailed indictments.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

128 Cal.App. 434

GREGG et al. v. STARK et al.
Civ. 8664.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1932.

1. Assignments ⇨129.

In several actions to compel lender under building loan to pay money into court for

benefit of mechanic's lien claimants, assignee of borrower held necessary and indispensable party.

2. Judgment ⇨116.

Where findings went outside issues under complaint, defaulting defendant held not bound by judgment rendered thereon (Code Civ. Proc. § 580).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Several actions by R. M. Gregg, doing business under the firm name and style of the R. M. Gregg Lumber Company, and others, against Milford G. Stark and others. From portions of the judgment rendered, the defendant Wilshire Mortgage Corporation appeals.

Reversed.

Robert E. Austin and John N. Helmick, both of Los Angeles, and J. E. Stillwell, of South Pasadena, for appellant.

Mark F. Jones and G. J. Oppegard, both of Los Angeles, for respondent.

"DOOLING, Justice pro tem.

This appeal is prosecuted upon the judgment roll by Wilshire Mortgage Corporation from certain portions of a judgment entered against appellant in nine separate mechanics' lien cases which were consolidated for trial. The actions were instituted by various persons claiming liens on the real property described in the complaints, and in some of the complaints it was alleged that Wilshire Mortgage Corporation, the appellant here, had made the defendant Milford G. Stark a loan of \$20,000 for the purpose of enabling said Stark to erect and construct the improvements on the property described in the complaint, which loan was secured by a deed of trust of said property; that Wilshire Mortgage Corporation had paid out \$10,000 of said loan, and the balance of \$10,000 was held by Wilshire Mortgage Corporation for the use and benefit of Stark and as a trust fund for the payment of lien claimants. Those complaints containing such allegations prayed that Wilshire Mortgage Corporation be required to pay said sum into court for the benefit of the lien claimants.

Wilshire Mortgage Corporation by its answer denied that it made any loan to Stark, but alleged that it did make a loan as described in the complaint to Arthur H. Disterheft, and alleged that the whole thereof was immediately advanced and paid out to Disterheft.

The court found that the contract to loan \$20,000 was made with Disterheft as alleged in appellant's answer; that Disterheft gave appellant his promissory note for that amount

secured by a deed of trust of the property in question executed and delivered by Disterheft; that Disterheft thereafter assigned to Stark his interest in the moneys accruing from said loan in the hands of appellant; and that \$2,663.13 of said loan remained undisbursed and in appellant's possession. By the portion of the judgment appealed from, the court ordered appellant to pay into court the said sum of \$2,663.13 for the benefit of certain lien claimants and also gave judgment against appellant for certain costs.

The case was ordered submitted on appellant's opening brief; no brief ever having been filed herein on behalf of any of the respondents.

The court in rendering judgment against appellant apparently had in mind the case of *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 271 P. 898. However, the facts of the instant case are far from parallel to those in the *Smith* Case. In the *Smith* Case the personal representative of *Smith*, who was dead, was the plaintiff. The personal representative was suing the defendant *Anglo-California Securities Company* to recover the balance due on a loan made by it to *Smith* to be used for building purposes. Certain lien claimants who were made defendants were held by the Supreme Court to be entitled to an equitable lien upon the sum awarded to *Smith* against *Anglo-California Securities Company*. It will thus be seen that the court had before it the borrower, the lender, and the lien claimants, and by one judgment could dispose of the entire controversy so that it would become *res adjudicata* as to all.

In the case now on appeal, the original borrower, *Disterheft*, was not made a party in any of the actions. His assignee, *Stark*, was served in only two of the nine actions, and in those it was alleged in the complaints, not that the loan was made to *Disterheft* and by him assigned to *Stark*, but that it was made to *Stark*, and that *Stark* executed and delivered the promissory note and deed of trust to secure its repayment. In the two actions in which he was served, *Stark* defaulted.

It will thus be seen that without *Disterheft* before it the court ordered appellant to pay into court \$2,663.13 found to be a balance due on a loan originally made to *Disterheft* and by the court found to have been assigned by *Disterheft* to *Stark*. We may concede for the purposes of this appeal that, in so far as the judgment may be *res adjudicata* as to *Stark*, it is also *res adjudicata* as to *Disterheft*, *Stark's* assignor. But *Stark* in his turn was only before the court to the extent that he was bound by his default in the two actions in which he was served.

[1, 2] We are satisfied, in a proceeding such as this, in which by the portion of the judgment appealed from appellant is compelled to

pay money which is found to be primarily due to *Stark* for the benefit of others, that *Stark* is a necessary and indispensable party, because the rights as between *Stark*, the appellant and the lien claimants are inextricably bound together. The judgment herein purports to determine that money found to be owing by appellant to *Stark* should be paid, not to *Stark*, but to the lien claimants. Unless *Stark* is bound by the judgment, in a suit by *Stark* against appellant on the same demand, appellant could not rely upon the judgment herein entered as *res adjudicata*, but would be compelled to litigate the question anew. "As against a defaulting or disclaiming defendant, the relief must be consistent with the case made upon the complaint and embraced within the issues. Section 580, Code Civ. Proc." *Balfour-Guthrie Inv. Co. v. Sawday*, 133 Cal. 228, 230, 65 P. 400, 401. The issues made by the complaints served upon *Stark* concerned the right of the lien claimants to an equitable lien upon moneys due *Stark* from appellant on a loan made directly to *Stark*. The findings went outside the issues so made and adjudicated the priority of the lien claimants in moneys due from appellant to *Stark* on a loan made to *Disterheft* and by him assigned to *Stark*. As to these issues not made by the complaints served upon him, *Stark* could in no manner be bound by his defaults. It results that the portion of the judgment appealed from cannot be *res adjudicata* as to *Stark*.

The portions of the judgment appealed from are accordingly reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

128 Cal.App. 391

In re WOOLSEY'S ESTATE.

STATE v. PERRY.

Civ. 4811.

District Court of Appeal, Third District,
California.

Dec. 27, 1932.

1. Descent and distribution ☞71(6).

Evidence supported probate court's finding that distributee was sole surviving next of kin, and hence entitled to estate as against state's contention that estate escheated for lack of heirs (Code Civ. Proc. § 1269a).

2. Evidence ☞320.

Hearsay evidence of witness regarding pedigree of family history held competent (Code Civ. Proc. § 1870, subd. 11).

3. Names ☞18.

Identity of persons may be established by identity of names; such evidence creating

presumption of identity of individuals when uncontradicted (Code Civ. Proc. § 1963, subd. 25).

4. Appeal and error $\S$ 1011(1).

Judgment supported by substantial evidence will not be reversed where evidence is conflicting.

5. Appeal and error $\S$ 1011(2).

In determining whether there is substantial evidence supporting judgment under rule that judgment will not be reversed where evidence is conflicting, facts adduced by deposition are as controlling as though witnesses were personally present at trial.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Petition for distribution of the estate of Charles W. Woolsey, deceased. From a decree of the probate court distributing the estate to Delia Perry, the State, which had intervened in the distribution proceeding, appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the State.

John Carfraie Birnie, of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal on the part of the state of California from a decree of the probate court distributing to Delia Woolsey Perry, as sole surviving heir, the entire estate of the deceased. The state of California intervened in the proceeding for distribution under the provisions of section 1269a of the Code of Civil Procedure, claiming that the deceased died without known heirs and that the estate therefore escheated to the state. It is contended the evidence fails to support the decree.

Charles W. Woolsey, aged sixty-two years, died intestate without issue in the county of Nevada. His wife, Elizabeth Harns Woolsey, had previously died intestate. Her estate was not probated. It was conceded the estate of Charles W. Woolsey consisted solely of community property, and that one-half of the estate was properly distributed to the heirs of his predeceased wife under the provisions of subdivision 8 of section 1386 of the Civil Code. Lila M. Champion was appointed administratrix of the estate of Charles W. Woolsey, deceased. After the debts and expenses of administration were paid, upon petition for distribution, the court found that, "Delia Woolsey Perry is the sole next of kin of Charles W. Woolsey, and is entitled to take the one-half of the community property as (surviving) representative" of the deceased.

Pursuant to this finding the court distributed to Mrs. Perry the balance of the estate amounting to the sum of \$6,448.84. From this decree, the state of California has appealed.

[1] The evidence in support of the finding that Delia Woolsey Perry is the sole surviving next of kin and representative of the deceased is entirely satisfactory. The evidence of her relationship to the deceased is established without substantial conflict by documentary proof. She is the only surviving child of Richard Daniel Woolsey, a predeceased first cousin of Charles W. Woolsey. From the deposition of Della Woolsey Perry it appears she was born in Shopiere, Wis., in 1859. She now resides in Beloit, Wis. Her father's name was Richard Daniel Woolsey. The name of her paternal grandfather was James Woolsey. He had a brother by the name of William E. Woolsey, who was born in Ireland, and who married Charlotte Ross, who was born in Scotland. William E. and Charlotte Woolsey had two sons named John Ross Woolsey and Charles W. Woolsey. As shown by his birth certificate, John Ross Woolsey was born in Wisconsin in 1861. This certificate corroborates the fact that his father, William E. Woolsey, was born in Ireland, and that his mother, Charlotte Ross Woolsey, was born in Scotland. John Ross Woolsey died in Nevada City, Cal., December 1, 1917. He had lived in California forty years prior to his death. Upon petition therefor, this deceased, Charles W. Woolsey, was appointed administrator of his brother John's estate. In his petition for letters of administration Charles alleged that he was the surviving brother of John Ross Woolsey. Thus we have convincing evidence, without conflict, that Charles W. and John Ross Woolsey were brothers, and that they were the sons of William E. and Charlotte Ross Woolsey, the greatuncle and greataunt of the claimant, Delia Woolsey Perry. The undisputed evidence of Delia Perry is that her paternal grandfather was James Woolsey, a brother of William E. Woolsey. In corroboration of the foregoing facts, it appears from the marriage certificate signed by Charles W. Woolsey in April, 1912, that he was born in Missouri, and that he was then forty-five years of age. This shows the year of his birth to have been 1867. In that certificate he declared that his father's name was William E. Woolsey, who was born in Ireland, and that his mother's name was Charlotte Ross, who was born in Scotland. It also appears that Charles W. Woolsey had resided in California fifty years prior to his death. From the certificate of the marriage license of Delia Woolsey Perry, it appears she was married December 3, 1884, at the age of twenty-six. From her deposition, it appears she was living with her parents at Shopiere, Wis., in 1865 when they received a visit from her greatuncle and greataunt William E. and

Charlotte Ross Woolsey. They were then accompanied by their son John Ross Woolsey, who was then but four years of age. Charles W. Woolsey was not born until two years thereafter, and Delia never saw him. She was then six years of age. She distinctly remembers to have then seen her greatuncle William E. Woolsey and his wife Charlotte Ross Woolsey and their son John Ross Woolsey. She was told by her own parents and by William E. Woolsey that he was a brother of her paternal grandfather, James Woolsey. She was later told by her parents that her greatuncle, William E. Woolsey, and his family had moved "out West." She knew nothing further concerning their whereabouts until she learned of the death of Charles W. Woolsey which occurred in Nevada City, Cal., August 17, 1929. The first information Delia Woolsey Perry received, regarding the family of William E. Woolsey after they went West, was in response to an inquiry which appeared September 8, 1929, in the Milwaukee Journal, as follows: "Woolsey: Information wanted concerning relatives of John Ross Woolsey, born Wisconsin about 1861, son of William E. and Charlotte (nee Ross); estate matter."

It will be observed this notice called for information by reference to John Ross Woolsey, whom Delia knew and had met in their home in 1865, in company with his parents.

From the foregoing facts there appears to be no reasonable doubt that John Ross Woolsey and Charles W. Woolsey were brothers; that both John and Charles were sons of William E. and Charlotte Ross Woolsey, and that William E. was a brother of James Woolsey, the paternal grandfather of Delia Woolsey Perry. All of the relatives of this Woolsey family are dead, except Delia. Not only are these facts a matter of family history, but there is convincing corroboration in the identity of names, which check and cross-check without a flaw. This furnishes very satisfactory evidence in support of the court's finding that Delia Woolsey Perry is the sole surviving next of kin of Charles W. Woolsey, deceased, and that she is therefore entitled to distribution of the balance of his estate.

The only apparent contradiction of any of the foregoing facts is a statement which Charles W. Woolsey made on a Sacramento bank deposit card, at some date which is not disclosed. On that card he made the following statement in answer to an inquiry regarding his relatives: "Nearest Relative: None living." This signature card furnishes no substantial conflict to the foregoing positive evidence of relationship. In the first place Delia Woolsey Perry might not be deemed to be a "near" relative. It is not unreasonable that a depositor in a bank should assume that a request for the name of the "nearest relative," called only for the name of an immediate blood relative. There is no difficulty in reconciling the statement on the bank signa-

ture card with the documentary records and the deposition of Delia Woolsey Perry. It is quite likely Charles W. Woolsey, who had resided in California for fifty years, never heard of this collateral relative. Many individuals are ignorant regarding remote relatives. Nor is it strange that Delia had not heard of her greatuncle Charles. It was not uncommon for adventurous Americans who crossed the plains and the Sierra Nevadas in response to the lure for gold in the early days of California to become lost to their eastern relatives.

[2] The hearsay evidence of Delia Woolsey Perry regarding the pedigree of their family history is competent. 3 Jones Comm. on Evidence, 2097, § 1131; section 1870, subd. 11, Code Civ. Proc.; Estate of Walden, 166 Cal. 446, 137 P. 35.

[3] The identity of persons may be established by the identity of names. Such evidence creates a presumption of the identity of individuals when it is uncontradicted. Section 1963, subd. 25, Code Civ. Proc.; 19 Cal. Jur. 527, § 7; Estate of Williams, 128 Cal. 552, 61 P. 670, 79 Am. St. Rep. 67; Estate of Horgan, 93 Cal. App. 36, 268 P. 1090.

[4, 5] There is ample evidence in the present proceeding to support the finding of the probate court that Delia Woolsey Perry is the sole surviving next of kin of Charles W. Woolsey, deceased, and that she is entitled to distribution of the balance of the estate. In determining whether there is substantial evidence to support the finding and decree to meet the requirements of the well-established rule that a judgment will not be reversed on appeal when the evidence is conflicting (2 Cal. Jur. 921, § 543), the facts which are adduced by means of a deposition are just as controlling as though the witnesses were personally present at the trial. Estate of Moore, 162 Cal. 324, 122 P. 844, 845. In the case last cited the court says: "Appellant insists that we should review this evidence as triers of fact because it was presented to the court in probate upon deposition, and he argues that, as the credibility of the witnesses is not involved when the testimony is given by deposition, the rule of this court that it will not disturb a finding based upon conflict of evidence does not obtain. But this rule is not a court created rule and is not based upon the fact that the trial court or trial jury has had the witnesses before it. This fact is but one of the reasons for the existence of the rule which itself is created by the law. This court sits to review errors of law. * * * It is only when the question is presented to this court as one of law under the contention that the evidence is insufficient to support the verdict or finding, that this court will examine the evidence to this sole end, and, when it is satisfied that substantial evidence exists to support the

verdict or finding, its examination ceases at once."

The decree of distribution is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

WEDGE et al. v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al.*

Civ. 8669.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1932.

Hearing Granted by Supreme Court Feb. 24, 1933.

1. Evidence ⇨434(11).

Vendor cannot protect himself against consequence of agent's fraudulent representations by false recital in contract that no representation has been made.

2. Evidence ⇨434(11).

Purchasers seeking rescission held precluded from proving agent's fraudulent misrepresentations under contract stipulating that vendor should not be liable for any representation not stated therein.

Contract in question declared that it was agreed that property had been inspected by purchaser or some one on his behalf, and had been purchased wholly as result of such inspection and not on any representation made by vendor or its agent, and that purchaser waived all claims for damages by reason of any representation made by any person other than as contained in contract, and that vendor would not be liable for any representation or stipulation not specifically set forth therein.

3. Principal and agent ⇨148(4).

Agent exceeding authority cannot bind principal, where other contracting party knows limits of agent's authority.

4. Vendor and purchaser ⇨49.

Contract limiting buildings to single residence, duplex, or bungalow court held not to include agent's misrepresentation that bungalow court could be built beneath electric wires, precluding rescission.

It was contended that reference to bungalow court in contract in question amounted to inclusion in contract of agent's oral representation that bungalow court could be built beneath high-tension electric wires over lot, whereas in fact, as purchasers learned when they sought building permit, city had right of way

across lot for purpose of maintaining such wires, which prevented building of bungalow court on right of way.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by George N. Wedge and others against the Security First National Bank of Los Angeles and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

H. S. Clewett and Jos. J. Rifkind, both of Los Angeles, for appellants.

W. C. Shelton and Geo. W. Burch, Jr., both of Los Angeles, for respondents.

DOOLING, Justice pro tem.

This is an appeal from a judgment decreeing the rescission of a contract of sale of a lot of land and for the recovery of the purchase price and other moneys expended upon or in connection with the property. The rescission was granted on the ground of fraud.

Respondents, in purchasing the lot, dealt with a sales agent named Gould. They desired to construct upon the lot a bungalow court, and noticing the presence of high-tension electric wires over and across the lot they inquired of Gould if they would be allowed to build a bungalow court under such wires, and were told by Gould that they would have a right to do so. This representation was repeated by Gould just prior to the signing of the contract of purchase by respondents, when respondent several years later, sought a building permit to construct a bungalow court under such wires, they were informed for the first time that the city of Los Angeles had a right of way across the lot for the purpose of maintaining such high-power wires, which prevented the building of any portion of their proposed bungalow court upon such right of way. The contract of purchase was executed by respondents as vendees and Security Trust & Savings Bank as vendor. Gould was not a party to it. The written contract contained the following provision: "It is understood and agreed that said property has been inspected by the buyer or by someone on his behalf, and that the same is and has been purchased by him wholly as the result of said inspection and not upon any representation made by the seller or its agent, and the buyer hereby waives any and all claims for damages by reason of any cancellation or foreclosure of this agreement, or otherwise because of any representation made by any person whomsoever other than as contained in this agreement, and the seller shall not be responsible or liable for any inducement, promise, representation,

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 25 P.2d 411.

agreement, condition or stipulation not specifically set forth herein."

Appellants assert that by this provision in the contract respondents had notice that Gould was without authority to bind the vendor by any oral representation. In *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322, where a rescission was sought on the ground, among others, of certain fraudulent representations made by an agent, the contract contained this provision: "It is understood that no representative has any power to change, modify, or make any other terms or representations whatsoever than those herein stated, and that the representative is acting as special agent, and all representations not herein set out are by me deemed waived."

The Supreme Court, discussing this provision, of the contract, said at page 751 of 202 Cal., 262 P. 322, 323: "While the Civil Code, § 1625, provides that a written contract supersedes all negotiations and stipulations concerning the matter between the parties, it has always been the law that fraud in the inducement of a contract may be shown. A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further. [Citing cases.]"

In *Warner v. Taft Land & Development Co.*, 113 Cal. App. 71, 78, 297 P. 969, the provision of the contract under consideration by the court was in almost the identical language of the provision of the contract in the instant case which has been hereinabove set out. In the *Warner Case* this court in an opinion written by Mr. Justice Parker, pro tem., followed the rule laid down by the Supreme Court in *Gridley v. Tilson*, supra, and held that fraudulent representations by the agent could not in that case be shown. This court said in the *Warner Case*, at page 80 of 113 Cal. App., 297 P. 969, 973: "Much of modern business is done through some form of agency and if there were no way in which a principal, himself without fault, could be apprised of the integrity and finality of his contract we fear that an unhappy condition of insecurity would result. The buyer and seller here were dealing at arm's length and when the latter so plainly informed the former that his contract was based only upon the express conditions thereof and disclaimed responsibility for anything beyond the writing and the buyer thereupon acquiesced, it follows that the contract as thus made was the measure of the liability of the parties thereto."

Respondents cite and rely upon *Mooney v.*

Cyriacks, 185 Cal. 70, 195 P. 922, 926. There the contract simply recited "that no statements, agreements, understandings or representations of any kind or nature have been made, or exist, other than those in this agreement contained," and the court held that, despite such provision, oral fraudulent representations could be proved. The contract in that case did not pretend to give notice of any limitation of authority on the agent to make oral representations, but merely attempted to render any such representations ineffective if made by a recital that none had been made. The court properly held that such a recital would not operate to prevent proof that in fact oral fraudulent representations had been made.

[1-3] The distinction between *Mooney v. Cyriacks*, on the one hand, and *Gridley v. Tilson* and *Warner v. Taft Land & Development Co.* on the other, thus becomes clear: A party to a written contract cannot protect himself against the consequence of fraudulent representations actually made by a false recital in the contract that none have been made; but he can protect himself against liability for the fraudulent representations of an agent by inserting in the contract a provision which gives notice to the other party that the agent has no authority to make any representations not embodied in the contract. This results necessarily from the wholesome rule that an agent cannot bind his principal by any act in excess of his authority where the other party to the contract has knowledge of the limits of the authority under which the agent is acting.

[4] Respondents seek to avoid the effect of this rule by pointing to the following provision of the contract: "No buildings whatsoever shall be erected upon lots 1 to 24 exclusive, other than a single family residence to cost and be fairly worth at least four thousand dollars, or a double bungalow, or a duplex house, to cost and be fairly worth at least \$5,000, or a bungalow court to consist of at least four residence buildings, each of which must cost and be fairly worth at least \$1,500.00." (The lot here in question was lot 12.)

Respondents claim that the reference therein to a bungalow court amounted to an inclusion in the contract of the oral representation of Gould that a bungalow court could be built upon the power line right of way. The provision will not bear such a construction. It is not a grant to the vendees but a limitation upon their use of the lot in favor of the vendor. Its purpose is to restrict the uses to which the property can be put, and by no stretch of the imagination can it be considered a representation that the right of way over the lot could be occupied by a bungalow court on any portion of such court.

Since this point necessitates a reversal, we need not consider other questions raised by appellants.

Judgment reversed.

We concur: STURTEVANT, J.; NOURSE, P. J.

Action by Miller & Lux, Incorporated, against Hugh Sparkman. Judgment for plaintiff, and defendant appeals.

Affirmed.

Conley, Conley & Conley, of Fresno, for appellant.

J. E. Woolley, of San Francisco, for respondent.

128 Cal.App. 449

MILLER & LUX, Inc., v. SPARKMAN.
Civ. 4663.

District Court of Appeal, Third District,
California.

Dec. 28, 1932.

Rehearing Denied Jan. 27, 1933.

1. Taxation ☞531(1).

Where record title was in vendor when lien for taxes attached, vendor's payment of taxes held not voluntary, as regards right to recover from purchaser (Pol. Code, §§ 3718, 3899).

2. Vendor and purchaser ☞198.

Although deed was not delivered to purchaser until March 23, 1928, covenant against incumbrances implied from statute held not to obligate vendor to pay taxes, lien for which attached on first Monday in March, where vendor had delivered deed to depository for purchaser's benefit on February 25 (Civ. Code, §§ 1059, 1113; Pol. Code, § 3718).

Vendor was not obligated by virtue of covenant implied from Civ. Code, § 1113, to pay taxes, lien for which attached under Pol. Code, § 3718, on first Monday in March, 1928, since the purchase agreement clearly showed that it was parties' intention that as a part of the purchase price the purchaser should pay all taxes accruing after the date of the execution of the contract, and to effectuate that intention the doctrine of relation back was applied, whereunder the passing of title under the deed related back to the date of the constructive delivery under Civ. Code, § 1059, which was made by the vendor on the 25th day of February, 1928, by placing the deed in the hands of the depository for the use and benefit of the purchaser.

3. Appeal and error ☞843(2).

Exception to form of findings would not be considered, where any findings which might be drafted would be adverse to appellant's contentions.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant for the sum of \$915.01, based on an action to recover that sum on account of taxes paid by the plaintiff, which the complaint alleges should have been paid by the defendant.

On the 15th day of February, 1927, the plaintiff and the defendant entered into an agreement of purchase and sale, whereby the plaintiff agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff, all that certain tract of land situate and being in the county of Madera, state of California, described as follows, to wit: All of section 7, township 12 south, range 17 east, M. D. B. & M.; purchase price being the sum of \$54,893. The agreement contained a number of covenants and provisions relative to the payment of the purchase price, and other conditions to be performed by the respective parties, only one of which need be set forth herein, as found in the fifth paragraph of the agreement, to wit: "The seller shall pay the taxes on said property for the portion of the fiscal year, up to the date of this agreement, and the purchaser shall pay the taxes for the balance of this fiscal year. All taxes and all assessments hereafter levied or becoming due upon said land by irrigation, reclamation, drainage, water storage or other district or public corporation shall be paid by the purchaser. The seller may pay the said taxes or assessments, an insurance, if hereinafter provided for, on behalf of the purchaser, and the same shall become immediately due from the purchaser to the seller, together with interest at the rate of 6 per cent per annum from the date of payment by the seller until repaid, and said seller shall have a lien upon any interest of said purchaser in said land, for the money paid by it for said insurance, taxes or assessments, together with said interest thereon."

The agreement further provided that upon compliance with the conditions specified therein to be performed by the purchaser, the seller would execute and deliver to the purchaser a good and sufficient deed of conveyance, free and clear of all incumbrances, done or suffered by the seller, excepting all taxes, assessments, charges, etc., required to be paid by the purchaser. The agreement called for the payment of \$10,978.60, upon the execution

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

thereof, and the balance in six equal monthly installments, payable on the 15th day of February of each succeeding year. On the 18th day of February, 1928, the defendant wrote to the plaintiff as follows (omitting the address): "Please send deed to me, to Section 7-12-17, Madera County, on which I have a contract to purchase, with instructions to Security Title Insurance & Guaranty Company, of Madera. I am getting a loan to pay you off, and they ask Title Insurance, so please instruct Title Insurance to furnish same. Give as much time as possible for closing, as the loan is a government loan, and they sometimes are slow in getting papers ready, but loan has been approved and will be closed as soon as possible."

The second letter written by the defendant to the plaintiff bears date of February 23, 1928, and is as follows (omitting address): "Yours received with regard to my request for deed for Section 7-12-17, to be sent to the Security Title Insurance & Guaranty Company of Madera with your instructions. I will order the Title insurance and you pay toward that what the certificate would be, and I will pay the difference. You send the deed, and you can make it clear to the Title Company that you will be responsible only for cost of certificate, and then only if deal is consummated. I am not getting all the money from the Land Bank, but have to put in part of my own, which I am ready to do. I hope this will be satisfactory."

In pursuance of these letters the plaintiff sent instructions to the Security Title Insurance & Guaranty Company setting forth the amount of money still due, and directing the insurance company to deliver to the defendant an inclosed grant, bargain, and sale deed executed by the plaintiff to the defendant conveying to the defendant the premises covered by the agreement of purchase and sale heretofore referred to. The deed bears date as of February 23, 1928, and was delivered to the Security Title Insurance & Guaranty Company on February 25, 1928. This deed, among other provisions, contained the following: "To have and to hold the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever, subject, however, to the lien of taxes for the fiscal year ending June 30, 1928, and to all assessments, if any, heretofore levied or assessed by any irrigation, reclamation or other district."

The complaint sets forth that the defendant not having paid the taxes which became due and payable upon said granted premises, prior to the 5th day of December, 1928, the plaintiff, on the 14th day of December, 1928, paid the taxes then due and payable on said granted premises in the sum of \$915.01. Demand was thereafter made by the plaintiff upon the defendant for repayment of said sum, and fol-

lowing the refusal to make such repayment, this action was begun.

Upon this appeal the defendant urges two grounds for reversal: (1) That the payment of said taxes on the part of the plaintiff was purely voluntary; (2) that the agreement which obligated the defendant to pay the taxes upon the granted premises was merged into, and ceased to be effective upon the execution of the grant, bargain, and sale deed. That the grant, bargain, and sale deed was delivered into the possession of the defendant on the 23d day of March, 1928, and by virtue of section 1113 of the Civil Code the plaintiff, by reason of the covenants contained in the deed, was obligated to pay the taxes, and the defendant was relieved from the payment of taxes which accrued and became payable prior to the 5th day of December, 1928.

Was the payment of the taxes referred to voluntary on the part of the plaintiff? A large number of cases have been cited by the appellant all holding that voluntary payments made without request are not recoverable. Without questioning the correctness of a single one of the cases cited by the appellant, a reference to the Political Code will show their inapplicability. After providing that all taxes shall be levied upon property standing in the name of any person, the Political Code provides in section 3718 that all taxes levied for the following year become a lien as and of the first Monday of the year during which the taxes are levied. Other sections of the Code setting forth the procedure require the levy of the taxes to be made in the month of September.

By section 3899 of the Political Code the tax collector is not required to sell the property, but may bring suit therefor. That section reads (so far as applicable here): "The controller may, at any time after a delinquent-list has been delivered to a tax-collector, direct such tax-collector not to proceed in the sale of any property on said list whereon the taxes shall amount to three hundred dollars or more." The section then authorizes the beginning of suit for the collection of the unpaid taxes.

In 20 California Jurisprudence, p. 908, after defining the term "volunteers" the text reads: "On the other hand if a person, either by compulsion of law or to relieve himself from liability, or to save himself from damage, pays money which another ought to have paid, the law implies a request on the third person's part and a promise to repay, and the person paying has the same right of action as if he had paid the money at the other's express request. Payment under such circumstances will not be deemed to have been officiously made, nor will the payor be looked upon as a mere intermeddler in matters in which he has no concern."

To the same effect is the text in 41 C. J. 13, to wit: "One who is compelled by reason of

legal liability therefor, to pay an obligation for which another, in equity and good conscience should pay, may recover from that other the money so paid. It is not necessary that the payment should have been coerced by actual legal proceedings. The mere existence of the liability is sufficient." Citing authorities in footnotes.

[1] The title to the property covered both by the agreement and the conveyance to which we have referred stood of record in the name of the plaintiff on the first Monday in March, 1928. This fixed a legal liability upon the part of the plaintiff for the taxes which would, and did, accrue in November, 1928, and which should have been paid prior to the 5th day of December, 1928. Or, as said in *San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.*, 96 Cal. 623, 29 P. 500, 502, 31 P. 588, 18 L. R. A. 465, 470: "The personal obligation to pay taxes does not depend upon the continued ownership of the property assessed until after the levy of the tax, or until the time for payment arrives." See, also, *Finnell v. Finnell*, 159 Cal. 535, 114 P. 820. All of which shows that the argument of voluntary payment is untenable.

If the agreement entered into between the plaintiff and the defendant February 15, 1927, was merged into the deed of grant, bargain, and sale, bearing date of February 23, 1928, and delivered into the manual custody and control of the defendant on the 23d of March, 1928, then and in that case it did not cease, as contended for by the appellant; it was still in force and effect on the 1st Monday of March, 1928, and obligated the appellant to pay the taxes involved in this action.

[2] This action involving the payment of money by one, the payment of which another should, in good conscience, have made, involves an equitable principle applicable to the delivery of deeds in escrow, by reason of the fact that the agreement entered into between the parties shows clearly that it was their intention that as a part of the purchase price the defendant should pay all accruing taxes after the date of the execution of the instrument, and to effect the intention and to do equity the passing of title under the deed will be held to relate back and to take effect as and of the date of the constructive or conditional delivery—in this case, February 25, 1928, at which time it was placed in the hands of the Security Title Insurance & Guaranty Company, to be delivered to, or placed in the manual custody of, the defendant upon his compliance with payment, as promised in his letters.

Section 1059, Civil Code, reads: "Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: 1. Where the instrument is, by the agreement of the parties at the time of ex-

ecution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or, 2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." The consent of the grantee was express, and the delivery was made in pursuance thereof.

In *Marr v. Rhodes*, 131 Cal. 267, 63 P. 364, involving an exchange of lands, in following the equitable rule which we have just stated, the court held, quoting from the syllabus: "Deeds placed in escrow upon an exchange of lands, when finally delivered after all the conditions of the agreement have been fulfilled, relate to the date of their execution, and the rights of the parties are the same as if the deeds had been fully delivered on such date."

In 9 California Jurisprudence, p. 172, the text reads: "A grant, without actual delivery into the possession of the grantee, may be delivered constructively by delivery to a third person for the grantee, as where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed. Thus, where the depositary of a deed in the presence of the grantor and grantee, told the former that he could not at that time get the 'papers' which he desired to give to the latter, and the grantees requested the depositary to keep them for her, it was held, upon the presumption that the grantor assented to that arrangement, that eo instanti there was a delivery of the deed to the grantee. The grantee's assent is not required at the moment of delivery to the third person, but may be given subsequently, and even after the death of the grantor, the deed taking effect by relation, provided the rights of third persons have not intervened. * * * While a deed cannot be delivered conditionally to the grantee, it may be delivered conditionally to a third person, in which case it is either a deed absolute, or an escrow."

In *Hawl Mill & Plant. Co., Ltd., v. Flinn*, 82 Cal. App. 255, 255 P. 543, 546, the court, in referring to the rule of relation now under consideration, used the following language: "The case cited merely holds that no title passes until the condition of the escrow is so far performed that the grantee is entitled to the possession of the deed; that as the escrow was abandoned, the deed was not delivered pursuant to the escrow instructions, and it therefore became effective only at the time of the delivery. While that is true, it is likewise the rule that when the escrow is complete its completion relates back to the date when the papers were placed in escrow." Citing authorities.

In *Green v. Skinner*, 185 Cal. 437, 197 P. 60, 61, the court held the doctrine of relation back applicable, but not so as to cut out intervening equities. The language of the opinion reads: "Even so, however, such assent when

given will, as between the grantor and the grantee, relate back to the time when the grantor first handed the deed over to a third person to be delivered to the grantee. Such assent may be after the death of the grantor and yet it is effective by relation, so that the deed will be taken as delivered in the lifetime of the grantor. * * * This is well established, but with it goes the modification, likewise settled as the law, that the assent of the grantee will operate retroactively by relation only when the rights of third persons have not intervened."

In 10 California Jurisprudence, 593, the equitable principle here involved is explained. The text reads: "The general rule that a deed does not transfer title or that an instrument does not take effect until the contingency has occurred which entitles the grantee to a delivery, sometimes works a hardship. To overcome this the courts have, where the occasion has required it, resorted to a fiction whereby the subsequent delivery is held to have related back and taken effect as of the first delivery. So where, after the delivery of a deed as an escrow, the grantor conveys to another who has notice of the former transaction, the first deed will be held to have taken effect as of the date of the escrow, and a note delivered as an escrow takes effect as of the date of its delivery to the depository, upon the happening of the condition of the escrow, where, in the meantime the maker has died. So, also, where a deed has been delivered in escrow in favor of a grantee who has no knowledge of it, the assent of the grantee thereto may be given after the death of the grantor, and it will be effected by relation so that the deed will be taken and delivered in the lifetime of the grantor, provided the rights of third persons have not intervened."

In 10 *Ruling Case Law*, beginning on page 627, the rule which we are considering is thus stated: "Where an instrument has been delivered to a depository, as a writing or escrow of the grantor, it does not become a deed and no legal title or estate passes until the condition has been performed or the event has happened upon which it is to be delivered to the grantee, or until the delivery by the depository to the grantee. Following this rule, while a deed is in escrow awaiting the performance of conditions precedent to the delivery thereof by the vendor to the vendee, there is no change in the title or right of possession to the property, although the purchaser occupies it with the consent of the vendor, in anticipation of completing the contract of sale and purchase. * * * The deposit of a deed in escrow creates, however, in the grantee, such an equitable interest in the property, as that, upon full performance of the conditions according to the escrow agreement, the title will vest at once in him.

* * * This doctrine rests upon the general principle in equity that from the time of a contract for the sale of land, the vendor, as to the land, is considered a trustee for the purchaser, and the vendee, as to the purchase money, a trustee for the vendor."

Applying the equitable principles of relation back, as held by the foregoing authorities, the grant, bargain, and sale deed delivered by the plaintiff to the defendant should be held to speak as and of the 25th day of February, 1928, at which time it was placed in the hands of the depository for the use and benefit of the defendant, and speaking as of that date, none of the provisions of section 1113, Civil Code, were violated. See, also, *Flickling v. Jackman*, 203 Cal. 657-663, 205 P. 810.

[3] Exception is also taken to the form of the findings in this case, the findings being simply, in substance, that the defendant owes the plaintiff so much money. By reason of what we have said, it satisfactorily appears that whether the findings of the court in this case are sufficient or insufficient, any finding that we might draft would necessarily be adverse to the contentions of the appellant. From which the conclusion must be drawn that no correction of the findings in this case would be of benefit to the appellant, and that the appellant has suffered no injury by reason of any alleged defect therein.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 419

S. E. SLADE LUMBER CO. v. NATIONAL SURETY CO.

Civ. 8566.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1932.

Hearing Denied by Supreme Court Feb. 24, 1933.

1. Insurance ⇨78.

Insurer may limit agent's authority regardless of agent's rank or designation.

2. Insurance ⇨432.

Under lumber company's credit insurance policy providing that, if credit book of lumbermen's agency did not contain customer's name, another agency's credit rating should govern, latter agency's rating held applicable, where lumbermen's book, although containing customer's name, gave no credit rating.

It appeared that only purpose of resorting to credit book used in lumber trade

and published by certain lumbermen's mercantile agency was to ascertain credit rating of customers of insured company, and hence when it was found that, although name of particular customer appeared in such book, no rating was given for that customer, in order to include such customer in policy resort might properly be had under circumstances to credit ratings published by another agency, which was mentioned in agreement between insured and insurer's agent and also in application and in policy.

3. Pleading ⚡36(3).

Facts, including admission in answer that insured's customer was insolvent precluded contention that no evidence established insolvency.

4. Insurance ⚡136(5).

Generally, insured, accepting and retaining policy, is estopped from asserting that policy is not parties' contract.

5. Reformation of Instruments ⚡25.

Mere failure to read instrument with sufficient attention to perceive defect does not necessarily prevent reformation.

6. Insurance ⚡143(8).

Where insurer's manager represented that credit insurance policy would include customer, who did not appear therein by name but merely by letters representing rating, insured accepting and retaining policy *held* not estopped in reformation suit to assert that policy included customer.

Insured not only had assurance of insurer's manager that such customer would be included in policy in question, but examination of policy would not have disclosed that this customer was omitted, for reason that customer did not appear in policy by name, but only by two letters of alphabet, and these letters signified rating, and purported to carry insurance against such customer to certain amount.

7. Insurance ⚡432.

Freight paid by insured on lumber shipped to insolvent customer *held* within credit insurance policy.

Policy in question insured lumber company against loss resulting from insolvency of customers to whom lumber was shipped and delivered in usual course of business, and evidence showed that company, having paid freight charges on lumber shipped to insolvent customer, added those charges to its account against such customer.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the S. E. Slade Lumber Company against the National Surety Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Dinkelspiel & Dinkelspiel, of San Francisco, for appellant.

Derby, Sharp, Quinby & Tweedt, of San Francisco, for respondent.

PER CURIAM.

This action was brought by plaintiff to reform a policy of insurance issued to it by defendant, covering protection against insolvent debtors so as to include therein the account of Mox, Inc., an alleged debtor of plaintiff, and to recover the sum of \$7,066.25 as a loss sustained by plaintiff through the alleged insolvency of said Mox, Inc.

The amended complaint contains three counts. Defendant was granted a nonsuit upon the first; the second alleges a mistake in said policy known to defendant at the time of its delivery to plaintiff, and of which it deliberately failed to notify plaintiff at the time of its delivery; and the third count alleges defendant agreed to issue its policy to cover and include therein the names of customers of plaintiff, a list of which was submitted to defendant, including the name of Mox, Inc.; that thereupon defendant issued and delivered its policy to plaintiff, representing at the time of said delivery that said policy covered and protected plaintiff against loss from all accounts contained in the said list and particularly the account of Mox, Inc.; that thereafter the said Mox, Inc., became insolvent and made an assignment of all its assets to a committee of seven creditors for the benefit of all of its creditors; that plaintiff has demanded of defendant reimbursement for said loss, but the defendant refuses to pay same. Plaintiff requests that the said policy be reformed to conform to the agreement aforesaid, so as to include in said policy among the accounts of customers of plaintiff the account of Mox, Inc.

Defendant answered, denying that the policy contained any mistake known to it or any mistake at all, or that defendant was indebted to plaintiff under said policy in any amount or sum.

Judgment was rendered reforming said policy so as to include therein the account of Mox, Inc., and awarding plaintiff the sum of \$2,235.48. From this judgment defendant has appealed.

Respondent is engaged in the lumber business. Defendant is an insurance company issuing, among others, policies of credit insurance protecting the insured against losses arising from nonpayment of accounts by the assured's customers. The main office of appellant is located in New York City. It maintains a branch office in San Francisco.

It appears from the testimony of Russell C. Slade, respondent's vice president and general manager of its San Francisco office, that, in March, 1927, appellant, through Leon C. Voss, its Pacific Coast manager, solicited Slade to take out a policy for the benefit of respondent. Slade told Voss that he was wholly unfamiliar with credit insurance, and Voss thereupon explained to him that by virtue of a credit insurance policy the assured would be reimbursed for any loss caused by the insolvency of its debtors. He also informed Slade that the policy did not contain the names of the assured's customers, but only the ratings, and that in order to secure a policy with respect to them it was first necessary to make a list of their names and then ascertain their rating. At the request of Voss, Slade prepared a list of names to whom respondent sold lumber, including therein the name of Mox, Inc., against whom protection insurance was desired. There is a mercantile credit book used in the lumber trade commonly called the Red Book, and this book was used by Voss and Slade in ascertaining the credit rating of respondent's customers. This Red Book is a directory or reference book of the lumber trades, and also contains ratings of most of the names appearing therein, though some half a dozen names appear therein with no rating given them. Among these names, with no rating appearing opposite the name, was that of Mox, Inc. In other words, the name of Mox, Inc., was listed in said Red Book, but there was no rating opposite said name. Slade testified that he asked Voss how these customers, whose names appeared in the Red Book without any rating, could be covered by the policy, and that Voss replied that a rider would be attached to the policy setting forth their respective ratings as shown by the Bradstreet Mercantile Agency, and that thereby the accounts of these customers would be included in the policy.

The policy, under condition two, provides that no loss is covered unless the debtor to whom goods are shipped and delivered shall have in the published book of the Lumbermen's Credit Association Mercantile Agency at the date of the shipment a capital rating and its accompanying credit rating as tabulated therein. This provision of the policy was modified by a rider attached to it, which provided as follows: "It is agreed that if at the date of booking the name of a debtor does not appear in the latest published books or reports of the Lumbermen's Credit Association Mercantile Agency, then the Bradstreet Mercantile Agency shall govern in place of the Lumbermen's Credit Association Mercantile Agency, as specified in Condition No. 2 and the subjoined 'Table of Ratings' and gross amounts shall be substituted for the 'Table of Ratings' and gross amounts now contained in said Condition No. 2, where the goods are sold, shipped and delivered to a

similar class of debtors." Then follows in said table of rating the gross amounts of capital and the gross amounts covered by the policy. These ratings are indicated by letters of the alphabet. The name of Mox, Inc., is listed in Bradstreet under the letters N. B.; these letters indicating that its gross capital is placed therein at \$150,000 and the gross amount covered at \$10,000.

The trial court reformed the said rider by adding thereto the words "with a rating" after the word "appear," so that the said rider, so reformed, reads as follows: "It is agreed that if at the date of booking the name of a debtor does not appear with a rating in the latest published books or reports of the Lumbermen's Credit Association Mercantile Agency, then the Bradstreet Mercantile Agency shall govern," etc.

Slade testified that at the suggestion of Voss he made out and gave to him a list of respondent's customers against whom credit insurance was desired, including the name of Mox, Inc., and that he was assured by Voss that each of said customers would be covered by the policy. Appellant contends that as the policy limits the authority of the agent, the aforesaid agreements and representations of Voss are not binding upon it. This policy provides that: "No agent is authorized to make any alteration in, or addition to, this Policy, or to waive any of its terms, conditions or stipulations * * * unless expressed in writing and signed by the President or a Vice-President of the Company. * * *"

[1] That the principal may limit the authority of the agent seems to be well settled in this state. *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 138 P. 708, 52 L. R. A. (N. S.) 670; *Fidelity, etc., Co. v. Fresno Flume, etc., Co.*, 161 Cal. 466, 119 P. 646, 37 L. R. A. (N. S.) 322; *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322. And this limitation applies to all agents, no matter what their rank or designation may be. *Belden v. Union Central Life Ins. Co.*, 167 Cal. 740, 141 P. 370.

[2] However, the agreement made by Slade with Voss, that if respondent's customers did not appear in said Red Book the rating of Bradstreet would govern, was made a part of the policy by attaching to it the Bradstreet or concurrent rider signed by appellant's vice president. Appellant contends that as said rider provides that if the name of the customer did not appear in said Red Book, then only in that event would the Bradstreet rating apply; but inasmuch as the name of Mox, Inc., did appear in said Red Book, that therefore the said rider had no application to said customer. It is apparent that the sole object and purpose of resorting to the Red Book was to ascertain the rating of respondent's customers, and that failing to find a rating therein for Mox, Inc., then in order that this customer of respondent should be included in

the policy, resort was had to Bradstreet where such rating existed. Under these circumstances we are of the opinion that the mere fact alone, that the name of Mox, Inc., appeared in said Red Book, did not operate to exclude it from being covered by the policy as evidenced by the Bradstreet rider.

Furthermore, as indicating the sources that would be relied upon in fixing the rating of respondent's customers, this clause appears in respondent's application for said policy: "We agree that the ratings of the Lumbermen's Credit Association & Bradstreet Mercantile Agency shall govern exclusively shipments under said Policy." This application was sent to the home office of appellant, and was attached to the policy at the time it was issued.

The policy is dated June 23, 1927, and is for the term of one year beginning June 1, 1927, and ending May 31, 1928. As tending to indicate that the policy covered Mox, Inc., and was so regarded by appellant, Slade testified that on June 30, 1927, he sent to appellant's San Francisco office a credit memorandum which contained a list of his customers covered by the policy under the Bradstreet rating, and included in this list was Mox, Inc., rated N. B., amount covered \$10,000, with a clause therein stating that the Red Book governs unless blank, and then Bradstreet rating as above stated to govern. It is admitted by appellant that this credit memorandum was received at the San Francisco office.

Slade also testified that as respondent was not a subscriber to Bradstreet's books Voss agreed to keep it in touch with any changes of the Bradstreet rating; that if respondent would write to appellant's San Francisco office from time to time setting forth the names covered by the Bradstreet rider, appellant would note the changes thereon and return the letters to respondent; that on July 18, 1927, and again on September 1, 1927, Slade wrote to appellant, addressed to its San Francisco office, requesting to be informed whether or not there had been any changes in the Bradstreet rating of the customers covered by the policy, naming among said customers Mox, Inc., and that the letters were received back with penciled notations on same made by Voss.

[3] Appellant claims that there is no evidence establishing the insolvency of Mox, Inc. This claim is without merit. Not only is the insolvency of Mox, Inc., admitted by appellant's answer, but there is evidence that on or about September 1, 1927, Mox, Inc., assigned its assets to a committee of seven creditors for the benefit of all of its creditors. By the terms of the policy this assignment constituted insolvency.

[4-6] Appellant also contends that by the acceptance and retention of the policy by respondent it is estopped from asserting that

the policy is not the contract of the parties. Numerous authorities are cited in support of this contention. While as a general proposition, this is a correct statement of the law, yet it has frequently been decided that the mere failure to read an instrument with sufficient attention to perceive a defect in its contents does not prevent its reformation. 22 Cal. Jur. 726. And this depends upon the circumstances of each particular case. *Burt v. Los Angeles Olive Growers' Ass'n*, 175 Cal. 668, 166 P. 993; *California Packing Corp. v. Larsen*, 187 Cal. 610, 203 P. 102; *Siem v. Cooper*, 79 Cal. App. 748, 250 P. 1106, 1108. In this last-named case, the court said: " * * * Nor is the fact that the defendant failed to read the second instrument sufficient to preclude the trial court from granting relief. Such failure is an act to be explained, and where the testimony sufficiently explains such failure, it is removed from the case just as other acts of failure might be removed." In the instant case respondent not only had the assurance of appellant's manager, Voss, that Mox, Inc., would be included in the policy, but an examination of the policy would not have disclosed that this customer was left out of it, for the reason that Mox, Inc., did not appear in the policy by name, but by the letters N. B. alone, and these letters were in the policy signifying a rating and purporting to carry insurance against Mox, Inc., to the extent of \$10,000. Under these circumstances, no estoppel was created by the acceptance and retention of the policy.

[7] Appellant makes the claim that the policy does not cover the freight charges upon the lumber shipped by respondent to Mox, Inc. The policy insured respondent against all loss resulting from the sales of lumber shipped during its term and delivered in the usual course of business to individuals, firms, and corporations. The evidence is undisputed that respondent paid the freight upon the lumber that it shipped to Mox, Inc., and added this cost of freight to its account against Mox, Inc., for said lumber. Some evidence was received over the objection of appellant regarding the custom that prevailed as to the manner of handling this freight charge. The invoices that were made out on each shipment of lumber contained the amount owing for the lumber and the amount of the freight charge segregated. Slade testified that the reason for this segregation was that a discount of 2 per cent. was allowed on the price of the lumber if paid within sixty days; but there was no discount on the freight. This contention is without merit.

We are of the opinion that there existed no real necessity for the reformation of this policy in order to enable respondent to recover the loss sustained by it through the insolvency of Mox, Inc., for the reason that the policy, with the Bradstreet rider, carries the implication that as Mox, Inc., was not rated in the

Red Book its rating, as evidenced by the Bradstreet rider, was covered and included in said policy.

The judgment is affirmed.

128 Cal.App. 350

OAKDALE MERCANTILE CO. v. BAER.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1932.

As Modified on Denial of Rehearing Jan. 21, 1933.

1. Reformation of Instruments ⇨45(2).

Evidence held to support trial court's finding that agreement for liquidation of merchandise stock was not executed because of owner's fraud or by mutual mistake or liquidator's mistake, known or suspected by owner, in failing to insert certain provision (Civ. Code, § 3399).

The liquidator sought reformation of contract for mistake in failing to insert provision that half of inventoried value of stock, paid owner on date of contract, should be deemed part of expenses deductible from gross receipts of sale.

2. Reformation of Instruments ⇨45(2).

Evidence of mistake must be clear and convincing to justify reformation of contract (Civ. Code, § 3399).

3. Reformation of Instruments ⇨43.

Every presumption favors view that written instrument, deliberately executed, expresses parties' true intent and meaning.

4. Contracts ⇨245(2).

Presumption is that parties' entire negotiations are included in written contract, in absence of fraud or mistake (Civ. Code, § 1625).

5. Appeal and error ⇨1010(1).

Trial court's finding, supported by substantial evidence, that agreement was not executed by mutual mistake or one party's mistake, known or suspected by other party, is conclusive on appeal (Civ. Code, § 3399).

6. Customs and usages ⇨17.

Contract certain in terms cannot be varied by parol proof of custom.

7. Customs and usages ⇨17.

Evidence of custom in business of liquidating merchandise stocks that cost thereof should be deemed part of expense deductible from gross sales held inadmissible in action for sum due owner from liquidator under contract certain in its terms.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Oakdale Mercantile Company against Albert Baer, who filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

Jefferson E. Peyser, of San Francisco, for appellant.

D. J. O'Brien, and Langton A. Madden, both of San Francisco, for respondent.

PER CURIAM.

Plaintiff brought this action to recover the sum of \$3,511.15 alleged to be owing to it by defendant under an agreement entered into between them. This agreement is set forth in the complaint. Defendant answered the complaint, denying any indebtedness to plaintiff, and filed a cross-complaint in which he sought to reform said agreement. Judgment was rendered for plaintiff for \$3,250, and denying the relief prayed for by the cross-complaint for said reformation. Defendant filed a motion for a new trial, which the court failed to pass upon within sixty days after its filing, and therefore said motion is deemed denied. From this judgment defendant appeals.

The only question presented on this appeal is whether or not the trial court erred in its refusal to reform the said agreement.

The facts in substance are as follows: Respondent owned a stock of merchandise located at Oakdale, Cal., which it was desirous of liquidating. The appellant's place of business was located in San Francisco, and his business consisted of buying out stocks of merchandise of stores and liquidating same, and he had been engaged in that business for the past thirty years. Some time in the latter part of February, 1927, appellant was recommended to respondent as a suitable person to dispose of said merchandise, and thereupon A. E. Schadlich, respondent's vice president, called upon him and began negotiations relative to securing his services. On March 1, 1927, an agreement for the liquidation of said merchandise was agreed upon, and appellant stated that he would have his attorney reduce it to writing and send it to respondent. On March 3, 1927, the written agreement was sent to respondent, which was received by F. B. Pattee, the manager of respondent's store. The agreement as drawn was not entirely satisfactory to Pattee and he sent it back to appellant, suggesting some minor changes. These changes were made and the agreement was returned to respondent on March 5, 1927, and was immediately executed by respondent and returned to appellant for his signature thereto. Upon receipt of said agreement appellant also signed it.

This agreement provided that respondent should sell and convey to appellant the said stock of merchandise for a sum equal to 50 per cent. of its inventory value; that appellant should proceed with the sale of said stock at respondent's store in Oakdale for a period of ninety days, with an extension of thirty days, if necessary, and then remove the unsold merchandise to appellant's place of business in San Francisco and dispose of the remaining stock at auction; that at his discretion appellant could add additional merchandise to said stock, the cost thereof to be charged against said stock. The said agreement also contained the following provision: "It is further mutually understood and agreed by and between the parties hereto that the net proceeds of such sale which net amount shall be the difference between the gross sales and the expenses incurred in and about conducting said sale, which said expenditures shall be made at the sole discretion of the party of the second part, shall be divided between the parties hereto in equal proportions, in other words Fifty (50%) per cent. of such net proceeds shall be paid by the party of the second part to the party of the first part. Such payments shall be made at the conclusion of said sale and when a final accounting and settlement has been made as hereinafter provided for." While the agreement purports to convey the entire stock to appellant, respondent retained a one-half interest in the net proceeds thereof.

At the date of entering into said agreement, appellant paid to respondent 50 per cent. of the inventoried value of said stock; namely, \$8,640. The gross receipts from said stock in Oakdale amounted to the sum of \$9,405.10, and the gross receipts from sales in San Francisco amounted to \$6,435.53, making a total of gross receipts the sum of \$15,840.63. The expenses attending said sale amounted to \$3,053.44, and the merchandise furnished by appellant while conducting same amounted to \$5,764.89. Appellant contends that the \$8,640 paid respondent by him was a part of the expenses attending said sale, and should also be deducted from the gross receipts; that it was mutually understood between said parties that this sum so paid to respondent should be deemed a part of the expenses of said sale incurred in conducting same and deducted from the gross receipts; that the intention of both parties to said agreement was to have inserted therein a provision that the \$8,640 was to be deemed a part of the expenses incurred in said sale of stock, and was so mutually understood by them, but that by mistake this provision was omitted from the agreement.

[1] The grounds which will justify the reformation of a written contract are: (1) Fraud; (2) mutual mistake of the parties; (3) a mistake of one party which the other at the time knew or suspected. Civ. Code, §

3399. There is no evidence tending to establish fraud; and, upon the question of mistake as claimed by appellant, there is a direct conflict.

The trial court found that the said agreement was not executed by reason of fraud on the part of respondent, or by mutual mistake of said parties, or by the mistake of the appellant which respondent knew or suspected at the time said agreement was made and entered into.

This finding is supported by the testimony of Schadlich, respondent's vice president, and by Pattee, the manager of its store. Pattee testified that, at the meeting when the agreement was made, he and Schadlich and appellant and one Sol Charnak were present; that appellant offered three propositions for the disposition of said stock; that is to say, that he would sell it on commission, or buy the stock outright, or he would pay respondent for one-half of its value, this money so paid to belong to respondent absolutely, no matter what the outcome of the sale should be, respondent to receive one-half of the net proceeds resulting from the sale of the stock, less the expenses incurred in making same. This latter proposition was accepted. Appellant then stated that he would have this agreement written out and send it to them. This testimony was corroborated by Schadlich.

[2-5] Where a contract is sought to be reformed for mistake, the evidence of mistake must be clear and convincing, and every presumption favors the view that a written instrument, deliberately executed, expresses the true intent and meaning of the parties. *Burt v. Los Angeles Olive Growers Ass'n*, 175 Cal. 668, 166 P. 993. A written contract supercedes all oral negotiations which preceded or accompanied the execution of the instrument (Civ. Code, § 1625), and it must be presumed, in the absence of fraud or mistake, that the entire negotiations of the parties are included in the contract executed (6 Cal. Jur. 262). There is substantial evidence in support of the finding of the court that the said agreement was not executed by mutual mistake or by the mistake of the appellant which respondent knew or suspected at the time the said agreement was entered into, and, such being the case, this finding of the court is conclusive on appeal. *Wilbur v. Wilbur*, 197 Cal. 1, 239 P. 332; 2 Cal. Jur. 921.

[6, 7] Appellant produced evidence of a custom prevailing in the business in which he was engaged to the effect that the cost of the merchandise was deemed a part of the expense of its sale and should be deducted from the gross sales. In *Andrews v. Waldo*, 205 Cal. 764, 770, 272 P. 1052, 1055, the court said: " * * * Parties who contract as to a subject-matter concerning which known usages prevail incorporate such usages into their agreements by implication. *Luckehe v.*

First Nat. Bank of Marysville, 193 Cal. 184, 223 P. 547; Brown v. Central Land Co., 42 Cal. 257, 260; 25 Cal. Jur. p. 420. But by express Code provision stipulations which are necessary to make a contract conformable to usage are implied only in respect to matters concerning which the contract manifests no contrary intention. Section 1655, Civ. Code. In other words, where the known usage and the contract are in conflict the contract prevails." Where the contract is certain in its terms, it cannot be varied by parol proof of a custom. Withers v. Moore, 140 Cal. 591, 74 P. 159; Rasmussen v. Pacific Fruit Exchange, 111 Cal. App. 346, 295 P. 538. In the instant case, the contract provides in no uncertain terms that the respondent should receive one-half of the net proceeds resulting from the sale of said stock; that said net proceeds should be determined by deducting from the gross sales the expenses incurred in making the said sale and the value of the merchandise furnished by appellant in aid of the sale of said stock.

The judgment is affirmed.

128 Cal.App. 376

CHARLES H. DUELL, Inc., v. METRO-GOLDWYN-MAYER CORPORATION et al.
Civ. 8278.

District Court of Appeal, First District, Division 1, California.
Dec. 27, 1932.

1. Appeal and error ⇨907(4).

Where it reasonably appears from record that there may have been other proceedings or testimony supporting judgment, all presumptions will be in favor of affirmance.

2. Appeal and error ⇨671(3).

Where record is incomplete and does not contain all evidence, appellate court cannot determine whether claimed error resulted in miscarriage of justice so as to warrant reversal.

3. Judgment ⇨585(2).

In action against actress for breach of contract for personal services, judgment in former injunction suit between same parties, and involving identical contract, *held* res judicata.

Judgment in former injunction suit brought by same plaintiff against the same defendant, and involving the identical contract sued on, was res judicata in action for breach of contract, where it was shown that former action was had in court

of competent jurisdiction between same parties and involving same subject-matter, and that subject-matter sought to be litigated was fully adjudicated in the former action.

4. Judgment ⇨665.

Generally, principle of res judicata applies only between parties to original judgment or to parties in privity.

5. Judgment ⇨668(1).

Lack of privity in former action does not prevent estoppel by judgment where party exonerated was immediate actor and his personal culpability constitutes predicate for defendant's liability.

6. Judgment ⇨666.

General rule that party may not have benefit of judgment as estoppel, unless he would have been bound by adverse judgment, is subject to exceptions.

One of exceptions to general rule that party may not have benefit of judgment as estoppel, unless he would have been bound by it had it been the other way, is that in actions of tort, if defendant's responsibility is necessarily dependent on the culpability of another who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, had been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way.

7. Judgment ⇨678(1).

Judgment in former action against movie actress for breach of contract *held* res judicata in subsequent action against moving picture corporations for fraudulently and maliciously inducing breach of contract.

8. Appeal and error ⇨1138.

Appellate court will not remand case, where further proceedings would be futile.

9. Judgment ⇨725(6).

Where rights and liabilities of parties to contract have been finally adjudicated, judicial determination that neither party is bound ends contractual relationship.

10. Appeal and error ⇨1138.

Courts have direct interest in termination of litigation.

11. Pleading ⇨236(7).

Refusal, if any, of permission to amend complaint in action for breach of contract for personal services, *held* not abuse of discretion.

Refusal, if any, to permit plaintiff to amend complaint did not constitute an abuse of discretion, where amendment was offered after issue joined, and after a jury had been impaneled to try the case, and

presented an entirely new phase to the controversy, and where proposed amendment was of such matter as might be presumed to have been at all times within the knowledge of the plaintiff. Furthermore, no direct request was made for permission to amend, the matter coming up informally, and more by way of suggestion than by way of actual demand or request.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Charles H. Duell, Inc., against the Metro-Goldwyn-Mayer Corporation and others. From a judgment in favor of the defendants, and from an order denying its motion for a new trial, the plaintiff appeals.

Judgment affirmed.

Francis J. Heney, of Los Angeles (Henry Brown and L. R. Brigham, both of Los Angeles, of counsel), for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent Lillian Gish.

Loeb, Walker & Loeb and Milton H. Schwartz, all of Los Angeles, for respondent Metro-Goldwyn-Mayer, etc.

PARKER, Justice pro tem.

By this action plaintiff seeks to recover damages from the defendants arising out of the breach of a contract between plaintiff and defendant Lillian Gish. The claim against the defendants, other than Gish, is on the grounds that they and each of them, acting individually and in concert with defendant Gish, wrongfully caused and brought about the breach complained of. The cause was tried by jury, and at the conclusion of the trial the court directed a verdict in favor of all of the defendants. Such a verdict was returned and judgment entered thereon. Thereafter the plaintiff's motion for a new trial was denied. The appeal is from the judgment and the said order denying a new trial.

[1, 2] The appeal is presented on a bill of exceptions. Here we may note that this bill of exceptions presents but a portion of the testimony and a portion of the proceedings. The language introductory to the bill is as follows: " * * * The following testimony was a portion of the testimony taken, and the following evidence, both oral and documentary, being a portion of that taken, was introduced, and the following proceedings being a portion of the proceedings had. * * * " We have no inclination to evade a determination of the controversy on its merits, in as far as the record will permit; but necessarily our scope of review is limited to that record. It may be conceded that, if sufficient does appear to show the error complained of, the record may be accepted as complete. However,

if it reasonably appears that there may have been other proceedings or testimony from which the judgment might have additional support, then and in that event all presumptions would be in favor of an affirmation. Without quotation therefrom we cite the case of *Coleman v. Farwell*, 206 Cal. 740, 276 P. 335. That case brings out clearly the idea that under the constitutional restriction a reviewing court must disregard error, unless in addition thereto some prejudice results to a substantial right. The court then points out that, if the record does not contain all of the evidence, the constitutional requirement cannot be filled; that is to say, that without the record in full it cannot be determined whether the claimed error resulted in a miscarriage of justice. Reference may be had, likewise, to the case of *Dahlberg v. Dahlberg*, 202 Cal. 295, 260 P. 290.

The foregoing is, to some extent, merely by way of suggestion, though it will appear hereinafter that certain presumptions are indulged in support of the judgment through lack of definite showing in the partial transcript of all of the proceedings. It happens, in this particular case, that the record may be deemed sufficient in as far as some of the defendants are concerned and lacking as to others. Therefore we will proceed to a discussion on the merits of the entire appeal.

Plaintiff alleges the execution of a certain contract of service by and between Inspiration Pictures, a corporation, and the defendant Lillian D. Gish. Certain supplementary and amended agreements were thereafter executed. The contract and the fruits thereof, together with future profits and future services, was thereafter assigned to the plaintiff, which assignment was approved by defendant Gish. It was further alleged that the said Gish was an actress of well-known outstanding ability and repute, and that the character of service rendered and to be rendered by her was of a class described as special, unique, and extraordinary. In some detail the complaint recites the extent of performance by plaintiff and its assignor, as well as by the defendant Gish. The complaint alleges that on or about December 1, 1924, the said defendant Gish breached and repudiated the contract. This breach and repudiation is alleged to have occurred after the plaintiff had gone to much expense in creating publicity for the said Gish and had expended large sums of money in salary, production, advertising, and in procuring scenarios, etc. The complaint mentions, among other things, that plaintiff had procured and entered into an agreement with Metro-Goldwyn Distributing Corporation looking to the distribution of pictures made by the defendant Gish, and had expended large sums of money in preparations toward such distribution. It is then alleged that the defendants, including defendant Gish, did fraudulently, maliciously, wrongfully, and

unlawfully conspire and connive with the defendant Gish to induce her and to persuade her to breach the agreement and to fail in the performance of the terms thereof. The complaint charges that all of these wrongful acts of the defendants were with full knowledge of all of the facts. Issue was joined by all defendants and the case called for trial.

After a jury had been impaneled, plaintiff called its first witness. Thereupon defendants Metro-Goldwyn Distributing Corporation and Metro-Goldwyn-Mayer Corporation and Louis B. Mayer objected to the introduction of any evidence on the ground that said complaint stated no cause of action against them or either of them. This objection was sustained, and the jury so advised. The trial then proceeded as against defendant Lillian D. Gish. Defendant Gish had pleaded a bar to the action on the ground that the controversy had been previously determined and that the dispute was *res judicata*. When plaintiff rested its case, this defendant, Gish, proceeded first on her defense of *res judicata*, and, after the submission of oral and documentary evidence in support thereof, the trial judge held the defense should prevail, and accordingly directed a verdict in favor of all of the defendants. It had earlier been stipulated that, after the ruling in favor of the defendants other than Gish, a directed verdict would follow at the conclusion of the trial.

We will first consider the appeal from the judgment in favor of the defendant Lillian Gish. The sole question presented is on the point of *res judicata*.

[3] The present action was commenced on June 23, 1927. In January of 1925 the plaintiff in the present action filed in the United States District Court of the Southern District of New York a bill of complaint against the defendant Lillian D. Gish. In this bill of complaint it set up the identical contract sued upon in the present action. It alleged the breach of December 1, 1924, and allegation for allegation did correspond in every detail with the complaint in the present action. The action in the federal court sought an injunction against defendant Gish restraining her from contracting her services to or with any persons or corporations other than plaintiff, and alleged her then intention to so contract. The complaint in the federal court set up the existence of the distributing agreement with the Metro-Goldwyn Distributing Corporation and the expense incurred by plaintiff in the performance thereof. The relief sought was injunctive, as stated, and, in addition, plaintiff sought an accounting of such proximate and ascertainable damages as it had suffered and might suffer by reason of defendant's breach of the contract, and prayed judgment for such damages. Issue was joined. The defendant Gish admitted the contract, charged fraud in the amendments thereto, and ad-

mitted the contract had been breached, but alleged the breach to be on the part of plaintiff. Further, the defendant Gish alleged and admitted her unwillingness and refusal to proceed further under the contract until such time as the rights of the parties thereunder had been determined by the court. A trial was had and judgment entered in favor of defendant Gish. The court found that plaintiff had fraudulently overreached and defrauded the defendant, and that the breach was on the part of the plaintiff. Judgment was entered accordingly. This judgment became and was final prior to the commencement of the present action.

The foregoing appears from the record of the proceedings in the federal courts. In addition to this record, the plaintiff in the instant case did admit through the testimony of its president that the contracts sued upon in New York were the same contracts sued upon in the instant case.

Appellant does not seriously dispute the claim that the New York judgment may operate as a bar of the present action as against the defendant Gish. It does not, however, concede such a bar. It is claimed by appellant that in the present action there is an additional feature, not included within or involved in the former action and judgment. The new matter claimed deals with the distribution contract. Appellant claims that its present cause of action against defendant Gish seeks damages for the breach of a certain distribution agreement between plaintiff and Metro-Goldwyn Distributing Corporation. A reading of the complaint does not sustain this claim. The most that can be read into the pleading is that the distributing contract had for its subject-matter the distributing of a picture or pictures made by defendant Gish under the original contract.

As to defendant Gish, in both actions it was claimed that her failure to perform her contract of service necessarily placed plaintiff in a position where it was unable to perform its contract with the distributors to its damage. In neither case, the New York case nor the present, was it ever contended that defendant Gish had breached the distribution contract. Indeed, such a claim could hardly be sustained, for the reason that said Gish was not a party to the distribution contract.

Throughout the entire controversy the pleadings have been to the effect that the distributing outlet for the pictures to be made during the term of service of Gish was something accruing to plaintiff upon the performance of the original agreement. In other words, if the primary contract failed of performance, there would be no picture to distribute. Nowhere in the present pleadings is defendant Gish charged with the breach of the distribution contract, nor was there any evidence offered on this issue.

With the utmost respect to contending counsel, it seems somewhat absurd to argue that, after a final determination of the right of defendant Gish to refuse to proceed under the contract, a separate action lies to recover anticipated profits that would have accrued if she had performed. It seems almost demonstrated that in the former action pleaded as a bar to the present suit the proceeding was had in a court of competent jurisdiction between the same parties and involving the same subject-matter; that the subject-matter sought to be litigated herein was fully adjudicated in the former action, the judgment therein rendered having become final.

It is likewise clear not only that all controversial matters here presented could have been litigated in the former action, but that these matters were actually litigated and determined. It was definitely determined in the New York action that on and before December 1, 1924, the defendant Gish was freed and absolved from any liability under the contract, and her personal status was adjudged to be that of a person free to contract with whom she chose and to render service under said contract as her own judgment might decide. We think that determination operated, and does operate, as a bar to the present action.

We may now consider the appeal as it affects the remaining defendants. These defendants were not parties to the former action, and the present action, as against them, does not rest upon the performance or non-performance of any contract or agreement. The asserted claim as against them is that they and each of them, through fraud, malice, and oppression, did unlawfully, wrongfully, and to the damage of plaintiff persuade and induce the defendant Gish to breach, repudiate, and terminate the original contract between herself and the plaintiff.

The court below ruled that this complaint did not state a cause of action against these defendants, and precluded the further introduction of evidence against said defendants. At the appropriate state in the proceedings a verdict was directed in their favor. This ruling is assailed by appellant, and much of the briefs goes to a discussion of the legal points involved.

[4-7] It was the theory of the trial court that the law of this state affords no relief to a party to a contract of personal services against one who, while not a party to the contract, has caused a breach of that contract by the other party. We do not feel called upon to determine this question, inasmuch as the affirmance of the judgment does not require such a determination. We have held that the status of the parties to the contract between plaintiff and defendant Gish has been, prior to the commencement of this action, definitely settled and adjudicated. As a general proposition of law, we might con-

cede that the principle of *res judicata* applies only between parties to the original judgment or to parties in privity with them. However, it seems settled law that lack of privity in the former action does not prevent an estoppel where the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other. Thus it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way is subject to recognized exceptions, one of which is that in actions of tort, if the defendant's responsibility is necessarily dependent upon the culpability of another who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way. *Portland Gold Mining Co. v. Stratton's Independence* (C. C. A.) 158 F. 63, 16 L. R. A. (N. S.) 677; *Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co.*, 248 U. S. 55, 62, 39 S. Ct. 38, 63 L. Ed. 123; *Doremus v. Root*, 23 Wash. 710, 63 P. 572, 54 L. R. A. 649. For an expression of our own courts on the subject reference may be had to the following cases: *Bank of Orland v. Stanton*, 135 Cal. 593, 67 P. 1035; *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171; *Triano v. F. H. Booth & Co., Inc.*, 120 Cal. App. 345, 8 P.(2d) 174.

The entire case of plaintiff against the defendants other than Gish—and here it may be noted that this defendant, too, is declared an active participant with the others in the conspiracy—rests upon the asserted breach of the contract between plaintiff and defendant Gish. After a full and complete hearing, this question of breach was adjudicated as between the principals to the contract and there determined that no breach had occurred and that defendant Gish was forever freed from the obligations of the contract. It would result in an anomalous situation if we were to hold that the defendant Gish was thereupon free to contract her services to any person, but that no person was free to contract with her. Whatever epithetical allegations characterize the conduct of the defendants, the fact remains that, if the alleged breach on the part of defendant Gish was lawful and warranted, no cause of action remains against the other defendants.

It is true that no evidence was presented on the case against the defendants whose case we are now considering; likewise it is true that the sole ground of the court's ruling was that the complaint states no cause of action as against them. Yet these defendants had pleaded as a bar the former judgment, and at the conclusion of the case, prior to submitting

the case to the jury under the direction to return a verdict in favor of all defendants, the following proceedings were had:

"Mr. Sterry [counsel for defendant Gish]: I am willing to make a stipulation that we have not yet rested our defense, that at the suggestion of the court we presented that issue first and that that was the ground on which we requested it for the defendant, Lillian D. Gish, that the motion was made as to the other defendants because there had been no evidence allowed against them. I want to state that I don't think Mr. Loeb [counsel for the remaining defendants] would want to waive the right of Metro Goldwyn, that they might not also have the benefit of *res adjudicata*.

"The Court: Is that satisfactory?

"Mr. Heney [counsel for plaintiff]: Yes, your Honor."

Thereupon the prepared form of directed verdict in favor of all of the defendants was presented to all counsel and accepted by each and all, as to form.

[8] It would thus seem apparent that counsel for plaintiff then recognized the situation to be that the former adjudication determined the rights of all of the parties. If the question presented were one of purely academic discussion, it might appear that the defendants other than Gish should be considered and their rights determined without regard to the former adjudication. But it remains a rule of appellate procedure that a reviewing court will not remand a case where further proceedings therein would be futile. In this case, before any recovery could ever be had against those defendants charged with inducing the breach by defendant Gish, it would be imperative that plaintiff prove two things: First, that at the time of the alleged breach there was an existing contract; second, that the contract was breached. The entire controversy necessarily would surround the contract and all that goes to make any contract is the agreement and obligation of the parties thereto. In other words, the very essence of the contract between plaintiff and defendant Gish is and must be mutual obligations there-in assumed.

[9] Therefore, when the rights and liabilities of the parties to the contract have been finally adjudicated, in a court of competent jurisdiction, and a judicial determination made that neither party is any longer bound thereby, the contractual relationship ends. The authorities hereinbefore cited amply support the foregoing. Plaintiff has had its day in court, and has been accorded a full

and complete hearing on every issue presented. It can ask no more.

[10] Aside from a consideration of the parties to a controversy, the courts have a direct interest in the termination of litigation. The maxim of the law runs that it is to the interest of the republic that there be an end to the case. Under our conclusion here, if we should remand the case to the court below for further proceedings, the course to be there followed, under the law of the case rule, would be simply for the defendants to introduce the record of the former case, now unquestioned, and judgment would follow. With the entire record before us, at least sufficient thereof for the present consideration, it would seem an idle act to thus again set in motion the machinery of the courts to bring about a result already predetermined.

[11] The last ground urged by appellant is that the court below abused its discretion in refusing plaintiff permission to amend its complaint. It appears that, after the adjudication in New York, the defendant Gish demanded and received from Inspiration Pictures, the assignor of plaintiff, a certain sum alleged to be due her for services. This sum was paid by the trustees in liquidation, and was in the nature of a settlement and adjustment. It was plaintiff's contention, *arguendo*, that the acceptance of this money by defendant Gish restored the contract and operated as a waiver of the breach by plaintiff and its assignor. The amendment was offered after issue joined and after a jury had been impaneled to try the case. It presented an entirely new phase to the controversy, and might have required further continuance. The proposed amendment was of such matter as might be presumed to have been at all times within the knowledge of plaintiff. There was no direct request for permission to amend; the matter coming up rather informally and more by way of suggestion than by way of actual demand or request. In addition thereto, the facts surrounding the claim upon which the amendment would be based were already before the court, and showed that there would be little foundation for the claim to be advanced through the proposed amendment. No amendment was prepared or presented to the trial court to the end that the discretion might in any sense be guided. The mere statement of counsel as to the extent of the proposed amendment can hardly suffice as determinative of the court's action.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; OASH-IN, J.

128 Cal.App. 397

In re HENDERSON'S ESTATE.
HENDERSON v. HENDERSON.
 Civ. 4812.

District Court of Appeal, Third District,
 California.

Dec. 27, 1932.

1. Frauds, statute of §56(7).

Contract between husband and wife changing character of husband's property from separate to community property must be in writing, unless fully executed by either party.

2. Appeal and error §1008(1).

Whether conversations between husband and wife took place, and, if so, whether husband's statements and subsequent conduct indicated intent to convey community interest in his ranch to wife, held for trial court (Civ. Code, § 158).

3. Husband and wife §266.

Evidence held not to establish parol transmutation of husband's alfalfa and dairy ranch from separate to community property (Civ. Code, § 158).

4. Deeds §32.

Instrument which left name of grantee blank was void as deed.

5. Husband and wife §276(3).

Deed conveying property to executor vested title in husband's estate, and property became community property by virtue of relation back to date of payment.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Petition by Ferne S. Henderson to set aside homestead, opposed by Allen A. Henderson, as executor of the estate of F. W. Henderson, deceased. From an adverse order, petitioner appeals.

Affirmed.

David E. Peckinpah, of Fresno, for appellant.

H. K. Landram, of Merced, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

On July 26, 1931, F. W. Henderson died testate, leaving him surviving his wife, Ferne A. Henderson, and a son, the offspring of a former marriage.

By his will he appointed his son executor and residuary legatee of a considerable estate. Referring to his wife in his will he said: "To Ferne A. Henderson, my wife, I give nothing for the reason that she is al-

ready provided for and has sufficient for her needs."

Included in his estate were two pieces of real property, one an eighty-acre alfalfa and dairy ranch, appraised at \$12,000 and hereafter referred to as the Lingard property, and the other a house and lot in the city of Atwater, appraised at \$2,300.

The widow filed a petition asking the court to set aside to her as a homestead the Lingard property, but this the court refused to do, and in lieu thereof set aside as a homestead, the Atwater place. She, being dissatisfied with the order, has appealed therefrom.

The petitioner, who is the appellant herein, concedes the Lingard property was separate property of her husband, it having been acquired by him many years before his marriage to appellant, but was, by agreement, so appellant claims, transmuted into community property; as to the Atwater property she contends it was not property belonging to deceased, and therefore formed no part of his estate.

Let us first direct our attention to the claim of appellant that the Lingard place was transmuted from separate to community property.

About 1916 appellant was first employed by deceased as a stenographer, and continued more or less consistently to so act as his stenographer and confidential secretary, until their marriage in July, 1929. The deceased had been previously married, it having been terminated by a final decree of divorce very shortly before the marriage of appellant herein to deceased. The will from which the reference to Ferne A. Henderson has already been quoted was executed September 24, 1929, approximately two months after the marriage.

The contention of the appellant is that immediately after the marriage an agreement was made between Henderson and herself whereby the character of the Lingard property was changed from separate property into community property.

Appellant testified that, while she was employed by deceased as his stenographer and clerk, they frequently discussed the Lingard property and made frequent trips to the property and conversed as to what portion should be planted to alfalfa, and Henderson told her that when they were married it would become their home, and referred to the property as "ours." She further testified that within a few months after she and deceased first met they planned to marry. At one period of time prior to her marriage she received from deceased practically the entire income from the property for herself.

A day or two after the marriage appellant testified that Henderson said to her: "Well dear, we worked hard for that 80 acres out there, the Lingard ranch, and I am giving

you a half interest, a community interest in it for a wedding present. * * * He said: "You have worked hard, dear, since then and we both have worked hard and we will use these bonds to build us a home there or improve that one that is there and now I want you to have it, * * * and then Fred said to me, he said, 'Ferne, I will turn over one of the cream checks one month to you, I will endorse it over to you as your income from the place, your income from it, and I will keep the other because now that we are married, of course I will have to pay our living expenses,' and he said, 'Is that satisfactory?' And I said, 'Anything you do, dear, is satisfactory to me'; then I said to him, 'When we get back you will have to make a deed to me.' He said 'No, I won't have to make a deed to you, dear, but whenever we sell the place, why you will have to sign a deed and the next time we lease it of course you will have to sign the lease.'"

Upon one occasion after the marriage of Henderson to appellant, he, in the presence of appellant and a mutual friend, as they were driving past the Lingard property, said to the friend, "This belongs, this ranch belongs to Ferne and me," and he said they hoped they were going to build a home there.

The foregoing constitutes substantially all the evidence offered in support of the contention of appellant that Henderson had bestowed upon her a community interest in the Lingard property. No declaration or transfer concerning the property was reduced to writing.

Section 158, Civil Code, provides: "Either husband or wife may enter into any engagement or transaction with the other or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

[1] It is admitted, of course, that a husband and wife may alter their legal relations one toward the other concerning their property interests; and may change the character of their property from separate to community property. The law requires such contracts to be in writing, unless it has been fully executed by one of the parties, in which case it is taken out of the statute. *Martin v. Pritchard*, 52 Cal. App. 720, 724, 199 P. 846; *Estate of Wahlefeld*, 105 Cal. App. 770, 288 P. 870.

[2] Whether or not the conversations as narrated by appellant took place, and, if so, whether or not the statements and subsequent conduct of Henderson indicated an intent to convey a community interest in the property to his wife, were questions of fact to be determined by the trial court.

Appellant relies upon her own testimony almost without corroboration to establish a

parole transmutation of the Lingard ranch from separate to community property. Henderson, the only person who could testify as to whether or not these conversations occurred, and what was said, is dead. Mrs. Henderson has a very personal and financial interest in the outcome of the controversy between herself on the one hand and the son of her deceased husband on the other.

As Mr. Justice Burnett said in the case of *Turman v. Ellison*, 37 Cal. App. 204, 208, 174 P. 396, 398: "Indeed, it is true that actions to enforce oral agreements claimed to have been made with persons who are dead involve a dangerous assault upon property rights, and they are often supported by false testimony, and they naturally and reasonably excite suspicion. And while they may be genuine and worthy of confirmation, they require the closest and most careful scrutiny to prevent injustice being done. *Wall's Appeal*, 111 Pa. 460, 5 A. 220, 56 Am. Rep. 288. They afford and carry opportunity for fraud against the estates of deceased persons and a great temptation to perjury on the part of disappointed or avaricious relatives. *Hinkle v. Sage*, 67 Ohio St. 256, 65 N. E. 999. Such considerations could not be laid out of view by the trial judge."

Undoubtedly it occurred to the very able and learned trial judge that the deceased was an attorney by profession, of many years' standing, who, if he wished to clearly and unquestionably convey to his wife a community interest in the property in question, could have done so, not by a casual verbal statement out of the presence of witnesses but by the usual and customary mode known to lawyers; namely, by some written evidence of change of ownership, or by a definite reference thereto in his will. No one could have been more familiar with the weakness of such evidence of title than the deceased himself. It is not the case of a layman inexperienced in the formalities of the law. So also the wife in this case was not the usual bride unacquainted with the laws of descent and the rules of evidence. She appreciated the situation, for she testified she said, "You will have to give me a deed to it then, won't you?" and he replied, "No, but if we sold the property that I would have to sign the deed. * * *"

A portion of the property was, within eighteen months after the conversation detailed above, transferred by deed from Henderson to San Joaquin Light & Power Company, in which conveyance Henderson did not ask his wife to join, a circumstance that indicates quite strongly where he considered the title to repose.

The fact that appellant received the cream checks from the Lingard property every other month after marriage is proof of nothing, particularly when we recall that a similar arrangement had existed long before the marriage.

It also appears in evidence that during the years of their acquaintanceship and prior to their marriage Henderson gave appellant various sums of money from time to time aggregating between \$7,500 and \$10,000 over and above moneys paid her for services as his stenographer. At the time of the death of Henderson there stood in her name title to two pieces of real property, a twenty-acre tract in Turlock and an eight hundred-acre ranch in Mariposa county. When interrogated as to who made the payments on these pieces, appellant testified she did, but when confronted with entries in the check books of deceased, she qualified her statements by saying that perhaps Henderson paid in the first instance, but she reimbursed him later, but no evidence of such repayments or entries appears in the record. We refer to this line of testimony as indicating perhaps that Henderson had in mind property such as the above when he drafted the paragraph in his will.

[3] We believe the court was fully justified, and the evidence warrants the finding of the court that the Lingard property was not community property.

It is the contention of appellant that the Atwater property was not at the time of Henderson's death the community property of himself and appellant.

[4, 5] On the recommendation of the deceased, his brother E. J. Henderson loaned to one Gonzales \$700 on the Atwater property, secured by a deed of trust. Gonzales was unable to repay the principal or interest on the loan, and finally executed a deed conveying the property to E. J. Henderson. About this time E. J. Henderson notified his brother, the deceased, that Gonzales was in default, whereupon the deceased, having originally recommended the loan, stated to E. J. Henderson that he supposed he would have to take the loan over, and he thereupon paid to E. J. Henderson the principal and accrued interest. Upon the receipt thereof E. J. Henderson signed and delivered to deceased a

grant deed, with himself as grantor, and describing the Atwater property, but leaving the name of the grantee blank. There can be no question the instrument was void as a deed (*Upton v. Archer*, 41 Cal. 85, 87, 10 Am. Rep. 266; *Jones v. Coulter*, 75 Cal. App. 540, 547, 243 P. 487), but, even if the legal title remained in E. J. Henderson at the death of F. W. Henderson, nevertheless, F. W. Henderson having paid to E. J. Henderson the full purchase price of the property, and having assumed possession and made expenditures thereon and improved the same, he had an equitable ownership therein; and could during his lifetime have compelled E. J. Henderson by an action in specific performance to convey the legal title of the property to him. Subsequent to the death of F. W. Henderson, his executor made such demand, and a deed was executed and delivered conveying the property to Allen A. Henderson as executor of the estate of F. W. Henderson, deceased. This, in our opinion, vested title in the estate, and it became community property of F. W. Henderson by virtue of its relation back to the date of payment.

"We are satisfied that it must be held, in view of the deed made by Kaiser to the executors of the will of John Newlove subsequent to his death in execution of the agreement of sale, that the Newlove ranch must be treated as part of the property of deceased at the time of his death. * * *

"As we have before said, the effect of the conveyance of the Newlove ranch by Kaiser to the executors of the will of John Newlove was to vest a legal title to the property in the same manner as if the deed had been executed prior to the death of John Newlove." *Newlove v. Mercantile Trust Co.*, 156 Cal. 657-662-667, 105 P. 971, 974.

We find no error in the conclusion of the trial court, and the order appealed from is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

128 Cal.App. 458

MITCHELL v. McKEVITT et al.

Civ. 8117.

District Court of Appeal, First District,
Division 1, California.

Dec. 29, 1932.

Hearing Denied by Supreme Court Feb. 27,
1933.

1. Officers ⇐11.

Rules made by Civil Service Commission for conducting examinations are binding and until abrogated have same force as charter provisions.

2. Mandamus ⇐76.

Mandamus would lie to give petitioner proper place on eligible list for appointment as police captain after result of examination is established.

3. Officers ⇐11.

Policy of the law is to allow commissions designated to conduct competitive examinations, to do so with as little interference as is reasonably possible.

4. Mandamus ⇐75.

Mandamus held not to lie to compel Civil Service Commission to change answers to certain questions in examination to establish eligible list for appointment as police captain.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Application for writ of mandate by Michael E. I. Mitchell to compel Hugh K. McKeVitt and others, as and constituting the Board of Civil Service Commissioners of the City and County of San Francisco, State of California, and the Civil Service Commission, to change answers to certain questions in an examination to establish an eligible list for appointment as captain of police and to advance applicant's rating. From a judgment directing issuance of the writ, defendants appeal.

Reversed, with instructions.

Hearing denied by Supreme Court; SEAWELL and LANGDON, JJ., dissenting.

John J. O'Toole, City Atty., and Thomas P. Slevin, Asst. City Atty., both of San Francisco, for appellants.

Vincent W. Hallinan and Michael Riordan, both of San Francisco, for respondent.

BEAUMONT, Justice pro tem.

Michael E. I. Mitchell and other members of the San Francisco police department were examined for the purpose of establishing a list of persons eligible for appointment to the position of captain of police. The examination covered many subjects, and it appears there was a total of four hundred questions asked. A "key" for rating the answers was prepared by examiners appointed by the Civil

Service Commission, and after the examination was held all participants therein were invited to inspect it. Those examined then had the privilege of objecting to the answers as given in the key, if they were of the opinion such answers were incorrect. After such inspection, Mitchell objected to the answers of three questions as fixed by the rating key. These objections were lodged with the Civil Service Commission, and the commission, after consideration thereof, changed one of the answers to accord with Mitchell's contention, but declined to make a change in the other two answers. Thereafter Mitchell made further protest to the commission of the two answers last mentioned and of another answer not referred to before. The commission refused to make a further change in the answers; and upon the rating of the papers as determined by the examiners, the commission placed Mitchell No. 12 in the list of those eligible for appointment to the position of captain.

An application was made by Mitchell to the superior court for a writ of mandate to compel the Civil Service Commission and its members to change the answers complained of, and to alter respondent's position on the "eligible" list. Petitioner alleged, among other things, that the questions were to be answered as "true" or "false"; that if a statement in any question was not wholly true it was to be considered "false," and the court so found. After proceedings had, the court decided the issues in favor of petitioner. A writ issued, directing that the changes be made in the answers in accordance with petitioner's prayer, and that the position of petitioner be altered on the eligible list accordingly. This would place his name tenth instead of twelfth on the list. A change of personnel of the commission occurred in the course of the proceedings, and by consent the newly appointed members of the commission have been substituted for those originally named. Appeal has been taken from the judgment directing issuance of the writ.

There is no lack of good faith or intentional unfairness charged against the examiners in conducting the examination or against the commissioners in refusing to allow respondent's protest. Nor is arbitrary action alleged. Respondent contends that there was only one correct answer to each of the questions under consideration and that he gave it; that as the statements in the questions were to be answered as "true" or "false" (correct or incorrect) and were based respectively on provisions of the charter, rules defining duties of police officers, and a statute, there was no element of discretion involved in determining the answers; or, if it be assumed that there was discretion, then it has been abused; that he is entitled by mandamus to have the correct answers substituted for the incorrect ones, and thereafter to have his proper place

on the list. Appellants contend that the superior court was without jurisdiction to consider the action of the commission in determining the result of the examination, and that the evidence was insufficient to justify the issuance of the writ.

[1] Article XIII of the charter of the city and county of San Francisco deals with the civil service. It provides that the commissioners "shall make rules to carry out the purposes of this article, and for examinations, appointments, promotions and removals * * *" (section 3); that the "Commissioners may from time to time provide by rule for the manner in which * * * positions shall be filled * * * and no appointment to any such place shall be made except in accordance with the provisions of this article and the rules adopted thereunder by the Civil Service Commission" (section 2); that all applicants for places in the classified civil service shall be subjected to examination; that "such examinations shall be practical in their character" (section 4); that the "Commissioners shall control all examinations" and may designate persons to act as examiners (section 5); and that from the "returns of the examiners, or from the examinations made by the Commissioners, the Commissioners shall prepare a register for each grade or class of positions in the classified service of the city and county of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of the Commissioners, and who are otherwise eligible. Such persons shall take rank upon the register as candidates in the order of their relative excellence, as determined by examination, without reference to priority of time of examination" (section 7). From the foregoing it is clear that the general control of civil service examinations, including the making of rules considered advisable by the commissioners for conducting such examinations, was vested in the commission. Rules so made within the provisions of the charter, and in consonance with the fundamental principles thereof, are binding (*Mann v. Tracy*, 185 Cal. 272, 196 P. 484; *Haub v. Tuttle*, 80 Cal. App. 561, 251 P. 925; *State ex rel. Strecker v. Listman*, 156 Wash. 562, 287 P. 663), and until abrogated have the same force as provisions of the charter (*Timmins v. Civil Service Com'rs*, 276 Mass. 142, 177 N. E. 1, 75 A. L. R. 1232). The commission provided by its rules that those examined should have the right to file with the commission a written protest of the results of the examination. There is no claim that the commissioners refused to consider respondent's protest, but in effect it is that, having considered it, their decision was erroneous.

[2] Here two acts of the commission are to be considered: The first, the refusal to

change the rating key, or standard of answers; and the second, the designation of respondent's position on the eligible list. Mandamus, in our opinion, would lie to give the proper place on such list *after* the result of the examination is established, for it definitely follows the markings given those examined. *Keller v. Hewitt*, 109 Cal. 146, 41 P. 871; *Dean v. Campbell* (Tex. Civ. App.) 59 S. W. 294. In *Northington v. Sublette*, 114 Ky. 72, 69 S. W. 1076, 1077, it was held that while the particular grade certificate to a school is not subject to mandamus, still where the teacher has been examined and the grade fixed, the writ will lie to compel the issuance of the certificate.

There are many decisions involving mandamus and its application, but none has been presented in the briefs, nor have we been able to find one, where a court employed mandamus to pass upon answers to questions in an examination held by any board or commission authorized to hold such examination. *Certiorari* was resorted to in *Raaf v. State Board of Medical Examiners*, 11 Idaho, 707, 84 P. 33, 34. This case will be referred to hereinafter. On the other hand, we have not found any decision stating that the questions under consideration were, as here, to be answered unconditionally as correct or incorrect.

In *Tate v. North Pacific College*, 70 Or. 160, 140 P. 743, 746, appears the following: "The power to determine whether the plaintiff was entitled to a degree was vested in the faculty of the defendant. They examined him in the various branches taught by the defendant, and required for graduation, and decided, after such examination, that he was not qualified to receive the diploma or the degree, and the college refused to graduate him. In the absence of proof of bad faith, or misconduct or arbitrary action, on the part of the faculty, their decisions cannot be reversed by the court." In *People ex rel. Jones v. New York H. M. College* (N. Y. Super. Ct.) 20 N. Y. S. 379, 380, it is said: "The court cannot re-examine the relator as to his qualifications to practice medicine, nor go over the studies in which he is said to be deficient." The opinion of the court in *People ex rel. Braisted v. McCooey*, 100 App. Div. 240, 91 N. Y. S. 436, was as follows: "Neither upon the facts nor the law was there warrant for the granting of a peremptory writ of mandamus. In the absence of charges of bad faith or illegal action, we cannot review the determination of the civil service commissioners in rating candidates in competitive examinations, either by *certiorari* or by mandamus. *Allaire v. Knox*, 62 App. Div. 29, 70 N. Y. S. 845, affirmed 168 N. Y. 642, 61 N. E. 1127." In *Allaire v. Knox*, 62 App. Div. 29, 70 N. Y. S. 845, civil service required applicants for position of policeman to receive 70 per cent. on mental examination,

and declared applicants receiving zero in any subject ineligible. It was held that where an applicant for promotion to the position of inspector in the police department had fallen below the grading required on mental examination, and had received zero in the physical examination, mandamus would not lie to compel the medical examiner to cancel his report on the ground that it was false and to certify that the applicant was physically qualified. In that case it was said (page 848 of 70 N. Y. S., 62 App. Div. 29): "In the nature of things, the commissioners and those acting under their authority in conducting such examination are the persons vested with authority by the statute to determine the result of a competitive examination; and certainly no applicant for an office who is dissatisfied with the determination of these officers, upon whom is imposed the duty of determining the relative merits of those submitting themselves for examination, can ask the court to conduct a re-examination, and to reverse the action of such examiners. The examination is by statute required to be competitive, and the whole basis upon which a competitive examination rests would be swept away if one person who had failed upon such an examination were allowed to prove in court or before a jury that his rating should have been different from that awarded to him." "The court can neither conduct nor supervise civil service examinations," is a statement made in *People ex rel. Caridi v. Creelman*, 150 App. Div. 746, 135 N. Y. S. 718, 720. In *Keller v. Hewitt*, supra, the court said (page 147 of 109 Cal. 41 P. 871, 872): "They [board members] have power to prescribe and enforce rules for the examination of teachers, and to examine applicants, and prescribe a standard of proficiency which the person examined must reach to entitle him to a certificate (Pol. Code, § 1771); and, no doubt, in the exercise of these functions, the board is vested with such discretionary judgment that their action could not be reviewed, as, for instance, in determining the degree of proficiency and fitness shown by an applicant upon any matter involved in his examination, and perhaps in prescribing the standard of proficiency and subjects of examination. In such matters it may be safely assumed that their function being largely, if not wholly, discretionary, and involving an exercise of judgment, their determination would be held final." The charter provisions here involved give the commission substantially the same right to make rules for examinations as the section (Pol. Code, § 1771) referred to gave to the county board of education. *Northington v. Sublette*, supra, has the following: " * * * if they [the examiners] make a mistake in grading the teacher that mistake cannot be corrected by manda-

mus; for in grading the teachers they must exercise their own judgment, and this cannot be controlled by the courts." In Idaho a statute gave an applicant examined by a medical board the right to have the district court review the action of the board in refusing to grant a license. The plaintiff in *Raaf v. State Board of Medical Examiners*, supra, was examined by the board and had his grade fixed at 55.7 per cent. As this did not equal the passing mark of 75 per cent., a license was refused him. On certiorari, a review of the questions asked was had in the district court, and the court found that he was entitled to a rating of 73.48 per cent., and thereupon determined the applicant "did not pass said examination" and was not entitled to a license. On appeal the applicant contended the grades allowed were below those to which he was rightfully entitled. The respondent board claimed the court had no jurisdiction to review and re-examine the answers given by appellant and to re-rate him thereon. The court therein, in affirming the judgment, stated that the "affirmance is placed on the grounds that the courts have no jurisdiction under the medical law to examine applicants or review their answers and mark and grade them on such answers; such action being the duty of the medical board."

[3] While an analysis of the decisions referred to in the foregoing paragraph reveals among the cases certain distinguishing features as to statutory provisions as well as facts (and we do not cite the decisions from other jurisdictions as being approved by our own courts in all phases thereof), still as a whole such analysis shows a marked uniformity of decision on the part of courts to leave examinations in the hands of members of boards to whom they have been intrusted. In our opinion, this general view is well supported. The complexities of modern civic life demand that such problems should be determined by the boards and commissions designated by law for that purpose, and the policy of our laws is to allow this to be done with as little interference as is reasonably possible. *Maxwell v. Civil Service Commission*, 169 Cal. 336, 146 P. 869; *Mann v. Tracy*, supra. To have courts review by their necessarily slow process the questions and answers of every person who voluntarily submitted himself for examination as to his qualifications and who thereafter had a competitive test that was devoid of prejudice, caprice, and arbitrary action, practical in its character, given and determined in entire good faith by persons of a high degree of proficiency, but who (examinee) was dissatisfied with the grading he had received, would be a burden upon the courts (*Cook v. Civil Service Commission*, 160 Cal. 589, 595, 117 P. 663) and the taxpayers who maintain them. We do

not believe this was the intention of the framers of the charter or of the people of the municipality when they ratified the charter.

In *Dillon on Municipal Corporations* (5th Ed.) § 399, it is said that: "When power is given to civil service commissioners, or to examining boards, acting under their direction, to test the qualifications of applicants for public office, the method of such examinations with the result arrived at, necessarily rests within their discretion and judgment upon the examination had, and is not a judicial determination of any question presented to them in such a sense that it may be reviewed by the courts on certiorari or mandamus or otherwise." *Haub v. Tuttle*, supra.

[4] Looking to the language of the charter as it relates to the civil service and considering its general purpose, we are of the opinion that it is the intent of the charter that the decision of the commission upon the question of the examination before us should be final. Mandamus, therefore, will not lie. *Wood v. Strother*, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249; *Fairchild v. Wall*, 93 Cal. 401, 29 P. 60.

We do not believe it is necessary or that it would serve any useful purpose to discuss the three questions and answers with which we are concerned in this proceeding. We may state, however, that we have carefully examined them; that we are of the opinion there was sufficient basis for the decision of the commission; and that respondent has suffered no injury from the commission's action.

The judgment is reversed, with instructions to the superior court to enter judgment for defendants.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 440

**O. T. JOHNSON CORPORATION et al. v.
LOS ANGELES COUNTY.**

Civ. 8670.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1932.

Hearing Denied by Supreme Court Feb. 24, 1933.

1. Municipal corporations ⇨450(2).

Statutory requirement that each zone of park improvement district consist of lands "benefited in like measure" held not violated by ad valorem improvement tax (St. 1925, p. 855, § 5, as amended by St. 1927, p. 1359).

"Measure" means a quantity determined by a fixed standard, and the phrase "benefited in like measure" means that the amount of benefits to the lands within the particular zones shall all be such as are determined by the same standard of computation, especially since St. 1925, p. 849, as amended by St. 1927, p. 1358, provides for the levy of an ad valorem tax, so that the "measure" or standard by which the benefits within each zone are to be determined must be a "measure" or standard in relation to the assessed value of the respective lands, and not to their area, frontage, or any other factor, and, if the benefit to each parcel of land in a designated zone is calculated at the same percentage of its value, then a common measure is applied, and the lands within that zone are in fact "benefited in like measure."

[Ed. Note.—For other definitions of "Measure," see Words and Phrases.]

2. Municipal corporations ⇨407(1).

Statute creating park improvement district held not unconstitutional because requiring levy of taxes to pay interest on bonds issued (St. 1925, p. 849, as amended by St. 1927, p. 1358).

St. 1925, p. 849, as amended by St. 1927, p. 1358, although providing for the issuance of bonds and requiring a levy of taxes to pay interest thereon, is constitutional, as against the contention that interest is not an incidental cost of the improvement, and its inclusion without giving the landowner an option to pay the full amount at once, and to thus avoid the interest charge, is unconstitutional.

3. Municipal corporations ⇨407(1).

Statute creating park improvement district held not unconstitutional because providing for levies to meet deficiencies (St. 1925, p. 849, as amended by St. 1927, p. 1358).

St. 1925, p. 849, as amended by St. 1927, p. 1358, providing for levies to meet deficiencies, is not unconstitutional, as against the contention that, where delinquencies in tax payments occur, the nondelinquent taxpayer may be compelled to pay more than his just share of the costs of the improvement.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the O. T. Johnson Corporation and another against Los Angeles County. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Harold Ide Cruzan, of San Francisco, for appellants.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment in favor of defendant, county of Los Angeles. Plaintiffs and appellants are landowners and taxpayers owning lands within the limits of acquisition and improvement district No. 28 of the county of Los Angeles. This district was created under the provisions of the Acquisition and Improvement Act of 1925 (St. 1925, p. 849, as amended by St. 1927, p. 1358) for the purpose of acquiring certain lands for park purposes to be known as Alondra Park. In the proceedings looking to the acquisition of these lands, the board of supervisors, under the authority of section 5 of the statute, divided the property to be assessed into two zones, designated respectively zone A and zone B, and determined that zone A should bear 26 per cent. of the costs and zone B 74 per cent. thereof. Appellants' property lies in zone B, and appellants paid the district tax levied upon their property for the fiscal year 1928-29 under protest, and in this action seek to recover it back from the county.

Section 5 of the statute (as amended) authorizes the land within the assessment district to be divided into zones according to benefits, and provides that "each zone shall be composed of and include all the lands within the district which will be benefited in like measure." It further provides that the "legislative body shall also determine the percentage of the sum to be raised each year by the levy and collection of said special assessment taxes in said district for the payments on the principal and interest of the bonds, which will be raised from the lands in each zone." In other sections of the statute it is provided that the bonds of the district shall be a general lien upon all the real property within the district, and that the amounts necessary to make principal and interest payments on such bonds shall be raised annually by an ad valorem tax on such lands.

[1] Appellants point out that in zone B the special assessment taxes on their various parcels of land range from \$2.70 per acre to \$15 per acre, and they claim that such disproportionate levies upon lands within the same zone demonstrate that the board of supervisors in creating zone B did not follow the mandate of the statute that each zone should be composed of lands which will be benefited "in like measure." The word "measure," according to Webster's dictionary, means "a quantity determined by a fixed standard," and the phrase "benefited in like measure" may be taken to mean that the amount of benefits to the lands within the particular zone shall all be such as are determined by the same stand-

ard of computation. Since the statute itself provides for the levy of an ad valorem tax, the common measure or standard by which the benefits within each zone are to be determined must be a measure or standard in relation to the assessed value of the respective lands and not to their area, frontage, or any other factor. We must assume in favor of the action of the board of supervisors in creating the two zones and apportioning the tax burden in the ratio of 74 to 26 that they determined that the benefits to the lands within the two zones was in the same ratio, and, furthermore, that, in determining that the lands within each zone would be "benefited in like measure," the board determined that the relative benefits to each parcel within the same zone would be accurately measured by calculating the same percentage of the assessed value of each parcel. The land which is taxed at \$15 per acre as against the land which is taxed at \$2.70 per acre is so taxed because its assessed value is proportionately that much greater. If the benefit to each parcel of land in zone B is calculated, for example, at 10 per cent. of its value, then a common measure is applied, and the lands within that zone are in fact "benefited in like measure." The fact that the more valuable land pays a proportionately higher tax does not prove, as appellants claim, that the mandate of section 5 has been disregarded. It results necessarily from the fact that the "like measure" adopted in calculating the benefits is a measure based upon the percentage of benefits accruing to each parcel of land calculated upon the value of each such parcel. Since the tax required to be levied upon the lands is an ad valorem tax, the "like measure" to be applied in determining benefits must be an ad valorem measure. There is nothing in the record here to show that such a measure was not applied in creating the two zones within this district.

Appellants level an attack upon the constitutionality of the statute upon three separate grounds:

(1) While conceding the constitutionality of the zoning system and the constitutionality of the ad valorem system taken separately, they claim that combined they must result in unequal assessments for equal benefits. This claim is based upon the theory that, in determining that all the lands within a particular zone are "benefited in like measure," the board has determined that the benefits to all such lands are alike and equal, and, having so determined, it is an unconstitutional discrimination to proceed to tax them unequally upon an ad valorem basis. We have sufficiently disposed of this contention by pointing out that the "like measure" of the statute is a common percentage of the values of the respective parcels within the same zone.

[2] The statute in question provides for the issuance of bonds and requires a levy of taxes to pay interest thereon. Appellants

claim that interest is not an incidental cost of the improvement, and its inclusion, without giving the landowner an option to pay the full amount at once and thus avoid the interest charge, is unconstitutional. This question was decided adversely to appellants' contention in *People ex rel. Doyle v. Austin*, 47 Cal. 353. Appellants cite no authority on this point, and, in addition to the *Doyle* Case, respondent cites a wealth of authority from other jurisdictions holding that assessments may be constitutionally levied to pay interest. While perhaps not necessary to the decision in that case, our Supreme Court in *Mardis v. McCarthy*, 162 Cal. 94, 121 P. 389, cited *People ex rel. Doyle v. Austin* with approval. We take it to be the settled law of this and other jurisdictions that landowners may be assessed for the payment of interest upon bonds issued to finance public improvements.

[3] (3) The statute provides for levies to meet deficiencies. This feature is attacked as unconstitutional on the theory that, where delinquencies in tax payments occur, the non-delinquent taxpayer may be compelled to pay more than his just share of the costs of the improvement. The same question was ruled adversely to appellants' contention in *Municipal Improvement Co. v. Thompson*, 201 Cal. 629, 258 P. 955. Again appellants cite no decisions in point, and respondent cites many supporting decisions from other jurisdictions. We see no reason for not following the decision of our Supreme Court in *Municipal Improvement Co. v. Thompson*, *supra*.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

128 Cal.App. 474

ROCHEX & ROCHEX, Inc., v. SOUTHERN PAC. R. CO. et al.

Civ. 8410.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1932.

1. Dedication ☞44.

Highways ☞17.

In action to establish right of way and have it declared public roadway, finding that land had never been dedicated nor accepted or used as public way and that public had no easement therein supported judgment for defendant.

2. Trial ☞45(1).

In action to establish right of way, excluding question regarding witness' conversa-

tion with deceased old resident regarding right of way held not error, in absence of offer of proof.

3. Evidence ☞317(18).

In action to establish right of way over railroad's property, question whether railroad's deceased agent with whom witness had lived saw general use that was made of roadway held objectionable as hearsay.

4. Eminent domain ☞69.

Private property cannot be taken for public purposes without conveyance or consideration except by abandonment or "dedication."

To constitute a "dedication," two things are necessary, an intention by the owner clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication.

[Ed. Note.—For other definitions of "Dedication," see Words and Phrases.]

5. Dedication ☞15.

Intention to dedicate is essential to dedication, which, when unequivocally manifested, makes dedication conclusive as to owner.

6. Dedication ☞45.

Question of dedication is one of fact.

7. Adverse possession ☞31.

To establish prescriptive title, claim must be asserted so that owner may know of claim.

8. Adverse possession ☞85(1).

That landowner knew of travel over and occasional use of land did not raise presumption that such use was hostile.

9. Adverse possession ☞85(1).

Rebuttable presumption exists that strangers' occasional use of owner's land was permissive.

10. Dedication ☞44.

Highways ☞17.

Evidence held not to establish in adjacent owner prescriptive right to roadway over defendant's lot used by adjacent owners and defendant, or to show dedication to public.

Evidence disclosed that defendant's lot faced a street running at right angles to street which plaintiff's lot faced; that it was bounded on one side by defendant's railroad tracks, on another by deep creek, and on a third side by the back of the plaintiff's lot, and lots of others similarly situated; that the roadway was not a way through defendant's lot as a road or street, but only for ingress and egress; that it was for many years used by defendant, defendant's lessee, plaintiff, and other adjoining owners; that defendant always paid taxes thereon; and that there was a sign near the entrance stating that it was private property and that permission to pass over it was revocable at any time.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Rochex & Rochex, Inc., against the Southern Pacific Railroad Company and others for declaratory judgment that plaintiff owned right of way over defendants' property, and declaring such right to be public roadway. From the judgment in favor of named defendant, plaintiff appeals.

Affirmed.

J. E. McCurdy, of San Mateo, for appellant.

Kincaid & Fitzpatrick, of Redwood City, and H. W. Hobbs, of San Francisco, for respondent.

KING, Justice pro tem.

This action is brought for a declaratory judgment that plaintiff is the owner of a right of way over defendant's property and that this right of way be declared a public roadway.

Plaintiff owns land in San Mateo fronting on a public street, the rear line of which is bounded by property of defendant. Defendant owns a lot fronting on a street running at right angles with the street on which plaintiff's lot fronts. This lot of defendant is bounded on one side by its railroad tracks, on another by a deep creek, and on the third by the rear of property belonging to plaintiff and neighboring owners, so that there is no entrance to it except on the street side. On the street side it is inclosed by a row of iron posts, about 6 feet apart, except that an opening has been left between posts at one point sufficiently wide for vehicles to pass through. The right of way sought is over this lot from the street to the rear of plaintiff's lot and the lots of others similarly situated. It is not for a way through defendant's property as for a road or street, but for ingress and egress to and from a cul-de-sac open on one side only. A roadway on defendant's lot extending from the street is, and for many years has been, used by defendant and lessees of its property, and also by plaintiff and others owning or using properly adjoining plaintiff.

Defendant has at all times paid the taxes on the property. The roadway is described by witnesses as from 10 to 30 feet wide.

At or near the entrance to defendant's property defendant has maintained a sign, since 1916 or earlier, reading, "Private Property, Permission to Pass Over Revocable at Any Time." Some witnesses stated that during the first few years of the maintenance of this sign it read only "Private Property."

The use by plaintiff was mainly for hauling to and from the rear entrance to its property, and the owners of the other property fronting on the same street as plaintiff's property and with the rear abutting on defendant's

property made a similar use of it; while defendant used it for the various purposes incidental to the shipping of freight on its railroad, and its tenants of adjoining property for all purposes incidental to their leased portions of defendant's property. No showing was made that plaintiff or its neighbors ever formally asked or received any permission from defendant to use the property, or that their use was ever interfered with by defendant.

The complaint alleges that plaintiff's use has been continuous, open, notorious, peaceable, uninterrupted, and under a claim of right as its own, and adverse to defendant. By a second cause of action plaintiff claims that the railroad company, by permitting plaintiff and the public at large to use said property, as claimed has "Thereby offered to dedicate said right of way to the public use," and plaintiff and the public at large by their continuous use have accepted such offer.

Plaintiff claims that it has acquired the easement or right of way by prescription or adverse possession, and that the same has become a public highway by dedication on the part of the defendant.

Judgment went for defendant, and plaintiff appeals.

Plaintiff attacks the findings, alleging that certain findings are mere conclusions of law and hence not sufficient to support the judgment. The first criticism is of finding III, wherein it is found that the land described in the complaint, for many years "has had located thereon a private driveway or roadway. * * * Said driveway or roadway has been continuously used by said defendant in connection with the use of said land upon which the same is located ever since said defendant acquired title to said property in 1891."

Finding IV is to the effect that plaintiff, its predecessors and the public have not at any time used or traveled over said land "Adversely or in hostility to said defendant, or to said defendant's title, or under any claim of right."

Finding V is: "That the plaintiff had and has no right of way over the property of said defendant described in plaintiff's complaint, or any part thereof."

Finding VI is: "That the plaintiff has no prescriptive or other right to use the property of said defendant described in plaintiff's complaint, or any part thereof."

Finding VII: "That plaintiff has no right, title, or interest in or to any of the property of said defendant," etc.

Finding VIII: "That no part of said land * * * has ever been dedicated by said de-

pendant, or accepted or used as a public road, or street, or highway, and the public has no easement, or right of way, or interest, across or in the whole or any portion of said land."

Finding IX: "That there has never been any public road, or street, or highway on said property. * * * And no part of said property is a public road, or street, or highway."

[1] These seem to the court to be proper findings of fact, unless, possibly, we should except findings V, VI, VII, and IX. If the excepted findings be disregarded, there still remain sufficient findings of fact to support the judgment.

Criticism is made by appellant of the rulings of the court in excluding certain testimony in the following instances:

[2, 3] Miss McCarthy, a witness for plaintiff, was asked: "While you lived there with Mr. Brown, did Mr. Brown, see the general use that was made of this roadway?" To this question the court refused to permit an answer, saying: "Mr. Brown was dead long ago." Counsel for appellant replied: "But he was agent for the Southern Pacific at that time, and knowledge of the agent is knowledge of the principal, and I think we are entitled to that question."

The other instance complained of occurred while appellant was examining its witness Jennings, and the following occurred: Jennings had testified that his father was an old resident of San Mateo, now dead, and appellant's counsel asked the question: "Prior to the time of his death you had a conversation with him regarding this right of way?" On objection being made, the court sustained it. Appellant's counsel then stated: "Where there is a long custom and usage, particularly in public matters, I think we are permitted to show that by statements of deceased persons. We state, further, that there was a substitution of property regarding this identical property that we are speaking of, and we merely want to show the general understanding of the public as to that substitution of property at that time—and we offer to prove that at this time."

In his brief appellant states that: "The offered testimony would tend to establish the fact that the county gave the Southern Pacific Company a right of way for a street along the easterly boundary of their property, and that it was generally understood that at that time the Southern Pacific Company was to exchange for this right of way an easement along the westerly boundary of their property, i. e., the easement involved in the present controversy."

However, no testimony was offered to prove the giving by the county of such a right of

way, unless by the testimony of Jennings as to a conversation with his father.

We think the objection to the hearsay statements of Jennings, Sr., and as to what the witness McCarthy could state as to what Mr. Brown saw of the use of the property properly sustained. In the Jennings incident counsel fell far short of informing the trial court of what he now says he had expected to prove.

Respondent argues that the complaint fails to state whether the alleged right of way is 10, 20, or 30 feet wide, or whether it is 100, 200, or 500 feet long, and that it is essential in order to state a cause of action that a description of the right of way be given sufficient for identification.

A. Rochex testified: "I made no objection when I saw the private property signs on the property, nor did anybody else so far as I know. I never discussed the use of this roadway with anybody. Neither I nor anybody else made any claim of any right to anybody so far as I know. I merely went in and out without discussing my rights, or whether I had a right upon it. I never made any claim to go on that driveway and use it, until this particular instance, until we commenced this suit."

Appellant claims that the facts show a use by the plaintiff and the public which has been open, continuous, uninterrupted, and "without the permission of the owners of the property," and which has continued for many years.

The use having been open, notorious, and uninterrupted for many years and without the owner's permission (except as possibly affected by the maintenance of the sign by the owners for a part of the time containing the words "Permission to pass over revocable at any time"), the vital question seems to be whether the use was adverse or hostile to defendant. If it was so adverse, the lower court erred in its judgment.

[4-6] As to the dedication to the public: In the case of *Niles v. City of Los Angeles*, 125 Cal., at page 576, 58 P. 190, 191, the Supreme Court uses this language: "The law does not allow the land of a private owner to be taken for public purposes without any conveyance or consideration, except upon proof of such facts and circumstances as clearly show an intention on the part of the owner to abandon or dedicate the land to the public." And the court then quotes this from the early case reported in *Harding v. Jasper*, 14 Cal. 647: "The vital principle of the dedication is the intention to dedicate; and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. * * * Dedication, therefore, is a conclusion of fact

to be drawn by the jury from the circumstances of each particular case." See finding VIII quoted, *supra*, in this decision. The court further states: "To constitute a dedication of land to the public, two things are necessary, to wit: An intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use; and an acceptance by the public of the dedication." And see this expression at page 578 of 125 Cal., 58 P. 190, 192: "The finding that the strip of land was traveled and used by the public since 1887, without protest from appellants or predecessors in interest, is only the finding of probative facts tending to prove dedication, but the fact of dedication does not necessarily follow from such probative facts, as they are not necessarily inconsistent with a total absence of intention to dedicate, and may indicate a mere license."

[7-9] As to the prescriptive title: In *Clarke v. Clarke*, 133 Cal., at page 670, 66 P. 10, 11, the Supreme Court says: "Defendant testified that he used the way and claimed the right to use it, but it does not appear that any such claim was ever made to plaintiff or to his grantor. It is not sufficient that the claim of right exist only in the mind of the person claiming it. It must in some way be asserted in such manner that the owner may know of the claim. The fact that the owner knew of the travel and occasional use of the property does not even raise a presumption that such use was hostile or under claim of right. If any party who is allowed by silent permission to pass over the lands of another, nothing being said as to any right being claimed, after five years, without showing that he ever communicated such claim in any way to the owner, can thus gain title by prescription, it would be a blot upon the law. * * * The law will presume that the land belongs to the owner of the paper title, and that the use was by permission or silent acquiescence. If this presumption is overcome by evidence showing the use to have been hostile, and that the owner knew of such hostile claim and took no steps to protect his property for a period of five years, then the presumption changes. * * * Because he allows others to use and travel over a vacant lot without objection, the law does not presume that he intended to give it to them."

[10] Tested by these two cases from the Supreme Court, the evidence in this case fails to show an adverse use, and shows neither a dedication to the public nor that plaintiff has a prescriptive title.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

PETERS v. BINNARD et al. *

BINNARD v. PETERS.

Civ. 8654.

District Court of Appeal, First District,
Division 2, California.

Dec. 28, 1932.

Rehearing Denied Jan. 27, 1933.

Hearing Granted by Supreme Court Feb. 25, 1933.

1. Pleading ☞237(6).

Order allowing plaintiff to file amended complaint to conform to proof *held* not error.

2. Appeal and error ☞1047(4).

That trial court received evidence after amended complaint was filed to conform to proof *held* not reversible error.

3. Appeal and error ☞1071(5).

That trial court made immaterial findings outside of issues *held* not prejudicial error.

4. Pleading ☞8(4).

In complaint for specific performance, plaintiff was bound to plead facts, not conclusions, showing that under contract to buy and sell notes defendants were to receive adequate consideration, and as to them that it was fair.

5. Specific performance ☞114(1).

Complaint for specific performance of contract to buy and sell notes must contain allegations showing that plaintiff's legal remedy was not adequate.

6. Specific performance ☞121(11).

In action for specific performance of contract to buy and sell promissory notes, evidence showed that plaintiff failed to perform his agreement to induce third party to sell notes (Civ. Code, § 3386).

7. Specific performance ☞121(8).

That defendants named price for which notes would be accepted *held* insufficient proof that as to them contract to buy and sell notes was equitable, in action for specific performance.

8. Specific performance ☞121(3).

Finding that husband transferred note to wife in fraud of maker *held* unsupported.

Appeals from Superior Court, Los Angeles County; Harry A. Hollzer and William C. Doran, Judges.

Actions by D. L. Peters against B. Binnard and another, and by Gussie Binnard against D. L. Peters. From a judgment in favor of D. L. Peters, defendants in the first action and plaintiff in the second action appeal.

Reversed and remanded.

William Ellis Lady, of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondent.

STURTEVANT, J.

On an amended complaint praying specific performance, the trial court made findings in favor of D. L. Peters, and from a judgment entered thereon B. Binnard and Gussie Binnard, his wife, and National Thrift Corporation of America have appealed.

Both the facts and the pleadings are quite involved. On September 28, 1928, D. L. Peters executed and delivered his promissory note in the sum of \$5,000 to B. Binnard. The note was payable January 21, 1929. On November 20, 1928, B. Binnard assigned the note to Gussie Binnard, his wife. On June 25, 1929, Mrs. Binnard commenced an action against D. L. Peters on the note. Later the plaintiff filed an amended complaint which the defendant answered by denying all of the allegations and then alleging affirmatively that he executed the note, but that the note had been fully paid. On May 20, 1929, D. L. Peters commenced an action against B. Binnard, National Thrift Corporation of America, California Title Insurance Company, and Louisa G. Wood. Before the trial the action was dismissed as to the two defendants last named, Mrs. Wood, and the California Title Insurance Company. Later the plaintiff filed his second amended complaint (the pleading before the court when the trial commenced). Therein he alleged that on December 7, 1928, El Merrie Del Corporation and Louisa G. Wood entered into a contract by the terms of which the corporation agreed to buy and Louisa G. Wood agreed to sell four promissory notes of a face value aggregating \$24,000 and the trust deeds securing said notes. The contract recited that there were two escrows then pending between B. Binnard and Louisa G. Wood and that the personal property which was the subject of the sale was then on deposit with the escrow holder. Continuing, it set forth certain covenants regarding the opening of another escrow and the placing of said property therein. The plaintiff then alleged that a supplementary contract was made December 10, 1928, between Louisa G. Wood and the El Merrie Del Corporation; that on September 28, 1928, plaintiff executed to B. Binnard his note in the sum of \$5,000; that on February 27, 1929, B. Binnard and National Thrift Corporation of America agreed to buy the Wood notes and trust deeds for \$20,000; that D. L. Peters agreed to sell them for \$2,000 in cash, the promissory note of the National Thrift Corporation of America in the sum of \$9,500, and the cancellation and return by B. Binnard of the note of D. L. Peters in the sum of \$5,000; that the National Thrift Corporation of America also agreed to pay D. L. Peters

\$3,500 in cash; that to carry out the transaction an escrow would be opened and all of the transactions would be conducted through the escrow holder. The plaintiff further alleged that Louisa G. Wood thereafter agreed in writing to carry out her part of the transaction; that the National Thrift Corporation of America did likewise; and that B. Binnard did likewise. Continuing, the plaintiff alleged that on April 5, 1929, B. Binnard and National Thrift Corporation of America refused to carry out the transaction; that on May 10, 1929, Louisa G. Wood notified the plaintiff that unless the deal was closed May 20, 1929, she would declare the rights of El Merrie Del Corporation in and to the notes and trust deeds forfeited. The plaintiff thereupon added some allegations tending to show that his pleading was one for specific performance and then added a prayer that the defendants be compelled to specifically perform and for an injunction holding all matters in status quo pending the litigation. The defendants answered. Both actions came on for trial on November 4, 1929. It was stipulated that the trial would proceed in the case of Peters v. Binnard et al. and in the case of Binnard v. Peters, and that the evidence received in the one, so far as pertinent, should be admitted as being evidence in the other. On the conclusion of plaintiff's evidence in the Peters case a motion for a nonsuit was made by the defendants and denied. Evidence was then offered on behalf of defendants and the actions were submitted on November 25, 1929. Thereafter the trial court made an ex parte order that the plaintiff should have leave to file a third amended complaint to conform to the proof and that the action of Binnard v. Peters should be consolidated with the action entitled Peters v. Binnard and that they should be so consolidated under the number of the last-named case. On January 23, 1930, the plaintiff filed his third amended complaint. On January 24, 1930, the defendants gave notice of a motion to vacate the order permitting the filing of the third amended complaint, of the order consolidating the actions, and of a motion to strike out the third amended complaint. They also served exceptions and objections to the proposed findings and a demurrer to the third amended complaint. Later the motions were made and denied. The demurrer was both general and special. It was heard and overruled. Thereafter the defendants answered. On February 7, 1930, the order of submission was set aside. On March 10, 1930, the cause again came on for hearing and the court stated to counsel that it would receive any evidence that was admissible. Thereafter, over the objection of counsel for defendants, evidence both oral and documentary was received and the cause was again submitted. On April 22, 1930, findings were filed and on the next day the judgment was entered from which this appeal was tak-

en. The defendants make many points, all of which we will discuss, but not in the order in which the points are stated in the briefs.

[1, 2] It is claimed that the trial court erred in allowing the plaintiff to file an amended complaint to conform to the proof. The court did not err in making its order. *Rosemead Co. v. Shipley Co.*, 207 Cal. 414, 420, 278 P. 1038. The irregularity was the act of the plaintiff in filing a pleading which did not conform to the proof. That it did not so conform seemed to be the opinion of the trial judge; because, after its contents were called to his attention, he opened the case for the taking of additional evidence and much additional evidence was taken. A point closely related to the foregoing point is an objection to the evidence. That objection runs to the evidence which was taken after the third amended complaint was filed. While the procedure was irregular, we are not inclined to say it constituted reversible error.

[3] It is claimed that the trial court made findings outside of the issues. We think it did. However, the findings so made were on subjects that were wholly immaterial whether the plaintiff's cause of action be considered as an action for breach of contract or an action in specific performance. It follows that the findings complained of did not constitute prejudicial error.

[4, 5] The defendants' demurrer to the third amended complaint alleged that it did not state a cause of action. The demurrer was overruled and the defendants claim it should have been sustained. That claim is well founded. The action is clearly one for specific performance of a contract, not to recover damages for the breach of one. *Herzog v. Atchison, Topeka, etc.*, R. R., 153 Cal. 496, 499, 95 P. 898, 17 L. R. A. (N. S.) 428. As such the amended complaint was insufficient. The contract was one to buy and sell promissory notes. The pleader made no attempt to allege facts bringing the case within any exception to the general rule. *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 P. 1029; Civ. Code, § 3387. Furthermore, he was bound to plead the facts, not his conclusions, showing that under the contract the defendants were to receive an adequate consideration and as to them that it was just and fair. *Joyce v. Tomasini*, 168 Cal. 234, 237, 142 P. 67. The third amended complaint does not contain any allegations showing that the plaintiff's legal remedy was not adequate in all respects. *Wait v. Kern River Mining, etc., Co.*, 157 Cal. 16, 106 P. 98. If, as claimed, the defendants breached their contract an action in damages was, under the facts, a complete remedy and the measure of damages could easily be ascertained and applied. 23 C. J. p. 234; 17 C. J. pp. 1023 et seq. When the contract of sale was entered into between B. Binnard and D. L. Peters the former was not then the owner

and holder of the promissory note executed by D. L. Peters. The note at that time was held and owned by Gussie Binnard. Speaking of the same date, D. L. Peters was not the owner and holder of the Wood notes and trust deeds, but he was undertaking to induce Mrs. Wood to sell them. In this state it is statutory that an agreement to procure the act or consent of the wife of the contracting party, or of any other third person, cannot be specifically enforced. Civ. Code, § 3390. Furthermore, one party will not be compelled specifically to perform unless the other party has performed or can be compelled to perform. Civ. Code, § 3386. Here each party agreed to sell something he did not own at the time of the agreement.

[6] It is claimed the evidence does not support the findings. One of the statutory provisions is that specific performance cannot be enforced in favor of a party who has not fully and fairly performed. Glancing over the pleading before the court, it will be noted that D. L. Peters under the terms of the agreement did not undertake to do anything except as stated below. He did undertake to get Mrs. Wood to agree to the exchange. The court made findings in the language of the plaintiff's complaint. Weighing the question of performance or nonperformance on the part of Mrs. Wood, it will be seen that she signed an executory contract December 7, 1928. As to opening an escrow, a paper purporting to state her instructions was laid before her and she refused to sign it; but, on March 2, 1929, she signed a paper containing material alterations. On March 27, 1929, she sought to amend that document. The amendment sought to insert entirely new conditions. The defendants refused to accept the new conditions and so advised the escrow holder on April 11, 1929. Matters so stood until May 21, 1929, when Mrs. Wood canceled all instructions. It thus appears that Mrs. Wood never performed at all and that D. L. Peters did not perform that which he had undertaken to do.

In connection with the point just discussed, the defendants assert that the contract was discussed and that it was agreed it should be reduced to writing by opening an escrow and stating the details in written instructions. The plaintiff controverts that assertion by saying that the contract was orally agreed to and that the opening of the escrow was but a means of carrying into execution the terms that had been orally agreed to. If the oral negotiations constituted the contract, the purported contract was so indefinite and uncertain that it could not be made the basis of an action to compel specific performance. Civ. Code, § 3390, subd. 6. However, there is an abundance of evidence in the record showing that the terms of the escrow instructions should, when taken together, constitute the contract and, in the absence thereof, that there would not be and was not a completed

contract. All agree that an oral plan was discussed before the parties went to the California Title Insurance Company. The plaintiff claims it was complete. It is quite clear it was not and could not have been. Down to the moment the parties met at that company's office, Mrs. Binnard was the owner and holder of the Peters note and Mrs. Wood was the owner and holder of the trust deed notes. Those several documents were the subjects of the contract. But at that time neither Mrs. Binnard nor Mrs. Wood had been consulted and neither had stated the terms on which she would agree to make the proposed transfer. Mrs. Binnard says she never consented and that she did not sign any papers. Mrs. Wood later stated her terms and they were flatly declined by the defendants.

[7] The defendants also make the point that there is no evidence to support the findings that, as to them, the contract was supported by an adequate consideration and that it was fair and just. Continuing, they assert that there is no evidence in the record as to the value of the Wood notes, with or without limitation as to liability for a deficiency judgment. They go further and show that the owner, on March 2, 1929, without limitations as to recourse, offered to take \$15,000 for said notes. They also show that D. L. Peters vigorously contended that it was part of the agreement that the notes were to be endorsed without recourse. The plaintiff replies by quoting evidence to the effect that the defendants named the price for which the notes

would be accepted. The reply is not sufficient. The plaintiff was bound to plead and prove the facts showing that as to the defendants the contract sought to be enforced was equitable. He did not do so.

[8] The plaintiff alleged, and the trial court found, that the defendant B. Binnard transferred the \$5,000 note executed by D. L. Peters to Mrs. Binnard in fraud of the maker. That is one of the findings claimed to be outside of the issues. As we have stated, it was outside of the issues and was on an immaterial issue. However, the record shows that as early as October 21, 1927, Mrs. Binnard delivered to John Pingree \$5,000 to be loaned to D. L. Peters on a promissory note. Later the loan was made in her name, and still later that note was taken up and a new note was executed. The new note was written in favor of B. Binnard instead of Mrs. Binnard. Shortly after its execution B. Binnard indorsed it and delivered it to Mrs. Binnard. On November 27, 1928, D. L. Peters paid the interest by check written in favor of B. Binnard, but when the check was delivered to him he indorsed the same and delivered it to Mrs. Binnard in the presence of D. L. Peters. No evidence has been called to our attention showing any fraud on the part of Mrs. Binnard.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this decision.

We concur: NOURSE, P. J.; SPENCE, J.

217 Cal. 184

CITY OF LOS ANGELES v. ABBOTT et al.,
and twenty-three other cases.

L. A. 13122-13145.

Supreme Court of California.

Dec. 30, 1932.

Rehearing Denied Jan. 26, 1933.

1. Evidence ⇐43(3).

On appeal from judgment dismissing condemnation action and awarding landowners attorney's fees, appellate court could judicially notice injunction judgment enjoining condemnation action, where injunction judgment was considered by trial court, though not appearing in record (Code Civ. Proc. § 1255a; Deering's Gen. Laws 1931, Act 8198, § 14).

Injunction judgment in another action, enjoining city from prosecuting condemnation action, could be noticed by appellate court, because it was more consonant with principle of justice to consider the case on the merits and determine whether abandonment of the condemnation action caused by permanent injunction was such abandonment as would entitle property owners to costs and attorney's fees, and because the record was insufficient to sustain the judgment awarding costs and attorney's fees, in that there was no showing that the abandonment was such as to entitle the property owners to the costs and attorney's fees awarded.

2. Pleading ⇐8(9).

Allegation that condemnation suit had been abandoned is conclusion of law.

3. Costs ⇐172.

Attorney's fees in actions generally are not recoverable as costs, but are only recoverable when specifically allowed by statute.

4. Eminent domain ⇐265(5).

City's involuntary abandonment of condemnation suit caused by issuance of permanent injunction held not "abandonment" within statute, so as to entitle property owners to attorney's fees from condemnor (Deering's Gen. Laws 1931, Act 8198, § 14; Code Civ. Proc. §§ 1255, 1255a).

Word "costs," appearing by itself and undefined, means only the ordinary costs of suit, and does not include attorney's fees.

[Ed. Note.—For other definitions of "Abandon; Abandonment" and "Costs," see Words and Phrases.]

5. Eminent domain ⇐265(5).

Property owners held entitled to costs as distinguished from attorney's fees, where city abandoned condemnation suit because of injunction judgment enjoining such proceeding

In Bank.

Appeals from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Actions by the City of Los Angeles against Sadie D. Griffith Abbott, Robert L. Halperin, and others, against Leon Escallier, against Lena Granas, against Gussie Levy, against Louise B. Prudhon, against Minnie Cohen and others, against Louis Klener and others, against Burton & Company and others, against Oliva Duer, against Louise C. French, against John F. Hines and others, against Willis O. Lewis, against W. E. Lewis, against W. E. Lewis and others, against W. D. Morgan and others, against Fred Murch and others, against George W. Prior, against the Prudential Life Insurance Company and others, against Phillip A. Seewagen and others, against R. C. Solomon & Company, against Robert C. Solomon and others, against A. R. Thompson and others, against Herbert D. Updike and others, and against Westlake Park Investment Company. From the judgments, plaintiff appeals.

Reversed in part.

For prior opinions, see 300 P. 854, 856-862, 12 P.(2d) 19, 22.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., Arthur W. Nordstrom, and C. N. Perkins, Deputy City Attys., all of Los Angeles, for appellant.

Hyams & Himrod, W. W. Hyams, and Aubrey Devine, all of Los Angeles, for respondent.

Charles Schusterman, Harriet W. Pugh, and Schusterman & Pugh, all of Los Angeles, for respondents Minnie Cohen and others.

Andreani, Haines, Bisher & Carrey, Andreani & Haines, and Harold E. Prudhon, all of Los Angeles, for respondents Leon Escallier and others.

PER CURIAM.

Pursuant to stipulations of the parties, the above-entitled twenty-four cases have been consolidated for decision, it being agreed that all of the cases may be determined upon the briefs and arguments filed in L. A. 13122. Whatever is said in this opinion, therefore, in reference to the Halperin case will apply equally to the other twenty-three cases.

L. A. 13122 involves an appeal by the plaintiff, the city of Los Angeles, from a judgment dismissing a condemnation action, which judgment of dismissal allowed respondent Halperin his costs, including attorneys' fees. The other twenty-three appeals involve other defendants in the condemnation suit who were likewise awarded costs and attorneys'

fees. The facts giving rise to the present controversy are as follows:

In November of 1923 the city of Los Angeles filed a complaint in condemnation, naming respondent Halperin and the other respondents and other parties as defendants. The complaint was in the form usual in such actions, alleging the passage of an ordinance of intention by the city council, designated as Ordinance No. 45501 (N. S.), and asking that, in pursuance to that and other supplementary ordinances, portions of the lands of respondent Halperin and of the other respondents and others be condemned for the purpose of opening, widening, and extending Mines avenue and Tenth street in the city of Los Angeles. Respondent Halperin, and the other respondents, filed separate answers putting into issue the value and severance damages to their respective pieces of property sought to be condemned.

Early in May of 1929 the city was served by respondent Halperin with a notice of motion to dismiss the action. The notice of motion recited that respondent Halperin intended to move the court "to dismiss the above entitled action for the reason that the same has been abandoned by the plaintiff, and will also move the court for a judgment of dismissal and for costs and attorneys' fees herein under and pursuant to the provisions of section 1255a of the Code of Civil Procedure.

"Said motion will be made upon the ground that said action has been abandoned by the plaintiff, and will be based upon the affidavit of Wm. B. Himrod herewith filed, and upon the records, files and papers in the above entitled action."

The affidavit above referred to of William B. Himrod, one of the attorneys for respondent Halperin, recites that the condemnation suit had been instituted by the city pursuant to the Street Opening and Widening Act of 1903 (Stats. 1903, p. 376, as amended) for the condemnation of certain lands for street purposes; that respondent had appeared and answered; "that subsequent to the filing of said answer as aforesaid, plaintiff herein abandoned the above entitled action and has brought another suit in connection with the same proceedings, which said suit is now pending in the above entitled court." No counter affidavit was filed by the city. No other affidavit was filed on behalf of respondent. So far as the record shows, all that the trial court had before it when it decided the motion to dismiss was the notice of motion to dismiss, the affidavit of William B. Himrod, and the files and records in the condemnation suit. The trial court granted the motion to dismiss. The judgment recites that "it appearing to the court that the plaintiff has failed to prosecute said action and has abandoned the same. * * * Now, therefore, it is ordered, adjudged and decreed that the above entitled action be and the

same is hereby dismissed, and it is ordered that said defendant Robert L. Halperin have judgment against the plaintiff for costs [including attorneys' fees] in the sum of \$1,653.50."

[1] From this judgment the city has prosecuted this appeal. Appellant contends that although it does not appear in the record now before us, as a matter of fact, when the motion to dismiss was argued there was presented to the trial court, in writing, a copy of a final judgment of the superior court permanently enjoining the city from further prosecuting the condemnation suit here involved. Appellant presented this injunction to the trial court in explanation of its failure to further prosecute the condemnation suit. Appellant also states that it appealed from the judgment in the injunction matter, but that that judgment was affirmed by this court. The injunction proceeding was entitled *O. T. Johnson Corporation v. City of Los Angeles*, and the opinion of this court is to be found in 198 Cal. 308, 245 P. 164. This judgment of a state trial court, which was affirmed by this court without modification, in broad and general terms held said Ordinances No. 45501 (New Series) and No. 46537 (New Series), invalid and ordered that the temporary injunction be made permanent, and that the defendants and *all the officers, agents and employees of the city of Los Angeles and their successors in office* and each of them be restrained and enjoined from paying out any moneys of the said city for any costs or expenses incurred in connection with the *improvement provided for by Ordinance No. 45501 (New Series) and Ordinance No. 46537 (New Series)* (being the identical ordinances now before this court), including the costs of the prosecution of the condemnation suit purported to be authorized by said Ordinance No. 46537 (New Series) and that the plaintiffs have and recover their costs. Upon an appeal taken to this court we held upon an extended review of said ordinances, in addition to other pronouncements, that "There is, therefore, not only a failure of description, but a misdescription of the proposed improvement, and the ordinance of intention and notice of public work were fatally misleading and defective." This case presents unusual facts. We have before us as the foundation of a condemnation proceeding the identical ordinances which were adjudged invalid by this court in the *Johnson Case* and which, therefore, could not support a judgment. The original action in condemnation was commenced by the same plaintiff, the city of Los Angeles, against the respondents to effect a common public improvement; the properties sought to be condemned being units of an integral whole in the plan of a definite public improvement. To hold under the circumstances of this case that we cannot upon the affirmative matters appearing herein take notice of our own decision which con-

demned said ordinance and which would render an attempt to further prosecute the instant case an idle and indefensible act, if not indeed contemptuous, would be to blink the perceptive sense of courts to a degree not consistent with the increasing need for a more practical and efficient method in the administration of the law. Respondent does not deny that the city was in fact permanently enjoined from prosecuting the condemnation action by the judgment in the O. T. Johnson Corporation Case, nor does he deny that on the argument on the motion to dismiss, the trial court was furnished with a copy of the permanent injunction. Respondent contends that this court cannot consider the effect of the permanent injunction in reference to the respondent's right to costs and attorneys' fees, even though it was in fact considered by the trial court, for the reason that it is not contained in the record on appeal, and that this court is bound by the record on appeal. Respondent further contends that this court cannot judicially notice the injunction judgment under the authority of *Reed v. Cross*, 116 Cal. 473, 48 P. 491; *Sewell v. Johnson*, 165 Cal. 762, 134 P. 704, Ann. Cas. 1915B, 645; and other cases. Although those cases undoubtedly indicate that ordinarily the appellate court will not take judicial notice of its judgment in other cases, that rule has no application to the peculiar facts of the present case. The reason for the rule prohibiting the court from taking judicial notice of its judgment in another case is obvious. Ordinarily it would be unfair to a respondent to permit the appellant to rely on a judgment not contained in the record because the respondent has had no opportunity to argue its legal effect before the trial court, and to introduce, if he can, refuting testimony. Here there is no dispute but that the judgment involved was presented to the trial court and its legal effect considered by that court in rendering its judgment. The rule precluding the court from taking judicial notice of its judgment in another case is not an inflexible one, and has several exceptions. One such exception is recognized in *Sewell v. Johnson*, supra, where this court held it would take judicial notice of its judgment in one case rendered after the trial of the action then on appeal. The same exception is recognized in *Ballard v. Searls*, 130 U. S. 50, 9 S. Ct. 418, 32 L. Ed. 846; *U. S. v. Commercial Credit Co. (C. C. A.)* 20 F.(2d) 519. The fact that such an exception exists indicates that the rule is not based on lack of power but is a rule of expediency, to be applied or refused application as the equities and justice of the cases require. No good reason appears why an exception should not be made in a case like the present, where both parties expressly or impliedly admit that the legal effect of the O. T. Johnson Corporation injunction was in fact considered and fully argued before the trial court. We do not condone the omission of the

attorney for appellant in failing to present to the trial court in a counter affidavit or otherwise the fact that the reason the city had failed to prosecute the condemnation suit was because it had been permanently enjoined from so doing, but we cannot see how the ends of justice would be furthered by applying strictly the technical formalistic reasoning advanced by respondent. It seems to us far more consonant with principles of fairness and justice to all concerned to consider the case on its merits, as did the trial court, and determine whether or not an involuntary abandonment of a condemnation suit, caused by the issuance of a permanent injunction, is such an abandonment within the contemplation of the law of this state as will entitle the defendant to recover his costs and attorneys' fees from the condemnor.

[2] There is still another reason why, in this case, the interests of justice will be furthered by judicially noticing the O. T. Johnson Corporation judgment. According to the record now presented to us, and without considering the injunction, all the trial court had before it when it granted the judgment of dismissal together with costs and attorneys' fees, was the notice of motion to dismiss, the affidavit of Wm. B. Himrod, and the files and records in the condemnation suit. The affidavit contains the allegations that the city had abandoned the condemnation action, and had commenced another suit in connection with the same proceeding. No statement of the facts which were claimed to constitute the alleged abandonment appear in the affidavit or elsewhere, nor does it appear what the nature of the pending suit was or whether it involved the same questions involved in the Halperin action. An allegation that the condemnation suit had been abandoned is nothing more than a mere conclusion of law. This necessarily follows because of the fact, as we hold later in this opinion, that it is not every abandonment by the condemnor which entitles the defendant to his costs and attorneys' fees. Since this is so, it was necessary for the respondent to show that the abandonment here involved was of such a nature as to entitle him to his costs and attorneys' fees. The record contains no such showing, and if we were inclined to strictly construe the record we would be compelled to reverse the judgment solely on the ground that there is nothing in the record to show that the abandonment here involved was of such a nature as to entitle respondent to his costs and attorneys' fees. However, we are not inclined to decide this case adversely to respondent because the record is technically insufficient, any more than we are inclined to decide it adversely to appellant on the technicality already discussed. Particularly is this so when the technical deficiency of the record, both as to appellant and respondent, consists in the failure of the record to disclose the exist-

ence of the injunction judgment. In fairness to both parties, we think the interests of justice will best be served by deciding the case on the merits and by judicially noticing the existence of the injunction judgment.

[3] We turn then to a discussion of the question as to whether, when a condemnation suit is permanently enjoined, the defendants are entitled to attorneys' fees. It must be remembered that attorneys' fees, in actions generally, are not recoverable as costs. Attorneys' fees are only recoverable when specifically allowed by statute. *Coburn v. Townsend*, 103 Cal. 233, 37 P. 202; *Pacific Gas & Electric Co. v. Chubb*, 24 Cal. App. 265, 141 P. 36; *Bond v. United Railroads*, 20 Cal. App. 124, 128 P. 786. Eminent domain proceedings are special proceedings and are governed by a separate and special chapter of the Code of Civil Procedure (part 3, title 7, § 1237 et seq.). If any authority for the allowance of attorneys' fees exists, it must be found either in that chapter of the Code of Civil Procedure, or in the provisions of the Street Opening and Widening Act of 1903, under the terms of which this particular condemnation suit was instituted. The only section of the last-named act in any way referring to abandonment is section 14. So far as pertinent here, it provides as follows: "The city council may, at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings, by ordinance, and cause the said action to be dismissed, without prejudice; and if any of the assessments levied to pay the expense of the improvements, as hereinafter provided, shall have been actually paid in money at the time of such abandonment, the same shall be refunded to the persons by whom they were paid. If the proceedings be abandoned or the action dismissed no attorney's fees shall be awarded the defendants or either * * * of them." 1931, 3 Deering's Gen. Laws, Act 8198, § 14, p. 4506. The last sentence above quoted prohibiting the allowance of attorneys' fees has been held to be unconstitutional. *City of Los Angeles v. Cline*, 40 Cal. App. 487, 181 P. 78. The city maintains that since the above section provides for an abandonment by ordinance, it impliedly excludes other types of abandonment, and that since no ordinance abandoning the improvement was ever passed in the instant case, no abandonment which entitles respondent to his costs and attorneys' fees has taken place. We do not agree with this contention. With the last sentence of the above section deleted, there is nothing in that section or in any other provision of the act in reference to what constitutes such an abandonment as will entitle a defendant to his costs and attorneys' fees. We are therefore of the opinion that, since the act is entirely silent on this point, the general provisions of the Code of Civil Procedure in reference to eminent domain proceedings are con-

trolling on the question as to what constitutes an abandonment by the condemnor so as to entitle the defendant to his costs and attorneys' fees.

[4] Section 1255 of the Code of Civil Procedure provides for the allowance of costs generally, after judgment, in the discretion of the trial court. That section does not permit the allowance of attorneys' fees. It refers to "costs" only, and it is well settled that the word "costs," appearing by itself and undefined, means only the ordinary costs of suit, and does not include attorneys' fees. In fact, it has been specifically held that the word "costs" appearing in section 1255 of the Code of Civil Procedure does not include the right to attorneys' fees. *Lincoln Northern Ry. Co. v. Wiswell*, 8 Cal. App. 578, 97 P. 536. The only provision of the Code of Civil Procedure which allows a defendant to recover his attorneys' fees in eminent domain proceedings is section 1255a, added to our Code in 1911 (Stats. 1911, p. 377). It provides: "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action." Section 1251, referred to in the above-quoted section, has no reference to the present action, it providing for the time of payment of a judgment in condemnation. When read in conjunction with section 1255a, the two sections provide for an implied abandonment entitling the defendant to his costs and attorneys' fees when the case has proceeded to a judgment and defendant's damages have been assessed and the assessment has not been paid. No damages ever having been assessed in the instant case, obviously that clause of section 1255a, supra, can have no application. The only question left for determination is whether or not the other provisions of section 1255a of the Code of Civil Procedure allow a defendant his attorneys' fees when the condemnation suit is permanently enjoined. Is that such an abandonment as is contemplated by that section? The question is simply one of

Interpretation—If that section does not authorize the allowance of attorneys' fees, respondent cannot recover them, for the reason that there is no other statutory provision permitting their allowance. *City of Los Angeles v. Hannon*, 79 Cal. App. 669, 251 P. 247. Respondent argues that it is the intent of section 1255a to allow the defendant his attorneys' fees in any and all cases when the condemnation suit is abandoned, voluntarily or involuntarily. It is in effect argued that it is the purpose of that section to remove the entire burden of the cost of the litigation from the defendant whenever, for any cause, the condemnor fails to prosecute the action to a conclusion. Giving the most liberal interpretation to the section, we can find no such intent, expressed or implied. The statute provides that the plaintiff may abandon the action by "serving on defendant and filing in court a written notice of such abandonment," or by failing to pay the damages assessed after judgment has been rendered, and then provides "upon such abandonment" the defendant shall be entitled to his costs and attorneys' fees. There is nothing in the language of the section to indicate that it was intended by the Legislature that in all cases where the action is not prosecuted to a final judgment the defendants in eminent domain proceedings should recover their attorneys' fees. Certainly, giving the statute the most liberal construction, there is nothing in the section which expressly or impliedly indicates an intent to permit defendants in condemnation suits to recover their attorneys' fees when the condemnor has not voluntarily abandoned, but has been involuntarily restrained from further proceeding by a permanent injunction. We do not mean to hold that it is only when the condemnor has served on defendant and filed in court a notice of abandonment or has failed to pay the damages assessed that attorneys' fees can be recovered. We are of the opinion that the language used, liberally construed, means that in every case involving a voluntary abandonment attorneys' fees may be recovered, but we do not think that the statute can possibly be interpreted to apply to a case where the condemnation action is terminated without the consent, express or implied, and against the wish and will of the condemnor. We are of the opinion, therefore, that the section only refers to cases of voluntary abandonment and not to cases of involuntary abandonment.

Whenever the condemnor voluntarily abandons it is only fair and equitable that the defendants in the condemnation suit should be recompensed; but where the condemnor, as here, has conclusively shown that it in good faith was prosecuting the action, and only desisted because of an injunction, no good reason exists why the defendants should recover their attorneys' fees. Neither the letter nor spirit of the statute covers this situation. We can find no language in the statute au-

thorizing the recovery of attorneys' fees where the abandonment has been involuntary. Even at the expense of being repetitious it is well to state again that unless respondent can show not only an abandonment, but an abandonment within the spirit and intent of section 1255a of the Code of Civil Procedure, no attorneys' fees can be recovered. As we read the section and giving it the most liberal construction possible, it applies only in the case of a voluntary abandonment. Although no case has been decided by the courts of this state directly in point, Illinois has held, in interpreting a provision very similar to section 1255a, that it does not apply to an involuntary abandonment. In the case of *City of Mound v. Mason*, 199 Ill. App. 120, the court held in reference to a situation very similar to the one here presented as follows:

"It is contended by appellee that the provision of this statute is broad enough to include the dismissal of a petition for condemnation, not only where the same is voluntarily dismissed by the petitioner, but, also, where after a preliminary hearing the court on the motion of the defendant dismisses the same. Appellee insists in support of his position that the constitutional provision that private property shall not be taken for public purposes, except upon payment of just compensation, should be construed so as to require a petitioner to pay, not only compensation fixed by a jury and costs of the suit, as ordinarily understood, but also that it should be construed to require that the petitioner in a condemnation petition where the same is dismissed by the court over its objection, and where the property is not taken, as a matter of fact, shall be required to pay, not only the costs of the suit, but also the attorneys' fees and other expenses incurred by the owners of said premises in and about the defense made by him in connection with such condemnation proceeding. In other words, appellee insists that even though the provision of the statute in question is not broad enough in its literal terms to include a judgment against a petitioner for attorneys' fees and other expenses, where a petition for condemnation is dismissed by the court, that the courts in construing such statute should give it that effect.

"In his brief and argument appellee cites the following cases in support of his contention: *Chicago & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141 [35 N. E. 881]; *Epling v. Dickson*, 170 Ill. 329 [48 N. E. 1001]; *Sanitary District v. Bernstein*, 175 Ill. 220 [51 N. E. 720]; *Peoria, B. & C. Traction Co. v. Vance*, 251 Ill. 263 [95 N. E. 1081, 36 L. R. A. (N. S.) 624, Ann. Cas. 1912C, 532]. * * *

"A careful reading of each of these cases clearly discloses that they cannot be held to support the contention of appellee in this case. The language of the above statute seems so clear that it hardly admits of con-

struction. However, in the recent case of *Chicago Great Western R. Co. v. Ashelford*, 268 Ill. at page 87, the court in passing on the proviso of section 10 above referred to, at page 93 [108 N. E. 761], uses this language: 'The evident purpose of the proviso to said section 10 was to provide for two instances in which the defendant would be entitled to an order requiring the petitioner to pay the expenses incurred by him in making his defense to the petition: First, in case the petitioner should voluntarily dismiss the petition; and second, in case the petitioner should fail to make payment of full compensation within the time named in the order. In our opinion this was the sole purpose of the proviso.'

"It would seem from the language of this case that the Supreme Court has left but little doubt as to the construction that it places on this statute, and that it only applies where the petition is voluntarily dismissed by the petitioner or where the petitioner fails to pay the compensation within the time fixed by the statute. It is well to bear in mind in the construction of a statute, with reference to the allowance of attorneys' fees, to be taxed against the opposite party, that such statute is in derogation of the common law and that there is no right to have such fees so taxed unless the provision of such statute clearly warrants the same.

"For the reasons above mentioned the judgment of the trial court is reversed without remanding."

That section 1255a of the Code of Civil Procedure was not intended to apply to an involuntary abandonment is made evident not only by the language used, but also by the evils the statute was intended to remedy. Before section 1255a was added to the Code of Civil Procedure in 1911, the condemnor had the ability to abandon the condemnation suit, even after judgment, and the only expense to the condemnor was the payment of costs, a nominal expense. Under such a situation, whenever the award granted the defendants was, in the condemnor's estimation, excessive or unsatisfactory, the condemnor would abandon the action, pay the nominal costs, retry the action, and repeat this process until a satisfactory award was arrived at. It was to remedy the evils connected with a situation which permitted the condemnor to resort to an action without seriously intending to prosecute it to a conclusion that section 1255a was enacted. *Pacific Gas & Electric Co. v. Chubb*, supra.

[5] Under the general provisions of the Code of Civil Procedure respondents are entitled to their costs as taxed by the trial court, as distinguished from attorneys' fees. For the foregoing reasons, however, it is our opinion that that portion of the judgment of dismissal purporting to allow respondent Hal-

perin attorneys' fees should be, and hereby is, reversed. The same reasoning applies to the other twenty-three cases above listed, and for that reason those portions of the various judgments in all of the said cases purporting to allow the respective respondents their attorneys' fees are, and each is hereby reversed. Both sides to bear their own costs on this appeal.

217 Cal. 213

ALAMITOS LAND CO. v. SHELL OIL CO.

L. A. 13867.

Supreme Court of California.

Jan. 9, 1933.

1. Judgment $\S$ 229.

Judgments containing interlocutory provisions requiring payment of money maturing before main decree can be reviewed are not favored.

Such provisions are not favored, since they place the losing party at a great disadvantage.

2. Appeal and error $\S$ 158(2).

Lessee's payment required by judgment to prevent forfeiture of oil lease held not to defeat lessee's right to appeal.

The judgment for lessor, suing for items alleged not to have been accounted for by lessee and for forfeiture and cancellation of lease, required lessee to pay large sums for back royalties and other items, and provided that lessor should have judgment declaring termination of all lessee's interest under lease, with proviso that lessee should be relieved of forfeiture if it paid to lessor on or before date specified all sums for which judgment was given. Lessee, in order to avoid forfeiture of lease, under protest, made payment required by judgment, which matured before lessee could have such provisions reviewed on appeal, and thereafter appealed from entire judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by the Alamitos Land Company against the Shell Oil Company. From an adverse judgment, defendant appeals. On plaintiff's motion to dismiss the appeal.

Motion denied.

McOutchen, Olney, Mannon & Greene, of San Francisco, for appellant.

Oliver O. Clark, of Los Angeles, Raymond J. Kirkpatrick, of Long Beach, and Sherman Anderson, of Los Angeles, for respondent.

PRESTON, J.

Motion to dismiss appeal.

Respondent moves herein the dismissal of defendant's appeal in so far as it applies to four separate provisions of the final judgment of the court in this cause. The motion is founded upon the well-recognized principle expressed by this court as follows: "The right to accept the fruits of a judgment and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other." In re Estate of Ayers, 175 Cal. 187, 190, 165 P. 528, 529.

It seems that this motion is but a forerunner of several appeals in the above-entitled cause which must later receive attention and which grow out of the relationship of lessor and lessee between the plaintiff and defendant respectively in connection with certain highly productive oil property located at Signal Hill, Los Angeles county. In 1921 plaintiff leased these lands to defendant, and this agreement was supplemented in 1924 by a later one. For several years the parties have been operating under these contracts, and some thirty-nine producing wells have been drilled and are still producing large quantities of oil. A dispute has arisen between the parties as to whether a proper accounting has been rendered by defendant to plaintiff. Based upon the alleged misconduct of defendant, plaintiff sought by this action not only a judgment for the items not accounted for, but also for an out and out forfeiture and cancellation of the lease. The cause was put at issue, and after a prolonged trial the court gave a money judgment for plaintiff covering several items aggregating the sum of \$522,895.11, being for the said so-called back royalties and kindred items. The court concluded its judgment by paragraph eighth thereof, which reads as follows: "That plaintiff have judgment declaring the termination of all of the right, title, interest and equity of said defendant, in, to and under said lease of January 3rd, 1921, and said contract of March 14, 1924, provided, however, that said defendant shall be relieved of such forfeiture in the event that it pays to plaintiff, on or before the 29th day of August, 1932, all sums for which judgment is herein given."

Facing this interlocutory demand for payment of the money items, a demand which matured before the judgment as a whole could be reviewed on appeal and, facing the alternative contained in the above-quoted paragraph eighth, defendant was required to make a hasty but important decision. Accordingly, it decided to and did pay the money demands in full, with written notice to plaintiff that

the sums were not paid by way of compromise, but under protest, and to prevent the more drastic penalty of a forfeiture of the lease, announcing at the same time that an appeal from all or any portion of the judgment by it would not be considered prejudiced by this payment. Later this appeal was taken, not only from the money items in the judgment, but from the said paragraph eighth as well as from other provisions of the judgment not here involved. Now comes the respondent urging upon the court a dismissal of the portions of the appeal above described, and respondent asserts the question involved to be the following: "May the defendant accept the benefits of that part of the judgment which grants unto it the opportunity to secure relief from a forfeiture of its oil and gas lease, upon the timely payment of the moneys, which by another part of the same judgment are found to be owing by it to the plaintiff upon an accounting for royalties under that lease, and yet appeal from either, or both, of said portions of said judgment?"

The defendant counterstates the question involved to be as follows: "Does a defendant lose its right to a review by paying under protest a judgment which by its terms makes such payment the only means of escape from a more drastic penalty?"

[1] Each party recognizes the existence of the principles of law contended for by the other, but each contends that the principle advocated by it alone is applicable to the present controversy. The conclusion must therefore be found in an interpretation, properly made, of the judgment as given. Preliminarily it may be said that judgments having therein these interlocutory provisions, which mature prior to the main decree, are not favored, as they place the losing party at a great disadvantage. *Ochoa v. McCush*, 213 Cal. 426, 2 P.(2d) 357.

[2] The judgment before us arose out of an alleged failure by defendant to account to plaintiff, and this failure likewise constitutes the principal ground for forfeiture of the lease. If the accounting was proper, the decree of forfeiture was improper. The two issues are interdependent. Defendant has appealed from the judgment as to both these issues. It is manifest that in the face of the alternative to pay or lose the lease and then pay, it was wise for defendant to advance and pay the money demands. Such a payment, therefore, was under the clearest and most urgent compulsion and should not bar the right of review. Defendant received no benefits by accepting the lighter of the two burdens. It merely adopted the only safe course.

Respondent argues that by the terms of the judgment the forfeiture had already occurred and to allow defendant's rights in the lease to be restored was a distinct benefit, the receipt of which, although on terms, was yet a great

bargain; hence defendant should be estopped to complain. This argument, however, seems to beg the question, for it assumes the forfeiture not only to have been incontestable, but to have been conceded by defendant, neither of which conditions is true. Defendant here questions both the right to an accounting and the right to a forfeiture, and its statement of the question involved is therefore the proper one. Authorities to support the views above announced are numerous, but we need cite only a few: Warner Bros. Co. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am. St. Rep. 400; Pond Creek Coal Co. v. Runyon, 199 Ky. 539, 251 S. W. 841; Colvin v. Woodward, 40 La. Ann. 627, 4 So. 564.

The motion is denied.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

continuing to rely on the false representations of defendant after her discovery of their falsity. The court, however, also found for plaintiff on the other two counts, and gave judgment in her favor for the sum of \$3,646.41. Defendant has appealed.

Appellant refers us to the evidence in an effort to prove that it is insufficient to support the finding that there was a partial failure of consideration, and appellant further claims that respondent's laches should prevent a recovery.

Having reviewed the record, we are satisfied with the conclusion of the court below. There is ample evidence to support the findings and judgment and to warrant the court in holding that recovery is not barred by laches.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; IRA THOMPSON, J.

217 Cal. 227

**Lotta McHOSE, Plaintiff and Respondent, v.
RATTERREE LAND COMPANY,
Defendant and Appellant.**

L. A. 13727.

Supreme Court of California.

Jan. 13, 1933.

In Bank.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Harley E. Riggins, Schweitzer & Hutton, and Frank S. Hutton, all of Los Angeles, for appellant.

Winterer & Ritchie, Edw. Winterer, and L. S. B. Ritchie, all of Los Angeles, for respondent.

PRESTON, J.

Plaintiff alleged three causes of action: First, that she was induced through false and fraudulent representations to purchase a lot from defendant for \$5,750; that she paid thereon almost \$3,000, when she discovered the fraud, whereupon she rescinded the contract and demanded her money back; second, that she was induced to purchase said lot by reason of defendant's promise to improve the tract, do street, sewer, and electrical work, and because of its failure to keep such promise the consideration for the purchase failed in part, entitling her to rescind her contract; and, third, she pleaded a common count for money had and received.

The trial court found in accord with plaintiff's allegations on the first count, but further found that she had waived the fraud by

217 Cal. 225

WOLCOTT v. SALYER et al.

L. A. 13048.

Supreme Court of California.

Jan. 12, 1933.

Judgment ¶743(3).

Money judgment in action to declare trust in stock held not res judicata in action against another defendant to quiet title thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Timothy S. Wolcott, administrator de bonis non of the estate of Nelson A. Wolcott, deceased, against Edith Salyer, also known as Edith S. Leonard, and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Clay & Handy and Tanner, O'Dell & Taft, all of Los Angeles, for appellant.

James Westervelt, of Los Angeles, for respondents.

PRESTON, J.

This record presents solely the contention that a certain prior judgment between the same parties is res judicata of the issue in the present case. We cannot agree with this contention, and a reversal of the judgment is re-

quired. The only facts necessary to a consideration of this issue are:

That on January 5, 1929, plaintiff estate began in the superior court of Los Angeles county an action, No. 268951, against the defendants Leroy Leonard et al. to declare an involuntary trust in some corporate stock or, in the alternative, to have a money judgment on a common count in the sum of \$10,000. During the pendency of the action plaintiff amended its complaint, making defendant Edith Salyer, also known as Edith S. Leonard, a party defendant, and charging the transfer of the corporate stock in question to her by the other defendant, a transfer not noted in the corporate books, and further alleging that the transfer was without consideration and in fraud of plaintiff's rights. This incoming defendant answered with a plain denial but no affirmative allegations of ownership of stock. The cause proceeded to trial. We have only the judgment roll before us, from which it appears that evidence, oral and documentary, was received, findings of fact made, and judgment given. The judgment of the court, however, determined only the issue of indebtedness, and was in favor of plaintiff and against the defendant in the sum of \$10,000, dismissing defendant Salyer and all other defendants from the action.

The question is thus narrowed to whether this judgment estops plaintiff from pursuing defendant Salyer with reference to the title to said stock. The further facts are that on the judgment rendered in the first action, plaintiff sought and obtained a writ of execution, levied same upon the interest of said defendant Leroy Leonard in said stock, exposed same for sale, and became the purchaser thereof, and upon this basis brought the present action to quiet title thereto against defendant Salyer. Said defendant pleaded in bar of the action and as *res judicata* the judgment roll we have just above described. The court approved this plea and upon that, and that alone, gave judgment in favor of defendant and against plaintiff in the present action.

It is our conclusion that not only is the judgment in the former action not conclusive as to ownership of the stock as against plaintiff, but that a consideration of the findings in said cause would indicate that the court was of the view that the said Leroy Leonard owned the stock and not the defendant Salyer. But be that as it may, one thing is clear, and that is that the court in the trial of the former action gave consideration to and disposed of only the issue of the indebtedness of Leroy Leonard to plaintiff estate and declined to dispose of the issue as to the ownership of said stock.

There is therefore nothing to hinder plaintiff from pursuing its cause of action here to a final determination thereof, and, if it should

appear therein that said Leroy Leonard is the true owner of said stock, we can see no reason why it may not be so properly declared.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; TYLER, Justice pro tem.

217 Cal. 219
RISSO v. CROOKS et al.
S. F. 14625.

Supreme Court of California.
Jan. 12, 1933.

1. Taxation ⇨696.

Law at time of tax sale governs right of redemption.

2. Taxation ⇨745.

Where no tax deed was made to state at time of tax sale, as required by statutes then in force, deed under subsequent statute to purchaser from state *held* void (St. 1895, p. 327 et seq., as amended by St. 1913, p. 557; St. 1909, p. 921).

3. Adverse possession ⇨41.

Attempted inclosure made by plaintiff in year in which he filed action to quiet title *held* too late to support claim of adverse possession under color of title (Code Civ. Proc. § 323, subd. 2).

4. Appeal and error ⇨1073(1).

In quiet title action, affirmative relief decreed defendant, even if erroneous because not prayed for, *held* not prejudicial to plaintiff, and was considered mere surplusage.

Decreeing that defendant's title under tax deed was quieted as against plaintiff's was not prejudicial to plaintiff, though defendant's answer set up only claim of fee-simple title to the property without setting up any elements of cross-complaint, and made no prayer for affirmative relief, since court's purpose in adding such clause to judgment was to benefit plaintiff in securing award to him of money which he had expended for taxes on the property.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by E. Rizzo against Samuel R. Crooks and others. From the judgment, plaintiff appeals.

Affirmed.

Thomas T. Califro and Stanley H. Rich, both of San Francisco, for appellant.

Marcus D. Wolff, of Berkeley, for respondents.

PRESTON, J.

Action to quiet title commenced in 1923 but not tried until January, 1931. The title alleged by plaintiff was based upon a purported tax deed and an attempted showing of adverse possession. Defendant Stone Company, hereinafter denominated defendant and respondent, answered asserting fee-simple absolute title to the property. The court found that the purported tax deed was void; that adverse possession was not established, but that plaintiff was entitled to be reimbursed by defendant for the sum of \$2,411.80, which he had paid out in taxes and interest on the property. Judgment followed, decreeing that upon payment of said sum defendant's claim to said property should be quieted and plaintiff should be forever enjoined from asserting any right adverse thereto. Plaintiff appealed.

[1, 2] The appeal is without merit. The record shows only clear and undisputed facts in support of the judgment. The property was originally sold to the state in 1908, but no deed was made to the state as required by statutes then in force. St. 1895, p. 327 et seq.; St. 1909, p. 921. Instead, the tax collector followed the procedure prescribed by the amendments of 1913 (St. 1913, p. 557), and on July 7, 1914, issued to appellant a purported tax deed covering sale of the property for delinquent taxes thereon for the year 1909. This tax deed was void as the law existing at the time of the sale first above mentioned controls the period of redemption. *Johnson v. Taylor*, 150 Cal. 201, 205, 88 P. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. This authority is cited in *Blaggi v. Ramont*, 189 Cal. 675, 679, 209 P. 892, a case directly in point, to which reference is made for a fuller discussion of the subject. This holding was not impaired by the later case of *Jacoby v. Wolff*, 198 Cal. 667, 247 P. 195, as that case involved an assessment sale and other proceedings, all occurring subsequent to the act of 1913, which set up an alternative method of disposing of property delinquent for taxes for five years.

[3] Considering the purported tax deed in connection with other evidence offered to support appellant's claim of adverse possession under color of title, we likewise find the

conclusion of the court below to be correct. The property consisted of some sixteen acres of tidelands. Appellant stated that he visited it once in November, 1918, and walked on it alone; that he next went on it in July, 1923, and stayed four hours, during which time he fenced the property, driving posts from 50 to 75 feet apart and placing two wires around them; that he again visited the place in 1926 and found no trace of the fence, although some surveyor's stakes remained. This testimony was evidently given with a view to invoking subdivision 2 of section 323 of the Code of Civil Procedure, defining adverse possession under written instrument where the property "has been protected by a substantial inclosure." But even if we could credit appellant's statement that in four hours he and a surveyor located boundaries and fenced over sixteen acres of ground, nevertheless this attempted and apparently insubstantial inclosure came too late, because the original complaint in this action and respondent's answer thereto were filed in 1923, thus putting the title, as between these parties, in issue, and precluding appellant thereafter from claiming an adverse possession against respondent.

[4] Appellant objects that the judgment renders respondent affirmative relief in decreeing that its title "is hereby quieted as against said plaintiff. * * *" Appellant urges that the court had power to decide that he was not the owner of the land but that it had no power to render an affirmative judgment establishing the title of a defendant whose answer contained none of the elements of a cross-complaint and no prayer for affirmative relief. *Hungarian, etc., Co. v. Moses*, 58 Cal. 168. It is true that the answer set up only a claim of fee-simple title to the property, but the record shows that the purpose of the court in adding the clause in question at the close of the judgment was to benefit appellant in securing the award to him of the money which he had expended for taxes on the property. To this course appellant raised no objection, and obviously he has suffered no prejudice in any of his substantial rights; hence, the insertion in the judgment, if erroneous, was no more than mere surplusage. *Warden v. Stoll*, 210 Cal. 374, 291 P. 835.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

217 Cal. 223

**ELM et al. v. SACRAMENTO SUBURBAN
FRUIT LANDS CO. et al.**

Sac. 4616.

Supreme Court of California,

Jan. 12, 1933.

1. Judgment ☞622(2).

Vendor's claim for balance due in purchaser's specific performance suit *held* waived by prior adjudication in damage suit, wherein defendant made no counter demand for such balance.

2. Judgment ☞713(2).

Judgment is conclusive in other actions between parties on matters which were or might have been previously litigated.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Charles J. Elm and another against the Sacramento Suburban Fruit Lands Company and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, and Arthur C. Huston, of Woodland, for appellants.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for respondents.

PRESTON, J.

Appeal by defendants from judgment for plaintiffs in an action for specific performance of a contract to convey real property. Plaintiffs alleged that they had paid in full for said property, and were entitled to a conveyance thereof from defendants. Defendants admitted the contract and part payment of the purchase price, but denied that the balance of said price, amounting to some \$640, had been paid. Upon the trial plaintiffs introduced in evidence the entire transcript of the record in a prior action brought by them in the federal court against defendant lands company for damages for fraud and deceit in inducing said contract. Plaintiffs there claimed that said defendant falsely represented the land as rich, fertile, productive, and adapted to the raising of fruit trees; they further alleged that, relying upon such false representations, they contracted to purchase the property for \$2,750, and paid \$2,110 on account of the purchase price; they also greatly improved the property and endeavored to grow fruit trees thereon, but such effort was unsuccessful, due to the condition of the soil. The prayer of the complaint was for \$9,000 damages and for other relief. Defendant in said prior action answered,

but made no counterdemand for the balance due on the purchase price. The jury, being fully apprised in the premises, returned a verdict for plaintiffs in the sum of \$1,940; judgment was rendered accordingly and affirmed on appeal [Sacramento Suburban Fruit Lands Co. v. Elm et al. (C. C. A.) 29 F.(2d) 233].

[1, 2] Upon the showing so made, the court in this cause, as above stated, gave judgment for plaintiffs, and defendants have appealed, urging that their claim to the balance of said purchase price was not waived by said prior adjudication.

With this contention we cannot agree. To this situation is clearly applicable the well-established rule that " * * * a judgment between the same parties is conclusive not only as to the subject-matter in controversy in the actions upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were met and decided. * * *" Bingham v. Kearney, 136 Cal. 175, 177, 68 P. 597. See, also, Price v. Sixth District, 201 Cal. 502, 511, 258 P. 387, 391, where the court, citing 15 Ruling Case Law, § 446, pp. 969, 970, says: "The judgment operates as res judicata, not only in regard to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded. * * *" Further discussion is unnecessary.

The judgment is affirmed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

217 Cal. 222

**Adam MORTON, Plaintiff and Respondent, v.
Nanette M. OSTLUND and Helgar L. Ostlund et al., Defendants and Appellants.**

L. A. 13533.

Supreme Court of California.

Jan. 12, 1933.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Floyd M. Hinshaw, of Los Angeles, for appellants.

C. P. Von Herzen, of Los Angeles, for respondent.

PRESTON, J.

Appeal from an order made December 24, 1931, appointing a receiver.

The main action was to foreclose a mortgage upon a tract of real property of three acres, with a dwelling and peach orchard thereon. A decree of foreclosure was made December 16, 1931. The mortgage was for \$10,000. The appraised value of the property and improvement was \$7,000.

The court, on a showing by affidavit and upon a report of the appraisers, gave and made the order in question. No counter showing was made.

Plainly it is a case where the discretion of the court may not be overthrown. The chief complaint of appellants is that there is little or nothing to be done by a receiver. The orchard is dying and worthless, and the house is in a bad state of repair. But perhaps the receiver might rent the place or prevent waste.

It is useless to indulge an appeal in a case like this where default is admitted and the insufficiency of the security is plain, and the more useless where, as here, the mortgage covers the rents, issues, and profits of the property.

The order is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; TYLER, Justice pro tem.

128 Cal.App. 538

IVERSON et al. v. ROBERTS.

Civ. 1000.

District Court of Appeal, Fourth District,
California.

Jan. 4, 1933.

1. Specific performance ☞121(3).

In purchasers' suit for specific performance of contract whereby owner's sister and husband agreed to sell property which owner had deeded to sister, evidence justified finding that owner knew of contract.

2. Specific performance ☞126(3).

In specific performance suit, judgment properly awarded purchasers possession, although issue was not formed by pleading.

3. Equity ☞39(1).

Equity, having acquired jurisdiction, will settle all controversies between parties that it can reasonably do, to avoid unnecessary litigation.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by E. Iverson and another against Louise J. Roberts and another. From a judgment for plaintiff and an order fixing the amount of a stay bond, defendant named appealed, and, pending the appeal, defendant named died, and J. H. Roberts, as administrator of her estate, was substituted in her place and stead.

Affirmed.

Wheeler & Wackerbarth, of Los Angeles, for appellant.

Howard F. Shepherd, of Los Angeles, for respondents.

MARKS, J.

Louise J. Roberts, originally one of the defendants in this action, died pending this appeal and J. H. Roberts, as the administrator of her estate, has been substituted in her place and stead.

This is an action for specific performance of a written agreement whereby Minnie L. Goodbub and J. H. Roberts agreed to sell, and E. Iverson and Inga Iverson agreed to buy, an apartment house and its furnishings for \$25,000. The contract was made on or about September 20, 1928, and was in the form of escrow instructions signed by Mr. and Mrs. Iverson and Minnie L. Goodbub and J. H. Roberts. The purchasers deposited the full amount of the purchase price with the escrow agent, and Minnie L. Goodbub deposited a deed conveying title to the real estate to them. The escrow was extended for a number of months to enable the sellers to clear a cloud on the title. On March 20, 1929, Minnie L. Goodbub conveyed the real property to Louise J. Roberts, and these two, with J. H. Roberts, gave written notice of the termination of the escrow and demanded the return of the instruments deposited by them. Thereupon this action was instituted to compel the specific performance of the contract of sale.

The evidence discloses that J. H. Roberts and Louise J. Roberts were husband and wife, and that Mrs. Roberts and Minnie L. Goodbub were sisters. The three lived at the apartment house in question, which was owned by Mrs. Roberts. She owed her sister about \$1,300 and deeded the property to her some time prior to September 20, 1928; Minnie L. Goodbub holding the record title until March 20, 1929.

The property was listed for sale with F. H. Steeves. Mrs. Roberts did not sign the listing. The realtor procured Mr. and Mrs. Iverson as purchasers of the property. They went to the apartment house at least twice to look it over and saw Mrs. Roberts there. She was present at a conversation between the realtor, her sister, and her husband when the amount

of the commissions to be paid for the sale of the property to Mr. and Mrs. Iverson was discussed. She was present in a small office of the escrow holder when the deed was prepared and signed by Minnie L. Goodbub and the sale discussed by her sister, her husband, and the escrow officer. She testified she did not know of the proposed sale.

The trial court found all necessary facts in favor of Mr. and Mrs. Iverson; that Minnie L. Goodbub was the agent of Mrs. Roberts and that Mrs. Roberts was estopped from denying the agency; that the Iversons had no notice of any claim to or interest in the property on the part of Mrs. Roberts. Judgment was rendered ordering the specific performance of the contract, the cancellation of the deed from Minnie L. Goodbub to Mrs. Roberts, ordering the escrow holder to deliver the deed from Minnie L. Goodbub to the Iversons, quieting title to the Iversons, and ordering that they have possession of the property.

[1] Appellant presents many specifications of error. The great majority of them attack findings as not supported by the evidence. These contentions are principally based on Mrs. Roberts' testimony that she had no knowledge of the sale to respondents. From what has been said it appears that the trial court was amply justified in finding that she did know of this transaction.

[2, 3] Appellant complains that the judgment went beyond the issues formed by the pleadings in awarding respondents possession of the property. The action was equitable in its nature. It is the policy of equity that it once having acquired jurisdiction it will settle all the controversies between the parties that it can reasonably do, so as to avoid unnecessary litigation. As was said in *Newport v. Hatton*, 195 Cal. 132, at page 153, 231 P. 987, 995: "In this action the right to the accounting, and any rights appellants may be found to have in the proceeds of the sales, depend upon the determination of the main issue. If appellants fail there, their whole cause fails for want of a foundation. The case seems to present, therefore, a proper situation for the application of the rule that where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation. *Swan v. Talbot*, 152 Cal. 142, 145, 17 L. R. A. (N. S.) 1066, 94 P. 238; *Barber v. Superior Court*, 43 Cal. App. 221, 224, 184 P. 952."

After the notice of appeal from the judgment had been filed, appellant sought to have the trial court fix the amount of a stay bond. Appeal was taken from an order fixing the

amount of the bond at \$5,000. The decision of the question presented by the appeal from this order has become unimportant because of the decision of the questions presented on the appeal from the judgment.

Judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

SMITH v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE. *

Civ. 8600.

District Court of Appeal, First District,
Division 2, California.

Dec. 28, 1932.

Hearing Granted by Supreme Court Feb. 24, 1933.

1. Insurance ⇨152(3).

All provisions of city ordinance, under which jitney bus liability insurance policy was executed, form part of insurance contract.

2. Insurance ⇨435.

City ordinance, requiring jitney bus liability insurance policies, held not to show that policy covered casualties occurring while insured was driving automobile, used as jitney bus at times, to work.

3. Insurance ⇨150.

Rider materially limiting subject-matter of paragraph in insurance policy is controlling.

4. Insurance ⇨435.

Jitney bus liability insurance policy held not to cover damage caused by described automobile while being driven from insured's home to authorized route to begin work.

One paragraph of policy provided for indemnification of insured against loss from liability for damages because of bodily injuries accidentally suffered by persons not in insured's employ as direct result of his ownership, use, or maintenance of described automobile, but attached rider provided that policy should not cover accident occurring while car was being operated otherwise than in insured's service as jitney bus and occasional rent car.

5. Insurance ⇨612(2).

Failure of one hit by jitney bus to give owner's insurance carrier's attorney in fact 30 days' written notice of intention to bring suit against it did not bar recovery (St. 1921, p. 1599).

6. Trial $\S$ 171.

Court's power to direct verdict for defendant for insufficiency of evidence is same as right to grant nonsuit at conclusion of evidence.

7. Appeal and error $\S$ 176(6).

Error in denying directed verdict for defendant may be corrected on appeal by ordering judgment for defendant.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Vina Smith against the California Highway Indemnity Exchange. Judgment for plaintiff, and defendant appeals.

Reversed, with direction.

John Ralph Wilson and Carl E. Day, both of San Francisco, for appellant.

Daniel A. Ryan, and Thos. C. Ryan, both of San Francisco (Geo. F. Snyder, of San Francisco, of counsel), for respondent.

STURTEVANT, J.

The plaintiff was injured by being hit by a jitney bus. She commenced an action against the driver, who was also the owner of the jitney bus, and recovered a judgment. The defendant appealed from that judgment, but it was affirmed. *Nicol v. Davis*, 107 Cal. App. 26, 290 P. 114. When the remittitur went down the plaintiff commenced an action against the defendant as the insurance carrier of the owner of the jitney bus. The case was tried before the trial court sitting with a jury. After all of the evidence had been introduced, the defendant made a motion that a verdict be directed in its favor. The motion was denied. Thereupon the plaintiff made a motion that a verdict be directed in her favor. It was granted, and on that verdict judgment was entered. From that judgment the defendant has appealed. It makes two points. It claims that the accident was not covered by the policy, and it also contends that the plaintiff did not comply with the provisions of the policy. We will discuss those points in the order stated.

On April 29, 1915, the board of supervisors of San Francisco enacted Ordinance No. 3212 N. S. By the terms of that ordinance a jitney bus was defined, and it was provided that before any person could operate a jitney bus he must apply to the policy commissioners for a permit. It was also provided that the owner should execute a bond or obtain an insurance policy as a condition precedent to the transaction of the business of operating a jitney bus. Some of the provisions of the ordinance follow:

"Section 1. A jitney bus is hereby defined to be a self-propelled motor vehicle, other

than a street car, traversing the public streets between certain definite points or termini and conveying passengers for a fixed charge of not more than ten (10) cents between such and intermediate points, and so held out, advertised, or announced. A jitney bus is hereby declared to be a common carrier and is subject to the regulations herein prescribed. * * *

"Section 4. In order to insure the safety of the public, it shall be unlawful for any person to drive or operate such jitney bus or to obtain a permit therefor unless he shall have given and there is in full force and effect at all times while such person is driving and operating such jitney bus on file with the Police Commission * * * (b) a policy of insurance in a company authorized to do business in the State of California, insuring said owner or lessee of said jitney bus against loss by reason of damage that may result to any person or persons or property from the operation of said jitney bus, * * *

"Said policy shall guarantee payment of any final judgment rendered against the said owner or lessee of said jitney bus within the limits herein provided, irrespective of the financial responsibility or any act of omission of said jitney bus owner or lessee. * * *

"Section 8. * * * (d) To drive or operate any motor bus unless there is displayed upon the wind-shield, or other prominent or fixed portion of said motor bus, words, in letters at least three (3) inches in height and one-half ($\frac{1}{2}$) inch wide and plainly written so they may be distinctly seen and read, showing that such vehicle is a jitney bus. Such sign shall be approved by the Board of Police Commissioners and the Chief of Police. * * *

"Section 19a. All jitney buses shall carry signs on which shall be displayed the route to be traversed and termination thereof, and all buses shall run to the termination so stated.

"Section 23. Any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred (100) dollars or by imprisonment in the County Jail for a period of not more than three (3) months, or by both such fine and imprisonment."

The jitney bus routes were not prescribed by ordinance, but were prescribed by the chief of police. Four had been so designated. Ray H. Davis had been authorized to operate on the one which extends from the Ferry to Twenty-Ninth and Mission. He lived at 311 Jersey street and kept his car in a garage at that place, which is six blocks away from the said route. Immediately before the accident he had been at his home and was

in the act of leaving for his work. He had no passenger. He did not have displayed a sign "jitney bus." He did not have displayed a sign "Ferry" or "Twenty-ninth and Mission"; but he had such signs in his car. Within a half block of his home and six blocks from his route the accident occurred. Reciting the foregoing facts, the defendant asserts that the accident did not come within the provisions of its contract.

The defendant is organized as a reciprocal exchange. Stats. 1921, p. 1599. Its members are called subscribers. The business is transacted by an attorney in fact. After the permit was granted to Ray H. Davis, the defendant executed and filed its policy with the police commission. In form the policy was made up as follows: Originally it consisted of one sheet containing much printed matter, a blank space after the words "Special Agreements," and blanks for the place and date thereof. To that sheet there was attached a rider, "Endorsement ——— S. F. Jitney rent effective April 28, 1924." It recited that it was "attached to and forming a part (when countersigned and dated by an authorized agent) of Policy No. 4150." It was duly dated and signed. It was attached immediately after the words "Special Agreements." Immediately on top and attached in the same manner was another document, "Special Agreements." It was likewise dated and signed. Still on top and attached in the same manner was a document "Certificate No. 555" and containing a passage, "We are today accepting coverage on Chandler, License 103-651 Eng. 122885. Policy is now being written and will be forwarded to you covering as per requirements of Ordinance No. 3212 new series of the City and County of San Francisco." It was likewise dated and signed. Among other things it contained the following passages:

"Subscribers at California Highway Indemnity Exchange * * * do hereby agree to indemnify the subscriber named herein: In consideration of the stipulations enumerated in the Schedule of Warranties attached hereto, subscribers at California Highway Indemnity Exchange do hereby severally agree to indemnify the subscriber named herein against the hazards covered by the Special Agreements: File—Police Commission San Francisco Special Agreements S. F. Jit-Rent End Att Injuries to persons. (a) Against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered * * * while this contract is in force, by any person or persons, not in the employ of the subscriber, resulting directly from the ownership, use or maintenance of any automobile described in the schedule herein contained. This contract shall cover such injuries so sustained wherever any automo-

bile covered hereby may be in the service of the subscriber. * * *

"Schedule of Warranties, Contract No. 4150.

"(j) The following Warranties are hereby made a part of this contract and are acknowledged and warranted by the subscriber to be true on acceptance of this contract: * * * Subscriber is Individual Business Jitney Bus and Occasional Rent Car.

"(k) The uses to which the automobiles described are to be put Jitney Bus and Occasional Rent Car. * * *

"Endorsement—S. F. jitney rent effective April 28, 1924. Notwithstanding any or all expressions inconsistent with or contrary thereto in this policy contained, it is expressly understood and agreed that the car mentioned in the attached schedule is to be operated in the service of the subscriber as a jitney bus and occasional rent car service for a slightly elevated fare, within the city and county limits of the city of San Francisco, California, and not elsewhere or otherwise, and that this policy is not intended to, and shall not cover any accident that occurs while said car mentioned in the schedule attached hereto is being operated for any other purpose or at any other time or place than herein stated, but it is intended that this policy shall cover said car when used as in this paragraph provided. * * * Attached to and forming a part * * * of Policy No. 4150 issued by the California Highway Indemnity Exchange, Los Angeles, California, to R. H. Davis of San Francisco, California." (Duly signed.)

The foregoing paragraphs, excepting the last one, are copies of the body of the contract, but the last paragraph is a copy of a portion of a rider, evidently the same document above referred to "S. F. Jit-rent End. Att."

[1, 2] As the policy sued on was executed in compliance with the provisions of Ordinance No. 3212, all of the provisions of that ordinance which are applicable form a part of the contract. *Marshall v. Wentz*, 28 Cal. App. 540, 542, 153 P. 244, 32 Cal. Jur. 1162. Considering the facts in connection with the provisions of the ordinance, it is clear that as Davis, the owner and operator of the automobile, drove it away from his door it was not a jitney bus; but it was an automobile. At that time it was not "conveying passengers for a fixed charge of not more than ten (10) cents between such intermediate points, and so held out, advertised, or announced." When an automobile is being operated but not as a jitney bus it is subject to the general laws; but when it engages in the business of a jitney bus it also becomes subject to the special laws applicable to a jitney bus. *Ex parte Counts*, 39 Nev. 61, 153 P. 93, 96. Reg-

ulations such as Ordinance No. 3212 are enacted because of the increased dangers to the general public in the operation of jitney busses. In re Cardinal, 170 Cal. 519, 150 P. 348, L. R. A. 1915F, 850; Memphis v. State ex rel. Ryals, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, 1154, Ann. Cas. 1917C, 1056. The requirements as to giving bonds or taking out insurance by operators of automobiles in general is contained in the California Vehicle Act (section 36½ [as added by St. 1929, p. 563, § 1]). That statute was not enacted until some years after the plaintiff was injured. But there is nothing on the face of Ordinance No. 3212 to the effect that one who owns an automobile that is at times operated as a jitney bus should be required to take out insurance or furnish a bond covering casualties occurring while he was going to or returning from his work. We think it is clear, therefore, that there is nothing on the face of the ordinance showing, or tending to show, that it was the intention of its framers that the plaintiff's claim should be covered by the bond or insurance policy required by section 4 of the ordinance.

[3, 4] Examining the provisions of the policy in connection with the provisions of the ordinance, we reach the same conclusion. Before the rider was attached the frame of the policy was so general that the plaintiff could have asserted the claim she now makes. Paragraph (a) was broad enough to sustain her. The rider materially limits the subject-matter of that paragraph, and it is the controlling provision. 32 Cal. Jur., 1159, 1160. Its language is so clear as to leave no doubt that the defendant did not assume any responsibility for damage caused by the Davis automobile when it was not operating as a jitney bus. That conclusion is re-enforced by all of the other passages except paragraph (a), which was materially limited by the rider. If on a certain day Davis was transacting no business but was entertaining his family, and while so driving the automobile an injury occurred, it would not be claimed that the defendant would be liable. The fact that the recess did not extend over a day but lasted only a few minutes does not change the reasoning. The difference is a matter of degree, but the principle remains

the same. In the case entitled Interstate Casualty Co. of Birmingham v. Martin, 234 S. W. 710, the Court of Civil Appeals of Texas was called upon to determine a very similar controversy. The insurer in that case made the same contentions which the insurer makes in this case. Speaking of those contentions, at page 712, the court said: "That being the undisputed evidence, the contention of appellant must be sustained, for to do otherwise would be to ignore and set aside the solemn terms of a contract made in consonance with law, and to read into it conditions and liabilities never agreed to nor contemplated by the parties to the contract. [Citing many cases.]" See, also, U. S. Fidelity & Guaranty Co. v. Baldwin Motor Co. (Tex. Com. App.) 34 S.W.(2d) 815.

[5] The defendant's second point that plaintiff did not comply with the policy rests on the fact that before commencing this action she did not give the attorney in fact thirty days' notice in writing of her intention to bring the suit. The point has no merit. In different places the policy provides: (1) That actions may be brought against the exchange; (2) that other actions may be brought against the attorney in fact; and (3) that other actions may be brought against two or more of the subscribers. The provision regarding notice to the attorney in fact is contained in a passage concerning the third class of actions; but as will be noted by the title the instant case falls within the first class above designated.

[6, 7] From what we have said it follows that the trial court erred on a question of law when it denied the defendant's motion for a directed verdict. In this state it is settled law that the power of a court to direct a verdict is, touching the condition of the evidence, the same as its right to grant a nonsuit at the conclusion of the evidence. 24 Cal. Jur. 915. It follows that the error may properly be corrected by ordering judgment for the defendant.

It is therefore ordered that the judgment be reversed, and that the trial court be directed to enter judgment in favor of the defendant.

We concur: NOURSE, P. J.; SPENCE, J.

128 Cal.App. 534

EASTMAN v. RABBETH.
Civ. 647.

District Court of Appeal, Fourth District,
California.
Jan. 4, 1933.

1. Automobiles ⇨244(6).

Evidence supported jury's implied finding that motorist, striking pedestrian crossing intersection, was guilty of negligence proximately causing accident.

2. Automobiles ⇨244(50).

Evidence supported jury's implied finding that pedestrian struck by automobile while crossing intersection was free from contributory negligence.

3. Automobiles ⇨160(1).

Motorist driving over city street must anticipate presence of pedestrians and keep machine under control enabling him to avoid collision with another using proper care.

4. Automobiles ⇨242(8).

In absence of contrary evidence, it must be presumed that pedestrian struck by automobile used ordinary care for his safety and that in so doing he looked.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Thomas S. Eastman against W. E. Rabbeth. From a judgment for plaintiff, defendant appeals.

Affirmed.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

Burton E. Hales, of Redlands, for respondent.

MARKS, J.

This is an appeal from a judgment for damages suffered by respondent, who, on November 30, 1930, was struck by an automobile being driven by appellant on a public street in the city of Redlands.

We are not assisted by the testimony of any eyewitness of the accident. Respondent, who was of the age of seventy-eight years, was rendered unconscious by the accident and only remembered that he had been walking on a public street in the city of Redlands. Appellant did not testify. After the accident, he was adjudged insane and had not been restored to competency at the time of the trial. While the record is incomplete in this respect, we assume from the allegations of the answer that he was represented by a guardian ad litem regularly appointed by the trial court.

The accident happened at or near the inter-

section of Cajon and Vine streets in the city of Redlands. Cajon street runs in a north-westerly and southeasterly direction. Vine street runs due east and west. Cajon street is fifty feet wide between curbs with cement sidewalks fifteen feet in width on each side. A single-track line of a street railway runs along its center. At the southeast corner of the intersection the south curb of Vine street joins the easterly curb line of Cajon street on a broad return curve. At about the point where this curb joins the curb on Cajon street there is a palm tree just inside the curb line and an electroller about four and one-half feet northerly from the palm. Another palm and electroller are similarly situated directly across from them on the westerly side of Cajon street.

Police officers of the city of Redlands appeared on the scene of the accident immediately after it happened. They found respondent lying on the pavement, his body in a line diagonal to the railroad tracks, his head ten feet six inches easterly from the center line of Cajon street and about six inches to the rear of the front bumper and slightly to the west of the left front fender of appellant's automobile, which had been turned somewhat towards the easterly curb of this street. From this evidence we take it appellant was driving northerly on Cajon street at the time of the accident. There were cuts and abrasions on respondent's face but not on any other part of his head.

The only other evidence bearing upon the manner in which the accident happened were the somewhat conflicting statements made by appellant. He stated he was driving at about fifteen miles per hour and did not see respondent in time to avoid hitting him. He also stated that respondent stepped out from behind a palm tree. We are not informed which of the two palm trees already mentioned he referred to in making this statement and cannot determine in which direction respondent was proceeding across Cajon street at the time of the collision.

The accident must have happened at a point more than fourteen feet six inches westerly from the easterly curb line of Cajon street and the palm tree on that side of the street and more than twenty-five feet easterly from the westerly curb line and the palm tree there.

We know that few vigorous men walk as fast as five miles an hour, or one-third the speed at which appellant said he was traveling. If respondent was crossing Cajon street in a westerly direction, appellant must have been forty-five feet or more from him when he stepped from the curb line into the roadway. If respondent was walking in an easterly direction, appellant must have been more than seventy-five feet from him when he entered the roadway.

If appellant saw respondent step from behind one of the palm trees into the roadway, he should have realized at that time that there was danger of an accident happening. If he did not see respondent until just before the impact, he could not have been watching the roadway over which he was traveling.

[1, 2] Appellant relies upon two grounds for a reversal of the judgment. He maintains that the evidence fails to show him guilty of any negligence and shows respondent guilty of contributory negligence as a matter of law. We have concluded that the evidence supports the implied finding of the jury that appellant was guilty of negligence that proximately caused the accident and that respondent was free from contributory negligence.

[3] It is the duty of a driver propelling his automobile over a street of a city to anticipate the presence of pedestrians upon the roadway over which he is traveling and "he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop." *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, at page 100, 239 P. 700, 715, 41 A. L. R. 1027.

[4] The question of the contributory negligence of respondent is settled by the case of *Tieman v. Red Top Cab Co.*, 117 Cal. App. 40, 3 P.(2d) 381, 383, where it is said: "In absence of contrary evidence, it must be presumed that he [the injured party] used ordinary care for his own safety, and that, in so doing, he looked."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App. 544

In re DONOHUE'S ESTATE.
Civ. 8859.

District Court of Appeal, First District,
Division 1, California.
Jan. 6, 1933.

1. Husband and wife $\S$ 262(1).

Unless presumption that property acquired after marriage is community property is controverted, court or jury is bound to find according to presumption (Civ. Code, $\S$ 164).

2. Husband and wife $\S$ 264.

One seeking to overcome presumption of community property must produce evidence

which would ordinarily produce conviction in unprejudiced mind (Civ. Code, $\S$ 164).

3. Appeal and error $\S$ 1010(1).

Sufficiency of evidence to establish fact is primarily for trial court, and, if there is substantial evidence supporting its conclusion, finding is not open to review.

4. Husband and wife $\S$ 264.

Evidence held to support judgment that property listed as assets of estate of deceased wife was her separate property (Civ. Code, $\S\S$ 162, 163).

5. Appeal and error $\S$ 1010(1).

There being substantial evidence supporting trial court's conclusion that property was separate property of deceased wife, its judgment was binding on appellate court (Civ. Code, $\S\S$ 162, 163).

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

The administrator of the estate of Annie Donohoe, deceased, filed his account showing the estate was ready for distribution, and James R. Boyle and others, heirs of Annie Donohoe, deceased, filed their petition to have the estate distributed to them, and Peter Donohoe and others, heirs of Thomas Donohoe, also filed a petition asking that distribution of one-half of the property be made to them. The court rendered judgment in favor of the heirs of Annie Donohoe, and the heirs of Thomas Donohoe appeal.

Affirmed.

William M. Stafford and Carey Van Fleet, both of San Francisco, for appellants.

Tinning & Delap, of Martinez, for respondents.

JAMISON, Justice pro tem.

Appellants are the heirs of Thomas Donohoe, deceased, and respondents are the heirs of Annie Donohoe, deceased. Thomas and Annie Donohoe were married on October 29, 1881, and continued to live together as husband and wife until May 21, 1924, when Thomas Donohoe died intestate. No administration upon his estate was ever had. Annie Donohoe died intestate on April 22, 1929. An administration was had upon her estate which resulted in the present contest.

The administrator filed his account showing that said estate was ready for distribution. Thereupon the heirs of Annie Donohoe filed their petition to have said estate distributed to them, alleging that the whole of said estate was the separate property of Annie Donohoe. The heirs of Thomas Donohoe also filed a petition setting forth that the whole of said estate, except a small piece of

real estate which they concede was the separate property of Annie Donohoe, was the community property of said spouses, and asking that distribution of one-half of said community property be made to them.

The trial court rendered a judgment in favor of respondents, holding that the whole of said estate was the separate property of Annie Donohoe, and from this judgment appellants have appealed.

The only question for determination on this appeal is whether or not the estate of Annie Donohoe was her separate property or was the community property of herself and her husband. It appears that, some time between the years 1881 and 1887, the record does not disclose just when, the Donohoes took up their residence at Hegewisch, Ill., and that they continued to reside there until 1903. In 1905 they came to California, stopping first in San Jose, and in 1907 located in Richmond, where they lived until their respective deaths.

Respondents produced three witnesses, one of whom, George Lee, testified that he is the administrator of Annie Donohoe's estate; that he became acquainted with the Donohoes in 1907; that he was then assistant cashier of the Bank of Richmond; that he did business for Annie Donohoe, but none for Thomas; that Thomas Donohoe was sickly and did no work. The Donohoes had a small place in Richmond upon which chickens were raised. In addition to this Annie Donohoe loaned money. She sold the chicken ranch and bought another place. Both of these places stood in her name. The loans were all made in her name. When witness suggested to Thomas that some one wanted a loan, he replied that the matter would have to be taken up with his wife, that it was all hers. At one time witness asked him if he had his affairs all fixed up, and he answered that it was all hers. Witness stated that, on one occasion when they were both in the bank and he asked Annie Donohoe if she wanted her husband's name on the loan papers, her husband spoke up and said that it all belonged to his wife.

James M. Jones testified that he was acquainted with Thomas and Annie Donohoe, knew them while they lived in Hegewisch, Ill., over a period of sixteen years; visited with them. When he first became acquainted with them the wife was operating a rooming house and the husband worked as a bricklayer. They then owned a two-story building, and they bought three or four cottages adjoining the two-story building. They sold this property for \$6,600 before coming to California. Witness came to Richmond, Cal., in 1903, and in 1907 the Donohoes came there. He says that he frequently visited them. Thomas Donohoe stated to witness several times that his wife had inherited some land near the town of Hammond, Ind.; that

Thomas Donohoe made statements on a number of occasions that the property all belonged to his wife. He said that when people asked him to loan them money he informed them that he had nothing and for them to see his wife about it. Witness further testified that the land Annie Donohoe inherited at Hammond, Ind., was the home place of her folks; that it consisted of either forty acres or twenty acres; he was informed that an offer of \$625 an acre was made for the place. Whether or not it was sold he could not say.

Mrs. Arretta Jones testified that she was the wife of James M. Jones; that she knew the Donohoes while they lived at Hegewisch, Ill., and after they came to California; that they were neighbors and visited each other often. Thomas Donohoe told her that the money with which they purchased the Hegewisch property came from the Hammond, Ind., land which Annie had inherited from her parents. He always claimed that all of the property belonged to his wife.

The assets of the estate of Annie Donohoe ordered to be distributed to her heirs amount to the sum of \$12,474.55, of which \$5,234.55 is cash, \$7,000 promissory notes secured by deeds of trust, and \$240 unsecured promissory notes, all of said notes and deeds of trust standing in the name of Annie Donohoe, and all of the deposits in the bank standing at all times in her name.

For their claim that the assets of the estate of Annie Donohoe are community property, appellants rely upon the presumption created by section 164 of the Civil Code. Sections 162 and 163 of said Code provide that all property owned by the wife or husband before marriage and that acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her or his separate property. All other property acquired after marriage by either husband or wife, or both, is community property. Section 164, Civ. Code.

[1] In *Re Estate of Jolly*, 196 Cal. 547, 238 P. 353, 355, the court said: "The disputable presumption raised by section 164, Civil Code, is a form of evidence under [the express terms of] section 1957, Code Civ. Proc. It may be controverted by other evidence, direct or indirect; but, unless so controverted, the court or jury is bound to find according to the presumption." *Stafford v. Martinoni*, 192 Cal. 724, 221 P. 919."

It has been frequently held that the presumption that the property acquired after marriage is community property can be overcome only by the production of clear and satisfactory proof that the property in question was the separate property of the wife. In *Re Estate of Jolly*, supra; In *re Estate of Rolls*, 193 Cal. 594, 226 P. 608.

[2] In *Freese v. Hibernia Sav., etc., Soc.*, 139 Cal. 392, 73 P. 172, 173, speaking of the

presumption created by said section 164, the court said: "We are of the opinion that it is incumbent on the party seeking to overcome the presumption of community property to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction in an unprejudiced mind, and that in the face of such evidence the naked presumption, unsupported by any testimony, must fall." In *re Estate of Pepper*, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092.

[3] "The sufficiency of the evidence to establish a given fact, even where the law requires proof of the fact to be clear and convincing, is primarily [as in other cases] a question for the trial court, * * * and, if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal." *Steinberger v. Young*, 175 Cal. 81, 84, 165 P. 432, 434; *Couts v. Winston*, 153 Cal. 686, 96 P. 357; In *re Estate of Coelho*, 119 Cal. App. 312, 6 P.(2d) 342.

[4, 5] Therefore the question for determination on this appeal is whether or not there is substantial evidence to support the judgment of the trial court, holding that the property in controversy was the separate property of Annie Donohoe. The undisputed evidence is to the effect that Annie Donohoe inherited from her parents their home place located at Hammond, Ind.; that the money with which the Donohoes purchased the Hegewisch property came from the property that Annie Donohoe inherited from her parents; that on many occasions, from the year 1887 until his death in 1924, Thomas Donohoe stated that all of the property of which they were possessed belonged to his wife; that he was failing in health when they came to California, and was unable to work and did no work from that time until his death; that his wife transacted all business and took all deeds, notes, and mortgages in her name alone, and that all deposits of money in the bank were made in her name; that there is no evidence that Thomas Donohoe was possessed of any means; that during the sixteen years they lived in Hegewisch he followed the trade of a bricklayer, but only engaged in working at that trade at intervals, and there is no evidence that he ever engaged in any other occupation. There was also evidence that the home place inherited by Annie Donohoe was of considerable value. It consisted of from twenty to forty acres, and at one time Annie was offered \$625 an acre for it. When it was sold, and for what amount, is not disclosed further than by the testimony of Mrs. Jones, who stated that Thomas Donohoe told her the Hegewisch property was bought with money that came from his wife's inheritance of her parents' home place.

Appellants rely largely upon the case of In

re Estate of Jolly, supra, for support of their contention that the assets of Annie Donohoe's estate are community property. An examination of the facts of that case will show that they differ materially from the facts proved in the instant case. In that case there was no evidence that the wife ever acquired any property by gift, bequest, devise, or succession, or that she ever owned or possessed any separate estate, or at any time engaged in any business or occupation of any kind except to perform her household duties. Under these circumstances the court could not do otherwise than hold that the presumption that the property was community property was not controverted by any substantial evidence.

In the case now under consideration we are of the opinion there is substantial evidence that the property listed as the assets of the estate of Annie Donohoe is her separate property. Such being the case, the judgment of the trial court, under the decisions heretofore cited in this opinion, is binding on this court. We consider it unnecessary to pass upon the point raised by respondents that there was a gift of the community interest of Thomas Donohoe to his wife.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 500

NATIONAL GYPSUM PRODUCTS CO. v.
BUTTONLATH MFG. CO.

Civ. 7518.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1932.

Rehearing Denied Jan. 30, 1933.

Hearing Denied by Supreme Court Mar. 1, 1933.

1. Patents $\S$ 214.

Licensee's failure to tender royalties due precluded termination of royalty contract providing for termination by licensee on 90 days' written notice and payment or tender of full amount of royalties then due.

2. Pleading $\S$ 236(1).

Granting or refusing motion to amend answer is discretionary.

3. Appeal and error $\S$ 959(1).

Court's ruling on motion to amend answer will not be disturbed on appeal, in absence of clear showing of abuse of discretion.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the National Gypsum Products

Company against Buttonlath Manufacturing Company. From an adverse judgment and from an order denying a motion to file an amended answer, defendant appeals.

Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

Lucien Gray, of Los Angeles, for respondent.

YORK, J.

This is an action to recover royalty—\$4,000 for the year June 3, 1928, to June 3, 1929, and \$1,000 for the quarterly period from June 3, 1929, to September 3, 1929—alleged to be due from defendant to plaintiff, under the terms of a contract entered into between the said parties under date of June 3, 1924. This contract provided for the sale by plaintiff to defendant of certain specified machinery and raw materials for the manufacture of tile, and for an exclusive license to defendant to use and manufacture plaintiff's patented machines. Under the terms of the contract, the license fees or royalties were graduated to the tile manufactured through the use of plaintiff's patents, to wit:

"Provided, further, that in no event shall the royalties to be paid to the Licensor herein by the Licensee, whether said royalties shall be derived from tile manufactured by the Licensee or from that manufactured by others to whom Licensee may give such right, be less than the following amounts per year: * * *

"Four Thousand Dollars (\$4,000) during the fifth year, and each year thereafter during the term of this contract."

It is for the royalty alleged to be due for the fifth year and royalty for an additional quarter period that the plaintiff prosecutes this action. The court denied relief for the "additional quarter," but the plaintiff does not appeal.

The answer asserted that the contract had been terminated by notice dated January 11, 1929; that all royalties due from defendant to plaintiff had been paid, and that defendant had fully complied with all the conditions in that behalf upon its part to be performed.

The contract provided for termination as follows:

"Fifth: This contract license may be terminated by either party hereto in the following manner under the following conditions, to-wit: * * * (b) By the Licensee, at any time during the term of the contract upon ninety (90) days written notice of intention to terminate; provided, however, that Licensee shall have no right to terminate as aforesaid unless the full amount of the royalties owing to Licensor have been paid in full, or any balance owing on account thereof

is tendered to Licensor, together with notice of intention to terminate."

The court found that, "except for the payment of the sum of \$3,147.30, on account of minimum royalty due under said agreement for the year commencing on the 3rd day of June, 1928, and terminating on the 2nd day of June, 1929, the defendant, at all times in the complaint mentioned, performed each and every provision of said agreement between the parties on its part to be performed.

"7. That neither at the time of service of said notice, nor at the expiration of ninety days thereafter, had defendant fully complied with all the conditions for the termination of the contract upon defendant's part to be performed; that neither at the time of the service of said notice, nor at the expiration of ninety days therefrom, did the defendant pay the full amount of the royalties owing to plaintiff or pay to plaintiff any sum or sums other than \$414 paid October 9, 1928, and \$438.70 paid January 11, 1929, nor did defendant tender to plaintiff any other or further sum or sums of money whatsoever."

Judgment was thereupon rendered in favor of plaintiff for the sum of \$3,312 and costs.

Defendant appeals from the judgment and also from the order of the court made on May 9, 1930, denying defendant's motion of May 13, 1930, for leave to renew its motion to file its amended answer to the complaint.

Upon this appeal, appellant makes the following contentions:

I. The minimum royalty as prescribed in the contract was payable annually and only in the event the contract was not terminated during the year.

II. The obligation to pay a minimum royalty was conditioned upon the use of the license equipment and patents throughout the year.

III. The court below erroneously excluded evidence offered by appellant.

IV. The court erroneously denied appellant's motion to amend its answer.

[1] The evidence shows that during the life of the contract the annual minimum payment was made annually at the close of the fiscal year, on or about July 1st of the next succeeding year. In between those times, the quarterly payments were made simply upon the tile actually manufactured and sold. It was also shown that the only payments made by defendant in the year beginning June 3, 1928, were \$414 on October 9, 1928, and \$438.70 on January 11, 1929. In order to terminate the contract, it was necessary that the defendant give the 90 days' written notice and pay or tender the full amount of royalties to date of termination. The contract bound the defendant to pay at least \$4,000 royalty for the year beginning June 3, 1928.

Since no tender of the amount due was

made, we are of the opinion that no termination of the contract was had during the year June 3, 1928, to June 3, 1929, and that the minimum royalty was payable at the end of said year.

We find nothing in the contract indicating that the obligation to pay the minimum royalty was conditioned upon the use of the license equipment and patents throughout the year.

We find no error in the exclusion of evidence offered by defendant. In each case the testimony was either immaterial or the question asked called for a conclusion of the witness.

[2, 3] As to alleged error of the court in its denial of appellant's motion to amend its answer, this is a matter which is purely discretionary with the trial court, and, in the absence of a clear showing of an abuse of discretion, will not be disturbed upon appeal.

The judgment is affirmed. The order is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

128 Cal.App. 563

BURR v. POLICY HOLDERS' LIFE INS. ASS'N.

Civ. 4705.

District Court of Appeal, Third District,
California.

Jan. 9, 1933.

1. Evidence ⇨14.

Court cannot judicially notice character of disease called milk leg.

2. Insurance ⇨665(3).

Although insured had disease called milk leg, evidence supported finding that insured was in good health as stated in application.

Evidence showed that disease in question had not prostrated insured, and that it bothered her but little; that from time to time she had ulcers on her leg, but only as result of injuries sustained from bruises or knocks; that such disease was local, as distinguished from organic or constitutional, and would not shorten life; and that such disease does not affect general health of patient.

3. Insurance ⇨291(5).

"Good health" within life policy or application does not mean perfect health, and insured is in good health unless affected with substantial attack of illness threatening life, or with malady having some bearing on general health.

The term "good health" is comparative, and does not depend on ailments which are merely slight and not serious in their natural consequences.

[Ed. Note.—For other definitions of "Good Health," see Words and Phrases.]

4. Insurance ⇨291(5).

Warranty that insured is in "good health" requires only ordinary and reasonable degree of health.

5. Insurance ⇨668(7).

Truth of warranty that insured is in good health is generally question for trier of fact.

6. Pleading ⇨250.

It appearing at trial of action on policy that, to pay claim, mutual insurance company would be required to assess members, permitting filing of amended complaint asking for judgment directing such assessment held not error.

Amended complaint did not change cause of action, but merely sought more complete relief, namely, aid of court in enforcing claim sued upon.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by William Clark Burr against the Policy Holders' Life Insurance Association, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hugh Martin Young, Charles D. Warner, and Thomas W. Hughes, all of Los Angeles, for appellant.

J. A. Pardee, of Susanville, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The statement of the question involved is given by appellant thus: "The main question agitated upon this appeal involves the doctrine of warranties as applied to the statements and representations made by an applicant for membership in a Mutual Benefit Association organized and operating under the provisions of 452a of the Civil Code of California."

The contention is that the insured in her application for insurance asserted statements as to her health and bodily condition which were in fact absolute and strict warranties as to matters about which she was making declaration, and which were false when made, as a consequence of which the warranties so made by her failed and the obligation of the insurer thereupon became void.

In the court below judgment went for the

plaintiff who sued as the beneficiary of the deceased insured.

There seems little dispute as to the law, and strange as it may seem, there is no dispute of facts. In the application for insurance the following questions and answers appear:

"Q. Are you now in good health? A. Yes.

"Q. Have you knowledge that any physical disease exists in your system? A. No."

The application was dated June 3, 1930, and insured died some eight months thereafter. The finding of the trial judge is as follows:

That during a period of eighteen years prior to her death the said insured had at intervals been afflicted with what is commonly known as milk leg and at times ulcers would form on her leg, but said milk leg and ulcers were of a local nature and did not in any way affect her general health and did not contribute to her death.

Appellant does not seriously question the finding nor does he point out wherein the evidence is insufficient in support thereof. It is taken for granted, notwithstanding the finding, that the disease called milk leg was of such a character as to negative the insured's statement of good health. Assuming this much, appellant then seeks to apply the law relative to warranties.

[1] Conceding the statements in the application to be warranties and conceding that the falseness of these statements would void the policy, we are still left with the finding that the statements were true and that the health of the insured was good and that no physical disease existed in her system. Our inquiry then must be as to the sufficiency of the evidence to support the finding. The question is one of medical cognizance. As a court we can take no judicial notice of the character of the disease called milk leg and we cannot launch off into an uncharted course of medicine, pathology, and kindred subjects.

[2] The evidence indicates that the disease had not prostrated the insured nor caused her to become bedridden. From time to time she had ulcers on her leg, but only as the result of injuries sustained from bruises or knocks. No ulcer was present at the time of the application for insurance. Her family seemed to take no interest in the ailment and it bothered her but little.

The only medical testimony adduced is that the disease called milk leg is a local disease as distinguished from organic or constitutional; that such a disease would not shorten life and is entirely curable; and, further, that such an ailment could not render a person afflicted therewith ineligible for life insurance.

The testimony relied upon by appellant em-

braces an isolated statement that milk leg is not a healthy condition. Yet this one phrase is found in a more or less general discussion. The witness stated that milk leg was a local disorder and that it was not a healthy condition, but that as far as the whole general condition goes it has no effect upon such general condition, save that the patient suffers pain. Analyzing the testimony further, it appears that a person suffering from milk leg would be considered in good health. Still further, the evidence discloses milk leg as a disease that does not affect the general health of the patient. We conclude that the evidence fully supports the finding.

[3] The term "Good Health" in the life insurance policy or application is comparative, and an assured is in good health unless affected with a substantial attack of illness threatening his life or with a malady which has some bearing on the general health. It does not mean perfect health; nor would it depend upon ailments slight and not serious in their natural consequences. *Maine Benefit Ass'n v. Parks*, 81 Me. 79, 16 A. 339, 10 Am. St. Rep. 240.

[4, 5] A warranty that the insured is in good health is not broken unless the insured has an ailment of a character so well defined as appreciably to affect his health. Only an ordinary and reasonable degree of health is required and this question is generally to be determined by the trier of fact. 14 R. C. L. § 248, and cases therein cited; 1 May on Insurance, § 295.

[6] The appellant next urges that its rights were prejudiced by the action of the trial court in permitting the filing of an amended complaint. The original complaint was based upon the claim of plaintiff as the beneficiary under the policy and sought recovery for the amount of the insurance. It developed at the trial that defendant was a mutual insurance company and that losses were paid by assessment of its members. That there was maintained a benefit fund which was kept revolving through such assessments. It likewise appeared that the benefit fund had been and was depleted so that in order to pay the claim of plaintiff it would be necessary to levy another assessment.

The amended complaint, after setting up the general cause of action, asked for a judgment directing the levy of such an assessment.

It is quite apparent that the substituted pleading in no wise changed the cause of action but sought more complete relief, namely, the aid of the court in enforcing the claim sued upon.

Following the rule as announced in *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 84 Am. St. Rep. 53, we conclude that the action of the

court below in permitting the amendment was not prejudicial.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 437

**ANGELUS SECURITIES CORPORATION
v. CHESTER et al.**

Civ. 8666.

District Court of Appeal, First District,
Division 2, California.

Dec. 28, 1932.

Rehearing Denied Jan. 27, 1933.

Hearing Denied by Supreme Court Feb. 20,
1933.

1. Mortgages $\S$ 25(1).

Mortgagee which diverted proceeds of building loan to contractor in violation of agreement for disbursement only with mortgagor's consent, could not recover in foreclosure action, where contractor failed to erect building.

2. Mortgages $\S$ 25(6).

Evidence in action to foreclose sustained finding that mortgagee caused proceeds of loan to be disbursed contrary to agreement with mortgagor.

3. Trial $\S$ 105(1).

Evidence introduced without objection stands as evidence in case for all purposes.

Appeal from Superior Court, Los Angeles County; Edward Henderson, Judge.

Action by the Angelus Securities Corporation against Jessie Lawrence Chester and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Lewis Cruickshank and Donald Armstrong, both of Los Angeles, for appellant.

Merriam, Rinehart & Merriam, and Harvey M. Parker, all of Pasadena, for respondents.

DOOLING, Justice pro tem.

This is an appeal from a judgment for defendants in an action to foreclose a mortgage. It appears from the record on appeal that respondents herein arranged to borrow money from Bond Department, Incorporated, a corporation, whose business was subsequently taken over by the appellant. The money was to be used in financing the building of a home for respondents, and, to secure its repayment, the note and mortgage here in suit were giv-

en. Fifteen hundred dollars was placed in escrow by Bond Department, Incorporated, with the National City Bank of Los Angeles under agreement that it was to be disbursed by the escrow holder only upon joint written instructions from respondents and Bond Department, Incorporated. The \$1500 was paid to the contractor without the instructions or consent, written or otherwise, of respondents, and the contractor failed to construct the building. The court found that Bond Department, Incorporated, through its agent, E. A. Abbott, caused and instructed the National City Bank of Los Angeles to pay this money to the contractor without the instruction of defendants, in violation of the escrow agreement, and without taking any precaution as to the application of the amount to the erection of the building.

[1] If this finding is supported by the evidence, it is sufficient to support the judgment, since Bond Department, Incorporated, could not hold respondents liable for money which it had caused to be disbursed in violation of its agreement and without any benefit therefrom being received by respondents. *Equitable Loan Ass'n v. Hewitt*, 67 Or. 280, 135 P. 864.

[2, 3] It is appellant's contention that this finding is not supported by the evidence. E. A. Abbott was admittedly the agent of Bond Department, Incorporated, in the entire transaction. Without objection, respondent W. G. Chester testified to a conversation which he had with Abbott after the money had been paid to the contractor. That testimony was as follows: "I told him (Abbott) not to pay them any money and he says, 'I have already paid them \$1,500.' Q. And what did you say? A. I says, 'What did you do that for?' And he says, 'Oh, they came over and,' he says, 'put up—' well, I can't tell you just the words, but put up a hard luck story and wanted the money so bad, and I just gave it to them."

Respondent Jessie Lawrence Chester was asked to narrate the same conversation and counsel for appellant said, "I will be willing to stipulate to that."

This testimony is amply sufficient to support the finding attacked, and, while it might have been subject to the objection that it was hearsay, no such objection was made, and it therefore stands as evidence in the case for all purposes. *Powers v. Board of Public Works* (Cal. Sup.) 15 P.(2d) 156, and cases therein cited.

Certain other findings are attacked by appellant, but since, in our opinion, they are not necessary to support the judgment, we refrain from discussing them.

Judgment affirmed.

We concur: STURTEVANT, J.; NOURSE, P. J.

128 Cal.App. 368

CRAWFORD v. LOS ANGELES COUNTY
et al.

Clv. 8759.

District Court of Appeal, First District, Division 1, California.

Dec. 24, 1932.

1. Waters and water courses ⇨183½.

Legislature may provide for creation of taxation districts to pay cost of constructing and maintaining improvements, such as water works, for special benefit of district inhabitants, subject only to constitutional limitations (St. 1913, p. 1049, as amended).

2. Waters and water courses ⇨183½.

Legislature had right to designate county boards of supervisors to receive petitions for creation of water works districts, give notice thereof, and receive and determine protests (St. 1913, p. 1049, as amended).

3. Constitutional law ⇨290(3).

Statutory provision for hearing protests against formation of water works districts by county boards afforded right to hearing essential to due process (St. 1913, p. 1049, as amended; Const. Cal. art. 1, § 14; Const. U. S. Amend. 5).

4. Constitutional law ⇨290(3).

Guaranty of property owner's right to hearing before assessment does not necessarily require court proceeding; opportunity to present objections to local governing body being sufficient (Const. Cal. art. 1, § 14; Const. U. S. Amend. 5).

5. Constitutional law ⇨74.

Court cannot determine whether county board of supervisors acted wisely in denying protests against formation of water works district; its good faith being presumed (St. 1913, p. 1049, as amended).

6. Waters and water courses ⇨183½.

County board of supervisors' decision, after hearing protests against formation of water works district, is final, in absence of fraud or patent abuse of discretion amounting to fraud (St. 1913, p. 1049, as amended).

7. Waters and water courses ⇨183½.

Complaint in action to enjoin county board of supervisors from calling election to create water works district *held* insufficient as not alleging fraud or facts showing bad faith, abuse of discretion, or lack of due process (St. 1913, p. 1049, as amended; Const. Cal. art. 1, § 14; Const. U. S. Amend. 5).

The complaint alleged that approximately 51 per cent. of district property owners protested against creation of district; that plaintiff was present at original hearing and represented by counsel at second hearing; that only nineteen fami-

lies resided in district; that balance of lands therein were mostly unimproved; that plaintiff's property would be assessed approximately 40 per cent. of its appraised value; that he had well furnishing him sufficient water and would furnish enough to supply reasonable demands of others in district; that he would suffer great and irreparable loss by paying assessment, without receiving benefit therefrom; and that assessment and bond issue would be taking of property without just compensation or due process.

8. Eminent domain ⇨2(10).

Creation of water works district and issuance of bonds, payable by assessments on lands therein, *held* not unconstitutional as taking private property for public use without just compensation (St. 1913, p. 1049, as amended; Const. Cal. art. 1, § 14; Const. U. S. Amend. 5).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by William Crawford against Los Angeles County and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Ray H. Enter, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondents.

GEARY, Justice pro tem.

Plaintiff above named appeals from the order of the superior court of the state of California, in and for the county of Los Angeles, granting defendants' motion to dismiss plaintiff's action upon the ground that the amended and supplemental complaint failed to state a cause of action against said defendants or any of them.

Appellant is the owner of real property in Los Angeles county. On or about July 7, 1930, a petition was filed with the board of supervisors of said county seeking the creation of a water works district (Stats. 1913, p. 1049, as amended), which district would embrace certain lots belonging to appellant. Protests against the formation of the water works district were filed and were overruled by the board of supervisors. Thereupon, by resolution, the board of supervisors called a special election for October 7, 1930, to determine the creation of Los Angeles water works district No. 17, and the incurring of a bonded indebtedness in the sum of \$68,000 upon the land within the proposed district. Due to a misprint on the ballots, a second resolution was formally adopted fixing November 13, 1930, as the date of the election. Appellant by his action sought to enjoin the

board of supervisors from setting, calling, or holding a special election or any election looking to the formation of water works district No. 17, and from issuing any bonds thereon. A temporary restraining order was denied.

Appellant's action is founded upon the contention that the creation of the proposed water works district and the attendant costs thereof would result in no benefits to him, and that it is therefore as to him the taking of private property for public use without just compensation. The amended and supplemental complaint alleges the filing of the petition for the creation of the proposed water works district. It is then alleged (paragraph V): " * * * Protests were filed and said matter was thereupon continued to Aug. 4th and then continued to the 2nd day of September, 1930, for hearing and final determination. That at that time protests had been filed of approximately 51% against the creation of said water works district, *the plaintiff being present on the hearing of July 7th, 1930, and being represented by counsel on the August hearing*, and subsequently his protest being denied by said Board of Supervisors. * * *" (Italics ours.) Thereafter follow allegations setting forth that the supervisors denied the protests of a majority of the property owners of said district who would have to bear the expense of the creation of the proposed district; that there are approximately only nineteen families residing in the proposed district, mostly in the northwest corner thereof, and that the balance of the lands therein are mostly unimproved and without any need for a water works district; that plaintiff is informed and believes and upon such information and belief alleges that his property will be assessed approximately 40 per cent. of its appraised value for the creation of the proposed water works district; that plaintiff has a well on his property furnishing him with sufficient water for domestic and irrigation purposes, and that he can and under proper conditions would furnish sufficient water to supply the reasonable demands of others in the proposed district; that there are other wells in the proposed district individually or collectively sufficient to supply any necessary or reasonable quantity of water to the families residing therein; that American States Water Service Company is now supplying water to several families in the southwest portion of the proposed district. It is then alleged that, if the election is called and heard and the district created, plaintiff will suffer great and irreparable loss, in that he will have to pay the assessment and receive no benefit therefrom, and by reason thereof his property will be taken from him without just or due compensation. It is further alleged that the assessment against plaintiff's property and the issuance of bonds thereon for the purpose mentioned is the taking of property without just

compensation, without due process of law, and in violation of the Fifth Amendment of the Constitution of the United States and of article 1, § 14, of the Constitution of this state. In his reply brief herein, appellant states: "This action [is not] an appeal from the decision of the Board of Supervisors, but a direct attack on the constitutionality of the law itself." Hence, appellant argues, it is not necessary for appellant to set out allegations concerning what may have occurred at any meetings before the board of supervisors. It is contended that because "a few voting tenants may create this bonded indebtedness against the district and then blithely move away," an unfair and unjust situation is created, amounting, in effect, to the taking of property without just compensation therefor and without due process of law.

[1] The contention of appellant is without merit. The Legislature may enact legislation to provide for the creation of taxation districts for the purpose of paying for the cost of the construction and maintenance of an improvement that will be for the special benefit of the inhabitants of the district. The only limitations thereon are the limitations set up in the State and Federal Constitutions. *Bliss v. Hamilton*, 171 Cal. 123, 133, 152 P. 303, 308.

The case of *In re Madera Irrigation District*, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, involved the authority of the Legislature to authorize the creation of irrigation districts in California, with attendant powers and obligations upon property owners, closely analogous to those arising under the District Water Works Act. In its determination of that case the Supreme Court has definitely disposed of appellant's contentions herein. Beginning at page 319 of said decision in 92 Cal., 28 P. 272, 277, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, the court says: "Inasmuch as there is no restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization. In the present case the legislature has chosen to authorize the creation of a public corporation, in the manner and with the forms specified in the act under discussion. * * * It is objected to this that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors within that district, or who may even be non-residents of the district. This, however, is a matter which was addressed

purely to the discretion of the legislature.

* * * The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation, to be invested with certain political duties which it is to exercise in behalf of the state. *Dean v. Davis*, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. * * * It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote, in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. *His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final.* *People v. Smith*, 21 N. Y. 595; *Gilmore v. Hentig*, 33 Kan. 170, 5 P. 781; *Hagar v. Rec. Dist. No. 108*, 111 U. S. 701, 4 S. Ct. 663 [23 L. Ed. 569]; *Davies v. Los Angeles*, 86 Cal. 46, 24 P. 771. * * * *It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed.* * * * If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense, or, if within the limits of a drainage district there should chance to be found a cliff, that would be no reason for exempting it from assessment." (Italics ours.) *Islais Creek Rec. Dist. v. All Persons*, 200 Cal. 277, 282, 252 P. 1043; *Sharp v. Joint Highway Dist. No. 6*, 111 Cal. App. 81, 85, 295 P. 841; *Henshaw v. Foster*, 176 Cal. 507, 514, 169 P. 82.

[2-4] In the instant case, the Legislature, in its Water Works District Act, designated the boards of supervisors to receive petitions looking towards the formation of such dis-

tricts, to give notice thereof and to receive and determine protests against the same. This it had a right to do; in fact it is the usual method of procedure adopted in the formation of assessment districts of every nature. The provision for the receiving and hearing of protests by the board of supervisors after legal notice thereof in the manner prescribed by the Water Works District Act afforded to the property owner his right to be heard, one of the essentials of "due process of law." As is stated in *Hutchinson Co. v. Coughlin*, 42 Cal. App. 664, 670, 184 P. 435, 438, "*The guaranty of the right to be heard does not necessarily require a determination in a court proceeding.* The individual may be fully protected by an opportunity given to present to the local governing body his objections to an assessment such as is involved in this case." (Italics ours.) In *re Madera Irrigation District*, supra; *Henshaw v. Foster*, supra.

[5, 6] In the instant case the board of supervisors held hearings upon the protests received upon two occasions. Thereafter the protests were denied. Whether the board of supervisors acted wisely in the matter is not to be determined here. The law presumes that they acted in good faith. By statute, the determination of the protests was left to the discretion of the board of supervisors, and, in the absence of fraud or such an abuse of discretion so patent as to amount to fraud, the decision of the board of supervisors is final. *Hutchinson Co. v. Coughlin*, supra; *Duncan v. Ramish*, 142 Cal. 686, 691, 76 P. 661, 663; *Cutting v. Vaughn*, 182 Cal. 151, 156, 187 P. 19.

[7] Appellant did not allege fraud in his amended and supplemental complaint, nor are there allegations of facts therein from which a court could possibly assume either an absence of good faith or an abuse of discretion on the part of the board of supervisors. Indeed, with appellant represented by counsel at one of the hearings on the protests, it would appear that the hearings were not perfunctory affairs, but, on the contrary, full, fair, and complete in every respect. The amended and supplemental complaint wholly fails to allege facts showing a lack of due process of law. Thus it fails to state a cause of action.

[8] That the act of the board of supervisors does not violate the Federal or State Constitutions in that it amounts to the taking of private property for public use without just compensation therefor has been heretofore determined. Upon this point the Supreme Court in *Bliss v. Hamilton*, supra, stated: "Finally it is urged that the act of June 13, 1913, is unconstitutional because, it is said, the tax is to be imposed on all property within the district, irrespective of the benefits conferred by the improvement. *In view of the*

many decisions of this court as to the power of the Legislature in such matters as these, especially the decision in *Re Madera Irrigation District* [92 Cal. 296, 342, 27 Am. St. Rep. 107, 14 L. R. A. 755, 28 P. 272, 675], *supra*, we see no force in this claim." (Italics ours.)

Appellant herein places much stress upon the case of *Village of Norwood v. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443. That case, upon the authority of *Duncan v. Ramish*, *supra*, and cases cited therein, no longer states the rule properly applicable to facts as they appear in the instant proceeding. Our Supreme Court in *Duncan v. Ramish*, *supra*, after a review of the more recent cases of the United States Supreme Court on the subject, states: "*The question may therefore be considered as absolutely settled, and the decision in the Norwood Case as thoroughly discredited, although not expressly overruled.*" (Italics ours.)

The judgment of the trial court is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 604

BENCHLEY v. DURKEE FAMOUS FOODS, Inc.

Civ. 8093.

District Court of Appeal, First District,
Division 1, California.

Jan. 12, 1933.

Hearing Denied by Supreme Court Mar. 13, 1933.

1. Contracts ⇨171(1).

Question of entirety of contract is one of interpretation to be determined from parties' intention upon consideration of all circumstances.

2. Contracts ⇨153.

Generally, contract will be so construed as to render it enforceable.

3. Contracts ⇨171(1).

Contract giving defendant option to buy plaintiff's lease and equipment, and providing that after such deal defendant would employ plaintiff, *held* not on its face entire instead of severable.

A "severable contract" is one in its nature susceptible of division and apportionment.

[Ed. Note.—For other definitions of "Severable Contract," see Words and Phrases.]

4. Contracts ⇨175(3).

In action for purchase price of lease and equipment bought under contract which also provided that after such deal defendant would employ plaintiff upon terms to be

agreed upon, evidence *held* to show parties intended contract to be severable; hence portion sued on was not unenforceable because of vagueness regarding terms of employment.

5. Appeal and error ⇨193(9).

Generally claim of no cause of action may be raised for first time on appeal.

6. Appeal and error ⇨882(3).

Question of intent of parties to contract is fact question involving theory of trial, which cannot be changed on appeal.

7. Appeal and error ⇨1011(1).

Appellate court will not disturb findings on conflicting evidence where some substantial evidence supports findings.

8. Fixtures ⇨35(3).

Whether ice box attached to floor and held by hangers attached to ceiling was part of building *held* for trial court.

9. Appeal and error ⇨901.

Appellant has burden of showing error.

10. Sales ⇨360(1).

In action for purchase price of lease and equipment, judgment *held* not erroneous for including price of ice box taken and used but not included in bill of sale, absent showing whether it was fixture.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by W. W. Benchley against Durkee Famous Foods, Inc., in which defendant cross-complained. From the judgment for plaintiff, defendant appeals.

Affirmed.

Hearing Denied by Supreme Court; THOMPSON, J., dissenting.

Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PARKER, Justice pro tem.

The action is on a contract. Judgment in the court below went for the plaintiff, and defendant appeals.

The complaint was drawn in two counts and the judgment was in favor of plaintiff on the first count only. Also, there was a cross-complaint by defendant, asking affirmative relief by way of money judgment. On the cross-complaint the plaintiff and cross-defendant prevailed. However, it seems conceded that, if the judgment in favor of plaintiff upon his original complaint should lack support in the evidence, then defendant should prevail upon its cross-complaint. The case is thus sketched inasmuch as sufficient of the details will hereinafter appear and an analysis of the entire

case here would be merely historical in the sense of preserving names and places.

The present defendant and appellant is the successor of Glidden Food Products Company, and throughout the briefs no reference is made to the Glidden company, and the case is treated as though the present defendant was the party named in the original contract. We shall follow that procedure, inasmuch as no point is made as to the liabilities assumed and the rights accrued to appellant, it being conceded that the latter in all respects stands in the position of the former company. In February of 1929 the plaintiff Benchley was engaged in the business of manufacturing and selling certain food products in the county of Alameda and throughout the state. Defendant was engaged in the same line of business, although apparently upon a nation-wide scale. In the month and year named, plaintiff and defendant, after some prior negotiation, entered into the written contract around which centers the present controversy. The contract contained three parts, and the terms thereof follow: (1) Defendant was to acquire the business of plaintiff, at defendant's option, any time between date of contract and July 1, 1929, at a stipulated price for the good will of the business, which was to include the brands, processes, and so forth, plus the invoice value at the cost of the merchandise on hand, including manufactured goods, labels, advertising matter, cartons, cases, and supplies. (2) Defendant was given the privilege of purchasing from plaintiff, at book value, such equipment as the defendant could use. The third provision is the one out of which the difficulty arises; therefore it may be given in full: (3) "It is also our understanding that should circumstances arise that make it advisable for the Glidden Food Products Company to continue to operate your present Plant, that we are to be given the opportunity of taking over your lease and purchasing all of your equipment at book value and continuing to operate the business at your present place of business. It is mutually agreed that this arrangement shall not be permitted to militate against your selling the lease and the equipment, in the event that you have an opportunity, the understanding being that before accepting a proposition for the sale of your lease and your equipment, that you will first advise us of your proposition, so that in the event we desire to exercise our option on the lease and equipment that we may do so. It is understood that when the deal is consummated, that you are to enter the employ of the Glidden Food Products Company, to take charge of the sales of nut margarine, from their Berkeley Plant; that the basis of your employment is to be agreed upon between yourself and the President of the Glidden Food Products Company and is to consist of an agreed salary and a percentage of the profits." The contract was prepared in the form of a letter addressed to plaintiff by

defendant. This may be noted so that the language of the contract may be better understood, the first person pronoun indicating the defendant and the second person pronoun referring to plaintiff.

It seems agreed that the contract was executed with reference to all of its provisions excepting those contained in paragraph 3. It is further conceded that the contract was to be considered as three distinct contracts in so far as the subdivisions indicated. As hereinbefore noted, the present controversy involves only that portion of the written agreement as set forth in the third section. The expressed and agreed consideration for the entire arrangement, embracing the three divisions of the writing, was the extension of a \$10,000 credit to plaintiff, and it is not questioned that this consideration was entirely paid.

The trial court found that the defendant exercised the option given in paragraph 3 and failed to pay the purchase price of the lease and equipment. Accordingly judgment was entered in favor of plaintiff and against defendant for the amount found by the court to be the book value of the lease and equipment. The question on appeal in the case involves three points: (1) Appellant contends that the complaint does not state a cause of action, due to fatal defects within the instrument sued upon. (2) That, if the defects are not within the instrument, the testimony at the trial conclusively shows them. (3) The evidence is insufficient to support the findings and the judgment based thereon. Stating the problem of the first two contentions, considering them one, as does appellant, the claim is that the contract is unenforceable. The grounds of this claim are that the contract is a single entire obligation, and that, inasmuch as that portion thereof in reference to the future employment of plaintiff is too indefinite and uncertain to be specifically enforced, the entire contract must fail.

[1] Appellant has presented us with a remarkably exhaustive brief on the subject of entire and divisible contracts. Under its first contention, that the question of the entirety of a contract should and must be determined from the four corners of the instrument, we have been cited to authority collected from every state in the Union. At the conclusion of this digest, appellant then concedes that the rule of this jurisdiction as expressed in an almost unbroken line of decisions is that the question of entirety is one of interpretation, to be determined according to the intention of the parties upon consideration of all of the circumstances. *Pacific Wharf, etc., Co. v. Dredging Co.*, 184 Cal. 21, 192 P. 847; *Palmer v. Flx*, 104 Cal. App. 562, 286 P. 498. In the latter case the court adopts the definition of 13 Corpus Juris, page 561, declaring a severable contract to be one which in its nature and purpose is susceptible of division and apportionment. Paraphrasing, to some extent

the language of the Pacific Wharf Case, supra, we note that the value to be paid for the lease and equipment in the instant case was to be ascertained and determined without reference in any way to the understanding as to future employment. As a matter of simple understanding, the entire writing plainly manifests its purpose, and that purpose is obviously twofold. First, the defendant was to buy out the plaintiff, lock, stock, and barrel, at its option. After this was done, and it will be noted that the language of the contract specifically states "when the deal is consummated," then the parties were to agree upon the details of the plaintiff's employment. The very sense of the transaction implies that plaintiff, as long as he is in business himself, will not seek or need employment. Without further discussion we cite, in addition to the listed cases, as follows: Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 P. 55; Waybright v. Meek, 90 Cal. App. 13, 285 P. 370; 6 R. C. L. 858, § 246.

[2-6] It is a generally well-recognized rule of construction that a contract will be so construed as to render it enforceable. It would seem to be a rather unique holding to declare, under the present contract, that defendant could take over the property of plaintiff and then escape liability for payment by a failure to agree upon the plaintiff's employment. We hold that there is nothing on the face of the contract, nor within the terms thereof, that forces the conclusion that the same is entire and not severable. Therefore we turn to the intent of the parties as disclosed by the record before us. Appellant's brief on this particular phase of the case would be sufficient for its own undoing. There it is stated: "The only way [appellant] could get * * * Benchley's experience * * * was to take over his equipment and lease." Again: "If Durkee Famous Foods exercised the option set forth in paragraph (3) of the letter, to-wit: if it purchased from Mr. Benchley his equipment and lease at book value, Mr. Benchley was then and only then * * * to accept the [employment]." Going further on this question of intent, we find in the record a letter written by the president of Glidden company addressed to plaintiff Benchley and dated November 21, 1929. At this time some difficulty had arisen on this proposition of employment. The following excerpts taken from the letter, without destroying the general context thereof, throw light on this question of intent: "I desire to call your attention to the fact that you told me before witnesses that it was a matter of no importance to you whether you continued with our company after the purchase of your business was completed or whether you left to engage in other work. * * * You will recall that in our arrangement nothing was said about the period of employment because you stated to * * * me that you did not want to enter the employ-

ment of The Glidden Food Products Company unless you could produce results and could prove to be a valuable addition. * * * it certainly was not necessary for me to offer any inducements to have you make the sale because you were really very anxious to make the sale, as I am sure you will admit. * * * I am sure you distinctly remember the fact that in our verbal conversation you stated, not once, but twice, that it would not be necessary to employ you in the event the deal was closed." Thus it seems clear that the purchase and the employment were not considered as one even by the appellant, nor was such the intent of the instrument. However, we may concede, merely for the purposes of argument, that the agreement for subsequent employment was a part of the contract as an entirety, and we then find the rule as announced by Williston in his work on Contracts, volume 1, page 81, as follows: "Is the indefinite promise so essential to the bargain that inability to enforce that promise strictly according to its terms would make it unfair to enforce the remainder of the agreement. If the contract cannot be performed without settlement of the undetermined point, each party will be bound to agree to a reasonable determination of the unsettled point in order that the main promise may be enforced. If the undetermined matter does not preclude performance of the remainder of the contract and is of comparatively little importance, the uncertain promise may be left unperformed and the remainder of the contract enforced." The same rule is announced in Corpus Juris 13, page 659. Concluding, we note that at no time in the court below was this point of entirety of contract raised. The case was tried on the sole issue as to whether or not the option was exercised. As noted, we have not refused to consider the point. Respondent has strenuously argued that the appellant is estopped from raising the new point here, and to some extent we are in accord with respondent. It is true, generally speaking, that the claim of no cause of action may be considered at any stage of the proceedings, whether on appeal for the first time or at any stage of the trial. But the question of intent of the parties is purely a question of fact and involves the theory of trial, which cannot be changed on appeal.

The next claim of appellants is that the evidence is insufficient to sustain the findings and the judgment thereon. The trial consumed three days, and we have, in addition to one large volume of testimony, another volume of exhibits, being the writings and communications between the parties. While the evidence brought before us in appellant's appendix to the brief is rather scant, we have gone carefully over the entire transcript. We find the case one of a conflict of evidence with sufficient evidence to support the trial judge in his findings. This may seem rather a hur-

ried way of disposing of this claim of insufficiency, but, if we were to detail all of the testimony and the arguments based thereon, it would be a task undertaken simply as a gratuity; no rule of decision would follow, and the net result would be a thesis on the human mind with interpolations on the subject of judicial temperament and discretion.

[7] The rule is established by a host of decisions that an appellate court will not disturb the findings of a court when there is a conflict of evidence on material points, and where there is some substantial evidence to support the findings. When the evidence is conflicting, the court will presume that the evidence in support of the findings is true and construe it and resolve every substantial conflict as favorably as possible in support thereof. 2 Cal. Jur. 881, and cases cited therein. A detailed analysis of the present case would simply be for the purpose of demonstrating that this rule is applicable to cases of sales of oleomargarine plants. We feel this is already sufficiently established under the present authorities.

[8-10] Lastly, appellant contends that we should reduce the judgment by disallowing an item of the purchase price of a certain ice box. The only ground urged by appellant is that this ice box was not included in the bill of sale, nor in any of the schedules attached thereto. However, the evidence shows that the ice box was taken over and used by appellant with the rest of the equipment, and was not paid for. Further, the testimony discloses that the ice box was made of cement and cork and was built in and attached to the floor of the building and held by hangers attached to the ceiling. The finding, here upheld, is that the defendant took over the realty under the terms of the lease. Whether the ice box was a part of the building or not is a question of fact to be determined by the trial court. *Moses v. Pacific Building Co.*, 58 Cal. App. 90, 207 P. 946. The sole ground of appellant's complaint, as indicated in its brief, is that the ice box was not included in the inventory. There may be a hundred other reasons why the trial court found defendant was liable for the price thereof. No evidence, other than on the claim urged, is presented for our consideration. It is a burden affirmatively resting upon appellant to show any error, and this it has not even attempted to do. Without citation of authority, without argument of any sort, the appellant makes the simple assertion that there was no ice box listed in the inventory or in the bill of sale, and that therefore it was error for the trial court to include the amount of its purchase in the judgment. No showing is made as to whether or not it had become a fixture, trade or otherwise; no claim is made that the defendant did not receive it.

We find no error in the trial court's order denying the motion for a new trial.

The judgment and order appealed from are affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

CHITWOOD v. HICKS, County Auditor.*
Civ. 694.

District Court of Appeal, Fourth District,
California.

Jan. 6, 1933.

Rehearing Granted Jan. 30, 1933.

1. Courts ⇨55.

Secretary to judge of superior court is attaché of state institution, and not "county officer, deputy, or employee," as regards constitutionality of statute relating to secretary's appointment and salary (St. 1931, p. 2512, amending St. 1927, p. 1728; Const. art. 1, § 11; art. 4, § 25, subd. 33; art. 11, § 5, amended in 1914).

[Ed. Note.—For other definitions of "County Officer," "Deputy" and "Employee," see Words and Phrases.]

2. Statutes ⇨93(8).

That statute regarding appointment of stenographer to Superior Court judge used classification "counties of twelfth class" did not render it unconstitutional as using classification proper only in county government act, where statute formed no part of county government act (St. 1931, p. 2512, amending St. 1927, p. 1728; Const. art. 11, § 5, amended in 1914).

3. Statutes ⇨74(2), 76(3).

Statute providing for appointment of stenographer to superior court judge, and fixing stenographer's salary, but affecting one county only, held not unconstitutional as special legislation and as providing for appointment of state employee, under classification effective for county officers only (St. 1931, p. 2512, amending St. 1927, p. 1728; Const. art. 1, § 11; art. 4, § 25, subd. 33; art. 11, § 5, amended in 1914).

Proceeding by Aileen Chitwood for a writ of mandate to be directed to Ray T. Hicks, as Auditor of Riverside County.

Writ granted.

C. L. McFarland and George A. Sarau, both of Riverside, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, for respondent.

MARKS, J.

This is an original proceeding instituted here to have issued a peremptory writ of mandate directing the respondent, as county auditor of the county of Riverside, to issue to petitioner a warrant in the sum of \$375 in payment of her salary for the months of June, July, and August, 1932, as stenographer or secretary to the Honorable O. K. Morton, one of the two judges of the superior court of the state of California in and for the county of Riverside.

The facts of the case, certain questions upon which counsel are in accord and which do not require the consideration of this court, and the sole ground upon which the issuance of a peremptory writ of mandate is contested by respondent, are clearly set forth in the brief of his counsel as follows:

"In 1927 Riverside County was a county of the Fifteenth Class. In 1931, by re-classification, Riverside County became a County of the Twelfth Class. (Pol. Code 4005c.) In 1927, the Legislature by enactment of Chapter 848 (Statutes of 1927, page 1728) provided stenographic assistance to Judges of the Superior Court in Counties of the Fifteenth Class, as follows:

"Section 1. In counties of the fifteenth class having more than one judge there shall be appointed by the Judges of the Superior Court one competent stenographer and typist of skill in such work, whose duties shall be to render such service as such judges may require each day. The salary of such stenographer shall be fifty dollars per month; provided, this employment shall not prevent such stenographer from doing transcribing work for the court reporters of such court, but when doing work or rendering service for such reporters such court reporters shall pay such stenographer such sum as they may agree upon for the work done. Section 2. The salary of such stenographer shall be paid by the County in monthly instalments and at the same time and in the same manner and out of the same fund as the salaries of the county officers are paid."

"The above statute was amended by the Legislature in 1931 through the enactment of Chapter 1199, Statutes of 1931 (Page 2512) which enactment reads as follows:

"Section 1. Section 1 of an act entitled 'An act to provide a stenographer and typist for judges of the Superior Courts, and providing for their salaries and the payments thereof,' approved May 31, 1927, is hereby amended to read as follows: Section 1. In counties of the twelfth class having more than one judge there shall be appointed for each judge of the Superior Court, one competent stenographer and secretary skilled in such work, whose duties shall be to render such services as such judge may require each day; the salary of such stenographer and secretary

shall be one hundred twenty-five dollars per month."

"Chapter 1199, Statutes of 1931, became effective on the 14th day of August, 1931. Pursuant to the provisions of that enactment, the Honorable G. R. Freeman, Judge of the Superior Court of Riverside County, Department One, appointed Mrs. Flora Kauffman, to discharge the duties of stenographer and secretary, while the Honorable O. K. Morton, Judge of the Superior Court of Riverside County, Department Two, appointed Mrs. Aileen Chitwood, Petitioner herein, to discharge the duties of stenographer and secretary respectively.

"Both Mrs. Kauffman and Mrs. Chitwood entered upon such employment and have continued to and now are acting as stenographer and secretary to the two Judges of the Superior Court as aforesaid.

"Subsequent to the enactment of Chapter 1199, Statutes of 1931, and while Mrs. Kauffman and Mrs. Chitwood were employed as hereinbefore set out the question arose as to the propriety of the County Auditor of Riverside County, Ray T. Hicks, Respondent herein, drawing his warrants in favor of Mrs. Kauffman and Mrs. Chitwood, in payment of the monthly salary provided for by Chapter 1199, Statutes of 1931. Since the 31st day of May, 1932, the respondent has refused to draw his warrant as County Auditor under the provisions of Chapter 1199, Statutes of 1931, in favor of either Mrs. Chitwood or Mrs. Kauffman.

"Referring to the points and contentions of the Petitioner in support of the application filed herein, the Respondent respectfully submits as follows: 1. The respondent agrees that the Petitioner's appointment as such stenographer and secretary was made under the provisions contained in Chapter 1199, Statutes of 1931, Page 2512. 2. The Respondent also agrees that the Legislature has the power to provide clerical assistance for the efficient functioning of the Superior Court and other courts of record, provided, that in making such provision the same must not be violative of the constitution of the State of California. 3. It is also agreed by the respondent that the petitioner is not a county officer and that the purpose of the Statutes in question was to provide for only employees as mere adjuncts of the Superior Court to be appointed for the purpose of relieving it of certain of the administrative phases of its judicial functions. 4. And finally it is agreed by the respondent herein that the proper procedure in presenting this matter to the Court is by and through a petition for a writ of mandate."

[1] The superior courts are courts of the state (art. 6, § 1, Const.), and the judges of these courts are state officers. Petitioner, as a secretary to a judge of the superior court, is an attaché of a state institution and is in no

respect a county officer, deputy, or employee. *Noel v. Lewis*, 35 Cal. App. 658, 170 P. 857. The many decisions of our courts concerning county officers, deputies, and employees are inapplicable here.

Respondent bases his defense to the petition upon two grounds: First, that the act under which petitioner was appointed (St. 1931, p. 2512) is special legislation which violates the provisions of article 1, § 11, and article 4, § 25, subd. 33, of the state Constitution; second, that as the act creating the position which she holds provided for her appointment in a county of the "Twelfth Class" it is unconstitutional and void as attempting to provide for the appointment of a state employee under a classification which could be effective for county officers, deputies, and employees only. Art. 11, § 5, Const.; *Pratt v. Browne*, 135 Cal. 649, 67 P. 1082.

Article 1, § 11, of the Constitution, provides that "all laws of a general nature shall have a uniform operation." Article 4, § 25, subd. 33, of the Constitution, provides: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Thirty-third—In all other cases where a general law can be made applicable."

It has always been assumed that the Constitution vests in the Legislature the authority to provide the judicial department of our state government with the necessary personnel to properly discharge its functions. Ever since the adoption of our present Constitution, the Legislature has exercised this authority in some instances through the passage of laws having special or local application. It is particularly illuminating to review the legislation fixing the number of judges in the several counties of the state which, so far as we are advised, has never been attacked on constitutional grounds. For the purpose of illustration we will refer to a few of these enactments.

The first Legislature which met after the Constitution of 1879 went into effect passed a law providing in part as follows: "Within ten days after the passage of this Act the Governor shall appoint an additional Judge of the Superior Court of the County of Mono. * * *" (St. 1880, p. 99.) The next Legislature provided that "within ten days after the passage of this Act the Governor shall appoint an additional judge of the Superior Court of the County of Alameda. * * *" (St. 1881, p. 20.) For many years the same form of legislative enactment was used in providing for additional judges of the superior court. (St. 1887, p. 1; St. 1889, p. 5; St. 1891, p. 61; St. 1893, p. 3; St. 1895, p. 48; St. 1897, p. 48; St. 1923, p. 510; St. 1931, p. 1458. These citations are illustrative and not exhaustive.) In creating additional judges of the superior court of Los Angeles county, we find that the Legislature provided that "in

counties of the first class there shall be fifty judges of the superior court. * * *" (St. 1931, p. 1063), which in legal effect cannot be distinguished from the act under which petitioner claims her appointment, where it is provided that "in counties of the twelfth class having more than one judge there shall be appointed for each judge of the superior court, one competent stenographer and secretary. * * *" (St. 1931, p. 2512.)

The Legislature has at various times seen fit to reduce the number of judges of the superior court of some of the counties. All of the acts used similar language to accomplish that purpose. The following will serve as an illustration of the form generally used: "The number of Judges of the Superior Court of the county of Fresno is hereby reduced from three to two." (St. 1895, p. 156; see, also, St. 1985, p. 24 and p. 128.)

It will thus be seen that for more than fifty years the Legislature has by special acts, each applicable to one county alone, added to or reduced the number of superior court judges in the various counties of the state. So far as we have been advised this practice has never been questioned as being contrary to the provisions of the Constitution which by tacit consent of the courts and Legislature has been construed to permit such procedure. "Practice and acquiescence in this construction for more than 20 years have resulted in the acquisition of large property interests and the determination of personal rights and obligations. Such practice and acquiescence have fixed the construction which should not be disturbed at this late day." *Comstock v. Davis*, 44 Cal. App. 275, 186 P. 380, 381; see, also, *Dow v. Gould, et al., Co.*, 31 Cal. 629; *Morton v. Broderick*, 118 Cal. 474, 50 P. 644; *Miller & Lux v. Enterprise, et al., Co.*, 142 Cal. 208, 75 P. 770, 100 Am. St. Rep. 115.

If the office of superior judge can be created or abolished by an act affecting one county of the state, we can see no good reason why a secretary to a superior judge could not be appointed under a similar act. The law should not be more punctilious in its requirements as to the formalities by which a secretary may be appointed than it is in the legislation which creates the office of the judge she serves.

By what we have said we do not wish to be understood as indicating an opinion that the legislative acts to which we have referred, adding to or reducing the number of judges of the superior court in various counties, violate any of the provisions of our Constitution. Illustrations could be given of other special acts of the Legislature which have been upheld by the Supreme Court in cases where general laws could not fit the circumstance under which they were required to operate and no constitutional prohibition to their passage existed. As was said in discussing the constitutionality of the act creating the Sacramento

Drainage District (*People v. Sacramento Drainage District*, 155 Cal. 373, 103 P. 207, 212): "The act does no violence to article 1, § 11, nor to article 4, § 25, nor to article 11, § 6, of the Constitution of the state. * * * Nor, while a special act, is the law obnoxious to the other sections of the Constitution above cited. The considerations dictating the necessities of a special law are plain as above set forth. It would require a clear showing upon the face of the law itself that a special act was not required, before a court would interfere with the determination of a co-ordinate branch of the government upon this subject." The same question was considered in *People v. McFadden*, 81 Cal. 489, 22 P. 851, 854, 15 Am. St. Rep. 66, where it was said: "It is also claimed that the act is void because it is in conflict with, or passed in violation of, article 4, § 25, subd. 33, of the constitution, where it is provided that 'the legislature shall not pass local or special laws * * * in cases where a general law can be made applicable.' This point is not well taken. While it may be found practicable to, and the Legislature has already endeavored, by a single act, to provide a uniform system of county government, we can hardly conceive it possible, in view of the varied conditions of the different localities in this state, if, indeed, it could be done in any state, to frame a single law which should meet the necessities of each attempt to organize a new 'political subdivision of the state.' In any event, whether such a law could 'be made applicable' depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the legislature. The policy of adding to the number of the 'political subdivisions of the state' is one to be determined by the legislative department of the government, in each instance when the proposition to do so is made; and, if the determination be favorable, then the legislative department alone must fix and determine the boundaries of such subdivision."

Section 5 of article 11 of the Constitution provides for the classification of counties by the Legislature in accordance with population for the purpose of providing for local county governments and fixing the salaries of county officers, deputies, and employees. In accordance with the powers conferred by this section we find that it reclassified the counties of the state in accordance with the populations determined by the census of 1930. (St. 1931, p. 128.) In section 1 of this act we find the following: "The population of the counties of this state is hereby ascertained and determined to be * * * as follows: * * * 12. Riverside 81,024." In section 2 of the same act is the following: "For the purpose of regulating the compensation of all officers herein provided for, the several counties of this state are hereby classified, according to their population * * * as follows, to wit:

* * * Counties containing a population of eighty thousand and under eighty-two thousand shall belong to and be known as counties of the twelfth class." Riverside is the only county falling in this classification.

[2, 3] The act under which petitioner was appointed did not provide that it would be effective in Riverside county, by name, but that its provisions should apply to "counties of the twelfth class having more than one judge * * * of the superior court," which description applied to no other county in the state. It is admitted the constitutional provisions under consideration permit of the passage of laws affecting county officers, deputies, and employees. It has been held that a county government act passed under authority of this section should not attempt to fix the salary of an attaché of the superior court. *Pratt v. Browne*, supra. The question then arises, Does the use of the term "counties of the twelfth class," in the act under which petitioner was appointed, render it unconstitutional by using a classification or description of Riverside county that was only proper to use in a county government act, she being not a county employee, but an attaché of a state court? As the act in question forms no part of a county government act we have concluded that the answer must be in the negative. The expression "In counties of the twelfth class having more than one judge" is evidently descriptive only and is another and rather awkward way of saying "In Riverside County." It being used only for the purpose of designation and not being an uncertain designation, we can see no serious objection to its use by the legislature in the act in question. From what we have said earlier in this opinion, especially concerning acts providing for an additional judge in a particular county named, we do not consider the act approved June 19, 1931 (St. 1931, p. 2512), unconstitutional.

We do not consider our conclusions conflicting in any way with *Pratt v. Browne*, supra, relied upon by respondent. This case is authority for the rule that a county government act passed under authority of section 5 of article 11 of the Constitution cannot fix the salary of a court reporter of a superior court, he being an attaché of a state court and not one of the officers, deputies or employees of a county, concerning the salaries of which section 5 of article 11 permits legislation in a county government act. Had the act under which petitioner was appointed and claims her salary been passed as a part of the Riverside County Government Act, *Pratt v. Browne*, supra, would be authority for our denying her the relief she seeks. Such is not the case.

It is ordered that a peremptory writ of mandate issue as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.

PIPER v. SOMERVILLE.

Civ. 653.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1933.

Hearing Denied by Supreme Court Mar. 13,
1933.1. Money received $\S$ 11.

Action for money had and received against defendant depositing proceeds of sale of plaintiff's farm in defendant's name *held* maintainable without demand.

2. Trusts $\S$ 103(3).

Relation of trust and confidence existed between Indians who lived together as husband and wife; hence she could recover proceeds of sale of her farm which she, because of his misrepresentations, allowed him to deposit in his name.

Evidence disclosed that the parties had lived together in the relation of husband and wife for thirty years; that the man was much better educated than the woman, and acted as her business adviser; that he sold her farm and told her that, if proceeds were deposited in her name alone, the United States government would take about half, whereupon she agreed that half should be deposited in his name; and that he had promised to buy another farm and continue living with her, but deserted her and married another woman.

3. Money received $\S$ 8.

That plaintiff in action for money had and received had transferred money to defendant under mistaken belief induced by his misrepresentations that otherwise government would take all or part, and that transfer would evade such taking, did not defeat recovery.

4. Fraud $\S$ 36.

Defendant cannot validate his fraud by proving that defrauded plaintiff intended to defraud another.

5. Money received $\S$ 18(3).

In action for money had and received, evidence supported finding that there was neither gift of money nor trust created.

6. Appeal and error $\S$ 110.

Order denying motion for new trial is not appealable (Code Civ. Proc. $\S$ 963).

Appeal from Superior Court, Inyo County;
William D. Deby, Judge.

Action by Minnie Piper, also known as Minnie Somerville, against John Somerville. From the judgment for plaintiff, defendant appeals.

Affirmed.

J. Walter Hanby and Harry T. Young, both of Los Angeles, for appellant.

Randall & Bartlett, of Los Angeles, George Francis, of Independence, and Kenneth W. Kearney, of Los Angeles, for respondent.

MARKS, J.

The parties to this action are Indians. They lived together on respondent's farm in Inyo county in the relation of husband and wife without the formality of a marriage ceremony for a period of thirty years. During that entire time appellant acted as the business advisor of respondent and managed all her business affairs. From the manner in which they gave their testimony, and from their letters in the record, it would appear that appellant was much better educated than respondent. He was a deputy sheriff of Inyo county, the local representative of the Indian board, and had read some law.

In February, 1931, the city of Los Angeles purchased respondent's farm. For some years prior to the actual consummation of the sale the city had carried on its negotiations through appellant. When the deed to the city was recorded, the balance of the selling price of \$23,678 was paid, 10 per cent. of this amount having been paid when a contract of sale was executed. This final payment was in the form of a check drawn in favor of Minnie and John Somerville. They took it to the city of Los Angeles, where they opened two separate accounts in a bank, each depositing \$10,678.18. They then bought an equal amount of stocks and bonds, each investing \$9,021.36. The balance of the money was left in their separate accounts from which they each drew \$50 in cash and went shopping. They then went to the city of Oakland to have some dental work done. Appellant remained there about two weeks, when he returned to Inyo county. About two weeks later he went back to Oakland and brought respondent to their Inyo county home. On May 22, 1931, he deserted her. Three days later in the city of Los Angeles he met an Indian woman, a resident of Inyo county, whom he had known for several years, and they were married on July 17, 1931, after which they resided in the state of Nevada.

The testimony of respondent and her witnesses support the theory that prior to the consummation of the sale of her farm, appellant and respondent had decided to go to Nevada and purchase a farm with the money which was to be received from the city of Los Angeles; that appellant told respondent that, if the purchase price of the property were deposited in the bank in her name alone, the government of the United States would take about one-half of it for income taxes; that respondent then agreed that the money should be divided and deposited one-half in the name of each.

Respondent brought this action for money had and received to recover the one-half of the final payment from the city of Los Angeles, which had been deposited in the account of appellant. She did not allege nor prove any demand for the return of this money prior to instituting her action. Judgment went for respondent, and this appeal followed.

Appellant urges that an action for money had and received, without an allegation or proof of a demand for a return of the money, cannot be maintained; that the evidence does not sustain the findings and judgment, and that the transaction between the parties was either a gift or created a trust in appellant in favor of respondent.

[1] The cases of *Quimby v. Lyon*, 63 Cal. 394, and *Dunham v. McDonald*, 34 Cal. App. 744, 168 P. 1063, effectually dispose of the first contention that the action for money had and received under the circumstances of this case cannot be maintained.

[2-4] Under the second contention it sufficiently appears from the record that a relation of trust and confidence existed between the parties; that appellant took advantage of this relation by representing to respondent that the government would take approximately one-half of the selling price of her property for income taxes if she retained possession of all the money received; that for this reason the two accounts were opened and the money divided; that before the money was received appellant led respondent to believe that the money would be reinvested in a farm in Nevada and they would continue their former relations, living in the new home to be purchased; that shortly after the sale was consummated appellant deserted respondent and married another woman. Similar facts have been held sufficient to support a judgment in favor of a woman thus defrauded by a man with whom she had been living in the relation of husband and wife. Under the peculiar facts here described it has been held that because the property was transferred to the man by the woman under a mistaken belief that all or a part of it would be taken by the government of the United States, and that she would thus evade this taking, is not sufficient to defeat her action to recover the money. A defendant cannot be permitted to validate his own fraud by proving that the person he defrauded intended to defraud another. *Gatje v. Armstrong*, 145 Cal. 370, 78 P. 872; *Fieg v. Gjurich*, 163 Cal. 740, 127 P. 49; *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111.

[5] Appellant's last contention that the evidence showed either a gift of the money by respondent to appellant, or the creation of a trust, is without merit. The testimony of respondent flatly contradicted such a theory and amply supports the implied finding of the

trial court that there was neither a gift of the money nor a trust created.

[6] Appellant has attempted to appeal from an order denying his motion for new trial. Such an order is not appealable (section 963, Code Civ. Proc.), and the attempted appeal therefrom is dismissed.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App. 531

IFFLAND v. JOHN.

Civ. 4635.

District Court of Appeal, Third District,
California.

Jan. 4, 1933.

1. Evidence ⇨474(1).

Contractor who performed labor on building and superintended construction thereof held competent to testify as to construction cost on basis of his book entries.

2. Partnership ⇨336(3).

Court's finding as to cost of buildings held sustained by evidence in action between partners for accounting of profits of construction.

3. Appeal and error ⇨931(1), 1010(1).

Appellate court must accept all evidence tending to establish trial court's finding, and finding supported by any substantial evidence must be sustained.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by P. E. Iffland against J. A. John. Judgment for plaintiff and defendant appeals. Affirmed.

C. Roy Smith, of Long Beach, for appellant.

Todd, Pawson & Watkins, of Long Beach, for respondent.

KING, Justice pro tem., delivered the opinion of the court.

The action seeks a judgment that plaintiff and defendant formed a copartnership as building contractors; that the copartnership be dissolved; that the defendant be required to account for alleged profits; and that the amount found remaining to the credit of the copartnership be determined and distributed.

The court below found that there was a copartnership; that a profit of \$1,200 had been realized, which was held by defendant; that plaintiff had received \$350 only of this

sum, and gave him judgment for the remaining sum of \$250 as his half of the profits.

Defendant appeals, raising two points: (1) The trial court erred in overruling appellant's objection to the admission of respondent's testimony upon the cost of constructing the two houses in question. (2) The evidence does not support the trial court's finding of fact that there remained in the hands of defendant as net profit the sum of \$1,200.

As to the first point the testimony shows that the partnership was formed by an oral agreement by which the defendant was to secure the contracts and attend to the business affairs, receive, hold, and disburse the funds, while plaintiff was to superintend the actual construction of the buildings. They built a house for one Russell for which there was paid to defendant \$3,800, and a house for one Cochrane for which he was paid \$3,500. Respondent testified that the cost of the Russell house was \$2,772.85, while appellant's evidence was that it cost \$3,156.85. As to the Cochrane house, respondent stated that the cost was \$3,104.40, and appellant that it was \$3,639.59. If respondent be correct, the net profit on the two jobs was \$1,422.75, while appellant's figures would make the amount \$503.56, of which respondent's share would be less than the \$350 which he admitted receiving.

The learned trial judge very plainly stated at the close of the trial: "I am inclined to discredit the defendant in this case, the manner in which he testified with reference to those checks. * * * The court takes the view such an attitude on the part of the defendant compels the court to cast discredit upon his other testimony. He knew very well it wasn't all labor, that \$475.00, and the court is satisfied it wasn't. Some of it was a gambling debt, and he certainly misinterpreted the situation to the court. When courts find parties doing that, they are not entitled to much sympathy nor much credence. It is just one of those little straws which show which way the wind blows."

[1] The testimony specified in appellant's brief to which objection was overruled included the following: "Q. What was the cost of construction of each of the Russell and Cochrane jobs?" This was objected to as incompetent, irrelevant, and immaterial, the objection concluding: "There is no foundation to show this witness knows. In fact, his testimony throughout this whole trial has been Mr. John attended to the business end of the construction." The witness, respondent, was using books kept by himself, the entries in which he stated were made by direction of the appellant, and at the time of the transaction. On cross-examination he further testified that the source from which

he got his figures was from Mr. John, saying "We compared our figures." It appears, and the lower court found that the parties were partners. The plaintiff was a carpenter and contractor who performed labor on and superintended the construction of both the buildings in question. His statement of the cost was that of one who at least was somewhat familiar with the facts of which he was testifying, and was therefore a competent witness, and the objection was properly overruled.

[2, 3] The second point, that the court's finding as to the cost of the buildings is not supported by the evidence, is equally untenable. The court in the very recent case of *Fales v. New York Life Insurance Co.* (Cal. App.) 17 P. (2d) 174, uses this language: "A trial court is not bound to decide in conformity with the declaration of any number of witnesses who do not produce conviction in its mind against a presumption or other evidence satisfying its mind." And in the case of *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157, 1158, occurs this expression, very applicable to the instant case: "It must be borne in mind that, in examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding."

"The decision of the trial court upon questions of fact is conclusive upon us [the appellate court], in so far as there is any substantial evidence tending fairly, with such inferences as may reasonably be drawn therefrom, to support such decision." *Clopton v. Clopton*, 162 Cal. 27, 121 P. 720, 721.

"The determination reached by the trial court upon all matters of fact is binding upon an appellate court, except only in the single instance where there is no substantial evidence to support * * * the findings of the trial court, and, if such evidence is found in the record, then the findings must stand, notwithstanding the satisfactory character of appellant's evidence." *King v. California Bank*, 73 Cal. App. 136, 238 P. 108, 109.

These decisions amply justify the finding attacked here.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 623

HOUCK v. GENERAL DEVELOPMENT CO.

Civ. 7458.

District Court of Appeal, Second District,
Division 1, California.

Jan. 12, 1933.

Corporations Ⓒ422(3).

Where defendant introduced telegram signed by its president referring to contract without disclaiming telegram was authorized, defendant *held* bound by president's admission that contract was made.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by J. C. Houck against the General Development Company. From the judgment for plaintiff, defendant appeals.

Affirmed.

Hibbard & Kleindienst, of Los Angeles, for appellant.

McAdoo, Neblett & Clagett and John G. So-bieski, all of Los Angeles, for respondent.

CONREY, P. J.

The sole question presented upon this appeal is whether or not the trial court erred in admitting in evidence Plaintiff's Exhibit 1. This was the original contract sued upon, signed by defendant company by Geo. C. Paonessa, and by the plaintiff J. C. Houck; which was an agreement for posting of advertising cards of the corporation in motor-busses operating within the state of California. Plaintiff testified that Rosenberg, president of defendant company, had directed him to transact the business with Paonessa.

On cross-examination of the plaintiff, defendant obtained from the witness an admission that he had received a telegram dated November 30, 1928. The telegram, introduced in evidence by the defendant, was addressed to the plaintiff and signed "General Development Co., by E. H. Rosenberg." Rosenberg was the president of the defendant company. The telegram reads as follows: "In accordance with the understanding we had with you namely that after ninety days we could at our option cancel the contract between yourselves and ourselves we do hereby and herewith notify you of our election to cancel said contract as of November thirtieth." By introducing in evidence this telegram, and in the absence of any disclaimer that it was authorized, the defendant necessarily admitted that Rosenberg had the right to act for it in relation to the contract. Defendant therefore is bound by Rosenberg's admission that the contract had been made.

In view of these facts, we think that it is not necessary to determine the question as to whether the court had theretofore erred in admitting in evidence the said contract, and in overruling defendant's objection that the execution of the contract had not been duly authorized. In the light of the admissions contained in the telegram, together with the testimony given by plaintiff, it is clear that the contract was properly before the court, and that it was a contract actually executed on behalf of the corporation by an authorized agent. The contract itself was to run for a year, and it contained no provisions for cancellation. If there was any understanding such as that referred to in the telegram, "that after ninety days we could at our option cancel the contract between yourselves and ourselves," it must have been an understanding or agreement separate and apart from the written contract. But the defendant has introduced no evidence that there was any such understanding or agreement.

The evidence shows that the plaintiff performed the contract in accordance with its terms; that the compensation was earned, but has not been paid.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

128 Cal.App. 632

THOMMES v. THOMMES.

Civ. 1005.

District Court of Appeal, Fourth District,
California.

Jan. 12, 1933.

I. Venue Ⓒ70.

Affidavits setting out defendant left his residence in another county, became employed in county where sued, and thereafter returned to other county to obtain change of venue sustained order retaining venue in county where action was brought.

Such affidavits in opposition to defendant's motion for change of venue stated that defendant left his residence in the other county, took his furniture from his then home, brought his children with him, and came into the county where he was sued, and was employed therein, that defendant then left the county of suit and went to county of his former residence to obtain change of venue, and that defendant was seen in county of suit after he had removed to the county of his former residence.

2. Appeal and error ¶1024(3).

Conflict in affidavits on motion for change of venue must be resolved in favor of prevailing party.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmunds, Judge.

Action by Florence G. Thommes against Matthew P. Thommes. From an order denying his motion for a change of venue, defendant appeals.

Affirmed.

J. O. Reavis, of Bakersfield, and E. A. Kline, of Los Angeles, for appellant.

Harry M. Ticknor and Roland Maxwell, both of Pasadena, for respondent.

VAN ZANTE, Justice pro tem.

This is an appeal from an order denying a motion for change of venue. This action was brought in Los Angeles county. The defendant filed a demurrer and a demand that the place of trial be transferred to the county of Kern. The matter was submitted on affidavits of the respective parties, two of which were submitted by plaintiff and two by the defendant. The trial court denied defendant's motion.

The only question involved in this appeal is the sufficiency of the plaintiff's affidavits. There was no oral or other evidence offered by the parties other than the affidavits. "In considering the affidavits used upon the said motion this court is bound by the same rule that controls where oral testimony is presented for review." *Sourbis v. Rhoads*, 50 Cal. App. 98, at page 100, 194 P. 521.

The defendant admits the correctness of the above rule, but contends that plaintiff's affidavits do not contain any substantial evidence upon which the trial court could base its order. While we are not called upon to pass on the sufficiency of the defendant's affidavits, as was the trial court, we may observe here that the criticism offered of plaintiff's affidavits can be equally well applied to his affidavits. The affidavits of both parties are lacking in definiteness and particularity, and consist to some extent in conclusions of the respective affiants.

The following, omitting the formal parts, are the two affidavits in question: "That she is the plaintiff in the above entitled action; that the defendant Matthew P. Thommes previous to the 12th day of June, 1930, abandoned his residence in the County of Kern, State of California, and came to the City of Pasadena, State of California; that previous to leaving his said residence in the County of Kern, State of California, defendant took the furniture from his then home and abandoned the live stock situated at his place of resi-

dence; that thereafter defendant came to the City of Pasadena, California, and entered the employ of John J. Henne in the City of Pasadena, California, and was employed by the said John J. Henne until service of summons and complaint herein on the 17th day of June, 1930; that when defendant came to the County of Los Angeles he brought with him the children of the parties hereto and that the summons and complaint herein were served on the defendant in the City of Pasadena, California, on the 17th day of June, 1930; that affiant is informed and believes and therefore alleges that defendant left his employment in the City of Pasadena and returned to Kern County solely for the purpose of obtaining a change of venue in this action, and that until the time of the service of the summons and complaint herein on the 17th day of June, 1930, defendant had no intention whatever of returning to Kern County." "That she is the plaintiff in the above entitled action; that on Saturday, June 28, 1930, the defendant herein came to the home of affiant in the City of Pasadena; that on July 8, 1930, affiant saw defendant working in the 800 block on Lincoln Avenue in the City of Pasadena, California; that affiant has been informed by friends and acquaintances that they have seen defendant every day or two in the City of Pasadena since the said 28th day of June, 1930; that affiant is informed and believes and therefore alleges that defendant has been present in the City of Pasadena, California, and has been residing in said city continuously since the 28th day of June, 1930, as well as previously as appears from the affidavit heretofore filed herein by affiant."

The following statements are taken from the foregoing affidavits: "That the defendant Matthew P. Thommes previous to the 12th day of June, 1930, * * * came to the City of Pasadena, State of California; that previous to his leaving his said residence in the County of Kern, State of California, defendant took the furniture from his then home; * * * that thereafter defendant came to the City of Pasadena, California, and entered the employ of John J. Henne in the City of Pasadena, California, and was employed by the said John J. Henne until service of summons and complaint herein on the 17th day of June, 1930; that when defendant came to the County of Los Angeles he brought with him the children of the parties hereto and that the summons and complaint herein were served on the defendant in the City of Pasadena, California, on the 17th day of June, 1930." "That on Saturday, June 28, 1930, the defendant herein came to the home of affiant; that on July 8, 1930, affiant saw the defendant working in the 800 block on Lincoln Avenue in the City of Pasadena, California."

[1, 2] These statements are not mere conclusions of affiant, but are the statements of substantial and probative facts, most of which are practically uncontradicted. It has been held repeatedly by the courts of this state that where there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true and the facts stated therein must be considered as established. *Gordon v. Perkins*, 203 Cal. 183, 263 P. 231; *McKenzie v. Barling*, 101 Cal. 459, 36 P. 8; *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001; *Henderson v. Cohen*, 10 Cal. App. 580, 102 P. 826; *Sourbis v. Rhoads*, supra; *Smilie v. Smilie*, 24 Cal. App. 420, 141 P. 829. The ruling of the trial court is conclusive on appeal.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 591

McKINLEY v. SMITH (FIDELITY & DEPOSIT CO. OF MARYLAND, Intervener).

Civ. 4683.

District Court of Appeal, Third District, California.

Jan. 10, 1933.

Rehearing Denied Feb. 9, 1933.

Hearing Denied by Supreme Court Mar. 9, 1933.

1. Assignments ⇐137.

As regards assignee's right to money, evidence sustained finding assignor was robber of bank from which money was allegedly taken.

2. Evidence ⇐596(2).

That assignor of money involved in civil action robbed bank from which money was allegedly taken held required to be established only by preponderance of evidence.

3. Appeal and error ⇐1050(1).

Alleged erroneous admission of defendant's hearsay testimony tending to prove facts admitted by pleadings and supported by plaintiff's exhibit held not prejudicial error.

4. Evidence ⇐317(2).

In determining whether money was taken by assignor in bank robbery, jury could consider hearsay testimony that assignor refused to make statement regarding money.

It appeared that witness had gone to sister state to bring assignor back to state for criminal trial, that police officers of sister state in presence of assignor handed money to witness stating that the money was taken from the person of the assignor, whereupon the witness asked assignor as to what he had to say, to which

assignor stated that he was not saying anything.

Appeal from Superior Court, Stanislaus County; Stanley Murray, Judge.

Action by Hugo McKinley against Lee E. Smith, in which the Fidelity & Deposit Company of Maryland intervened. From an adverse judgment, plaintiff appeals.

Affirmed.

J. W. Hawkins and L. B. Schlingheyde, both of Modesto, and Joseph A. Brown, of San Francisco, for appellant.

Thomas E. Davis, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Plaintiff began this action to obtain a judgment against the defendant Lee E. Smith for the recovery of \$650. After the action was begun the Fidelity & Deposit Company of Maryland, a corporation, was allowed to intervene. Judgment went for the defendant and Intervener, and the plaintiff appeals.

The record shows that on or about the 6th day of February, 1931, the Modesto branch of the American Trust Company, a banking institution, was held up and robbed of the sum of \$1,548. The man robbing the bank passed across the counter to the teller a check upon the back of which was written a demand for all the money in sight, and, at the same time, presenting a gun to enforce his orders. After obtaining the money this person ran out of the bank, stopped an automobile, and commanded the driver thereof to step on the gas and speed away. About two weeks later Russell Hill was apprehended in St. Joseph, Mo., and at the time of his apprehension had upon his person between \$600 and \$700 in currency. This money was taken from the person of Russell Hill by the police officers making the arrest at St. Joseph, Mo., and by them delivered into the possession of Lee E. Smith, the chief of police of Modesto, who had gone to St. Joseph, Mo., to bring the person of Russell Hill back to Modesto for trial.

The record shows that, upon the return of the chief of police with Russell Hill to Modesto, he was identified by the teller of the bank who had been held up, identified by the driver of the automobile commandeered by Russell Hill after holding up the bank, and was also identified by Miss Elsie Osterberg who was standing immediately behind Russell Hill at the time of the robbery.

Following the preliminary examination of Russell Hill, held at Modesto, his trial in the superior court was set for May 7, 1931. Two

or three days previously to the trial Russell Hill committed suicide in the county jail at the city of Modesto.

On the 7th day of March, 1931, after Russell Hill had been returned to the city of Modesto, and had employed counsel, the record shows that he gave to his counsel the following written instrument, introduced as "Plaintiff's Exhibit A":

"Modesto, Calif. March 7, 1931.

"To Lee E. Smith, Chief of Police, Modesto, California.

"You will kindly deliver to my attorney Hugo McKinley, Six Hundred Dollars, being due him for services rendered and to be hereafter rendered in my behalf. This money was taken off of me by the police officers in St. Joseph, Missouri, at the time of my arrest. You will also deliver to my attorney the money refunded me for my railroad ticket while at St. Joseph, and oblige,

"Yours truly, Russell Hill

"Received a copy of the within order this 17th day of March, 1931."

The money held by the chief of police which was taken from the person of Russell Hill in St. Joseph, Mo., not having been delivered to the plaintiff upon the presentation of the written instrument just set out and oral demand for the money, this action was begun.

The first paragraph of the complaint is in the following words and figures: "That the plaintiff is now and at all times herein mentioned was the owner of and entitled to the possession of that certain Six Hundred Fifty Dollars (\$650.00) taken from the person of Russell L. Hill at St. Joseph, Missouri, and delivered to the possession of the defendant in St. Joseph, Missouri, and now in the possession of the said defendant; that the value of said money is Six Hundred Fifty Dollars (\$650.00)."

The answer admits all of paragraph I of the complaint, save and except as to the ownership of the money.

The assignment executed by Russell Hill purports only to transfer to him \$600 for alleged services, and includes an item for a refund obtained on the railroad ticket, without specifying the amount. The complaint, as we have just stated, is for the sum of \$650.

Upon the trial of the action it appears that the court permitted the witness Smith to testify to statements made by the arresting police officers in St. Joseph, Mo., in the presence of Russell Hill, at the time when the money referred to was handed to Smith by the police officers that the money so handed to Smith was taken from the person of Russell Hill, and that, after this statement was made, Russell Hill was asked by Smith as to what he had to say, to which Hill replied: "I ain't saying anything."

The transcript further shows that the money so turned over to Lee Smith, the chief of police of the city of Modesto, and brought by him back to the city, together with the person of Russell Hill, contained, among other denominations, a certain \$10 bill of which the Modesto bank had a memorandum of the serial number, showing that it had been stolen on the day in question by the person who had robbed the bank of \$1,548 in currency. Upon this appeal it is urged that the admission of this testimony constitutes reversible error, and without this testimony the judgment cannot be sustained.

[1, 2] In order to sustain the verdict the record must show that Russell Hill was the same person who robbed the bank on February 6, 1931; also, that the money in question was taken from his person, and that the money, or some of it, taken from the person of Russell Hill, could be identified so as to sufficiently sustain the inference that the whole sum of money taken from the person of Russell Hill was the remaining part of the money stolen from the Modesto bank. The identification of the person of Russell Hill as the robber of the bank stands out in the record, without contradiction, amply sufficient to sustain a finding of the jury beyond every reasonable doubt that Russell Hill was the robber of the bank. His suicide two or three days preceding the trial prevented, of course, the question ever being presented to a jury so as to necessitate proof beyond a reasonable doubt. This being a civil action, all that was required was to establish the facts by a preponderance of the evidence.

[3] Was the admission of what was said by the police officers in the presence of Russell Hill, when the money involved in this action was turned over to the possession of the chief of police of the city of Modesto, erroneous, and, if erroneous, is it of such a prejudicial character as to necessitate a reversal herein? The answer is found in the assignment upon which the plaintiff bases his right to the possession of the money, and also the complaint filed by him. The assignment, as we have set it forth, contains the following words: "This money was taken off of me by the police officers in St. Joseph, Missouri, at the time of my arrest." The complaint in the first count, which we have set forth, likewise shows the taking of the money from the possession of Russell Hill. It uses these words: "That certain \$650.00 taken from the person of Russell L. Hill, at St. Joseph, Missouri, and delivered to the possession of the defendant in St. Joseph, Missouri, and now in the possession of the defendant." The very basis of the plaintiff's action is that he is entitled to the money which was taken from the person of Russell Hill in St. Joseph, Mo., by the police officers

at the time of Hill's arrest, and turned over to the chief of police of the city of Modesto. The face of the complaint and the assignment thus set forth, and fixing the very fact to which the alleged hearsay testimony referred, is so definite and certain that it seems now almost passing strange that the admission of testimony, even though it be hearsay, to support the very facts set forth in the plaintiff's alleged title to the money and the complaint upon which he bases this action, should now be alleged as prejudicial error. The plaintiff's Exhibit "A" and his complaint obviated any necessity of proving that the money involved in the action was taken from the person of Russell Hill, and whether admissible or inadmissible, any further testimony supporting that fact would only be cumulative and tend to prove a fact admitted by the pleadings and supported by the plaintiff's own exhibit.

The record further shows that at the time that the plaintiff presented his assignment signed by Russell Hill, purporting to transfer the ownership of the money in question from Russell Hill to the plaintiff, the plaintiff specifically excepted in his demand upon the chief of police the turning over and delivery to him of the \$10 bill of which the bank had the serial number, and taken from the possession of Russell Hill. Why the plaintiff did not want all of the money is sufficiently apparent from what we have said, and needs no further comment.

The record further shows that at the time of the assignment upon which the plaintiff bases his right of action, and prior thereto, he knew that Russell Hill was confined in the county jail of the county of Stanislaus, in the city of Modesto, charged with robbing the Modesto branch of the American Trust Company. This fixes the fact that the plaintiff is not in the position of an innocent holder, and took no better title than that possessed by Russell Hill, the man identified, beyond any reasonable controversy, as the one who held up the bank.

In addition to what we have said, the record shows that Russell Hill was arrested in St. Joseph, Mo., about two weeks after the robbery of the bank in Modesto. The marked \$10 bill had not been paid out to any other person, and it could not have come into the possession of Russell Hill unless he were the one who had robbed the bank, or had obtained the bill from someone who had robbed the bank. The record being practically in-

controvertible that Russell Hill was the one who robbed the bank, the jury could not reasonably have come to any other conclusion than that Russell Hill was the person who robbed the bank, obtained possession of the marked bill, and took it with him with the other moneys found in his possession, to St. Joseph, Mo. Under these circumstances no jury could reasonably come to any other conclusion than that Russell Hill was the one who robbed the bank of the \$1,548, and still had in his possession, as a part thereof, the currency which was found upon him at the time of his arrest. Whether he had a confederate does not appear from the testimony, and what became of the remainder of the currency, of course, is not disclosed. Hill's lips are sealed, and that question cannot be answered.

[4] With reference to the hearsay testimony, we think the jury had a right to take into consideration as to where Russell Hill had obtained the money when he was asked by the chief of police if he had anything to say, and he replied, "I ain't saying anything." No one who had obtained the money honestly would have made such an answer. After the bank had been robbed, the Fidelity & Deposit Company of Maryland, a corporation, the insurance carrier of the bank, took an assignment of the bank's claim, was allowed to intervene herein, and was found by the jury to be the owner of the money involved in this action.

In view of the foregoing, we do not deem it necessary to enter into any technical discussion of the instructions given by the trial court to the jury, nor of the requested instructions that were refused, further than to say that a reading of the instructions shows that the jury was fairly and fully instructed, and that no error is disclosed sufficient to warrant any reversal, if error there be.

We do not deem it necessary to cite any authorities in this case, as what we have said, as disclosed by the record, is sufficient to satisfy any reasonable man that the money involved herein was a part of the currency stolen by Russell Hill, from the bank in Modesto, and that any one taking an assignment from him, with knowledge, would acquire no title.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 504

COURTNEY et al. v. TUFELD et al.

Civ. 4637.

District Court of Appeal, Third District,
California.

Dec. 31, 1932.

1. Usury $\hookrightarrow$ 42.

Note given for \$1,474 where borrowers received \$1,000 only from lender *held* usurious (Deering's Gen. Laws 1931, Act 3757).

2. Usury $\hookrightarrow$ 138.

Borrowers *held* not entitled to treble and recover amount lender deducted for interest, where borrowers never paid such sum either as principal or interest (Deering's Gen. Laws 1931, Act 3757).

3. Usury $\hookrightarrow$ 138.

Borrowers *held* not entitled to treble and recover sum paid after execution of usurious note, where such sum under terms of note was paid on principal (Deering's Gen. Laws 1931, Act 3757).

4. Usury $\hookrightarrow$ 137.

Borrowers *held* not entitled to treble and recover whole sum of usurious note, where such amount was not paid by them (Deering's Gen. Laws 1931, Act 3757).

5. Usury $\hookrightarrow$ 145.

Borrowers *held* not entitled to have whole contract, note, and mortgage canceled and declared void for usurious interest charged (Deering's Gen. Laws 1931, Act 3757).

6. Appeal and error $\hookrightarrow$ 1030.

Judgment giving defendants not appearing in action their costs, if error, *held* harmless, where defendants incurred no costs.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Elizabeth Courtney and another against Ben J. Tufeld and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

T. Frank Courtney, of Los Angeles, for appellants.

KING, Justice pro tem., delivered the opinion of the court.

This is an appeal from a judgment in a case brought under the Usury Law. Act 3757, Gen. Laws (Deering Gen. Laws 1931, Act 3757).

The complaint alleges that Ben J. Tufeld agreed to loan plaintiffs \$1,474 on October 30, 1925, and on said date plaintiffs executed to him their note for \$1,474, with interest at 8 per cent. per annum, principal payable in installments as follows: \$184.25 on November

30, 1925, and a like amount on the 30th day of each month thereafter until paid, "interest paid in advance." Plaintiffs also gave a chattel mortgage to secure payment of the note. The mortgage was immediately assigned to defendant Fidelity Reserve Corporation. It is then alleged that defendant Tufeld, upon receiving the note and mortgage, presented to plaintiffs a check for \$1,474 and asked plaintiffs to indorse the same, "In order that he might cash the said check and take out the interest charges which he demanded in advance." It is then alleged that plaintiffs indorsed the check and gave it to defendant Tufeld, who then handed plaintiffs \$1,000 in cash, and this sum was all that plaintiffs received on the loan. The complaint further alleges that plaintiffs paid to defendants the sum of \$184.25 on November 30, 1925; \$184.25 on December 30, 1925; and the sum of \$100 on February 9, 1926, a total of \$468.50, and that from and after February 9, 1926, defendants have demanded and are continuing to demand the sum of \$1,005.50, with interest "at 8 per cent per annum thereon from February 24, 1926." It then alleges that defendant Fidelity Reserve Corporation "at various times and now purports to be the owner and holder thereof," and alleges that said last-named defendant at the time of the assignment to it of the note and mortgage knew, and at all times since has known, that the note and mortgage were executed in the manner, under the conditions, and for the sums thereinbefore stated; and alleges that at all times defendant Tufeld was and is the true and only holder and owner of the note and mortgage, "and that the defendant Fidelity Reserve Corporation has at all times acted merely as a 'dummy' holder for purposes of making collections as agent only for defendant Ben J. Tufeld, and has no right, title or interest in said note and mortgage." It further alleges that one year has not elapsed since the various payments on the note, and asks judgment: (1) That the contract, note, mortgage, and agreement be declared usurious, illegal, null, and void; and defendants be ordered to cancel the note and mortgage, and be restrained from disposing of or foreclosing the same; that the corporation defendant be declared to be the collection agent only of the other defendant; (2) for judgment against defendant Tufeld for treble the sum of \$474 taken and charged as interest on October 30, 1925; (3) for judgment for treble the sum of \$468.50 paid by plaintiffs since the execution of the note; and (4) for treble the whole sum of \$1,474.

Defendants defaulted and the court finally on December 18, 1929, gave judgment that plaintiffs take nothing by their complaint, and that defendants "have judgment for their costs in said action."

It is from this judgment that the appeal is

taken by the plaintiffs, and the defendants do not appear in this court.

In the case of *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 612, 254 P. 956, 958, 255 P. 805, 806, 53 A. L. R. 725, the Supreme Court very fully discusses the "Usury Law," and, among other things, says that it is made clear and plain by the act that the maximum rate of 12 per cent. per annum on the amount loaned is the full measure of all profit to the lender in connection therewith.

[1] Very evidently the note given here for \$1,474, when the plaintiffs received the sum of \$1,000 only from the lender, is usurious under the explicit terms of the act, and defendants by defaulting seem to concede this.

[2] In the case of *Haines v. Commercial Mtg. Co.*, supra, the court held that a bonus of 3 per cent. exacted and deducted from the principal sum of the note involved in that case, "Was not actually paid, and is, therefore, not a proper item of said judgment for trebling the amount thereof," and that while it cannot be collected "But cannot be the basis of apportionment for either principal or interest, and the payments on account of principal will serve to reduce the net principal and will not be construed as a payment of said charge." The sum of \$474 deducted here similarly was never paid by plaintiffs either as principal or as interest, for they never had it. All they received was \$1,000, and the sum deducted not having been paid, plaintiffs are not entitled to treble and recover it.

[3] The sum of \$468.50 paid by plaintiffs was distinctly agreed by the terms of the note to be paid on principal, and therefore plaintiffs are not entitled to have it trebled and to recover it.

[4] The whole sum of \$1,474 which plaintiffs ask to have trebled and judgment given them for the amount has not been paid, and plaintiffs are not entitled to judgment for it.

[5] Finally, as to the prayer of the complaint that the contract, etc., be declared usurious, illegal, and void, and be canceled, the decision in the case of *Haines v. Commercial Mtg. Co.*, cited above, uses this language: "Even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest. * * * No authority has been cited, and none can be found, holding the principal debt forfeited under such provision of a statute."

This very clearly disposes of the claim for a cancellation of the debt.

[6] It is difficult to discern why the lower court gave judgment that the defendants have their costs in the action when they never appeared and were not before the court. However, it is just as difficult to see that they

incurred any costs whatever, not having been in court, so this part of the judgment is harmless to appellants.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 357

SHAFER v. LOS SERRANOS CO. et al.

Civ. 192.

District Court of Appeal, Fourth District, California.

Dec. 23, 1932.

1. Appeal and error ⇨901, 907(2).

Appellate court must assume that evidence not before it supported judgment; burden being on appellant to show error.

2. Mechanics' liens ⇨5.

Mechanics' lien statutes are intended to protect both materialmen and property owners.

3. Mechanics' liens ⇨135, 139(1).

Materialman, not stating kind of materials furnished and party furnished them in recorded lien notice, acquired no lien on property of bank, not connected with erection of building thereon, nor informed that materials were being furnished (Code Civ. Proc. §§ 1192, 1203).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warner, Judge.

Action by H. G. Shafer, doing business under the firm name and style of the Chino Lumber Company, against the Los Serranos Company and the United States National Bank of Los Angeles. From a judgment for defendant bank, plaintiff appeals.

Affirmed.

Pollock & Mitchell, of Ontario, for appellant.

Patterson, Bailey & Montgomery, of Los Angeles, for respondents.

BARNARD, P. J.

This is an action for the foreclosure of a mechanic's lien. The complaint alleges that the United States National Bank of Los Angeles is the owner and reputed owner of certain described premises; that on certain dates the Los Serranos Company engaged the plaintiff to furnish material to be used in the construction of a certain building on said premises at an agreed price; that the plaintiff furnished certain lumber to be used, and which was ac-

tually used, in the construction of said building; and that notice of claim of lien was duly recorded. Attached to the complaint is a copy of this notice of claim of lien which sets forth that the Los Serranos Company erected a building on the premises in question; that the name of the owner or reputed owner is the United States National Bank of Los Angeles; that the name of the contractors "who engaged with Los Serranos Company" is Hartley & Camp Construction Company; that the claimant supplied lumber to be used, and which was actually used, in the construction of said building; that said material was furnished between certain named dates; that no notice of completion has been recorded; that ninety days have not elapsed since the building was completed; that the reasonable value of the materials so furnished was a named amount; and that nothing has been paid on account thereof.

The defendant United States National Bank of Los Angeles filed an answer in which, among other things, it alleged that it held the legal title to the property in question, and that within ten days after it acquired knowledge of any work being done upon said property it gave notice of nonresponsibility by posting and recording a notice to that effect in accordance with the provisions of section 1192 of the Code of Civil Procedure. After a trial, judgment was entered in favor of the United States National Bank of Los Angeles, from which judgment the plaintiff has appealed upon the judgment roll alone.

The sole contention made by the appellant is that the court erred in finding or concluding that the claim of lien as filed "did not meet the requirements of chapter 2, title 4 of part 3 of the Code of Civil Procedure," and that for this reason the court erred in finding and concluding that "the plaintiff is not entitled to and has no lien upon the land described"; it being urged that in all other respects the findings entitle the appellant to a judgment as prayed for.

It is conceded that the notice of lien, as recorded, failed to set forth the kind of materials furnished; it being merely stated therein that the claimant "supplied material." It is also conceded that the notice failed to state to whom the material was furnished. In reference to the first omission, the respondent relies on the case of *Norton v. Bedell Engineering Co.*, 88 Cal. App. 777, 264 P. 311, 312. In that case a complaint was held insufficient which failed to allege the kind of work done or the kind of materials furnished; it being conceded that the notice recorded disclosed a similar deficiency. However, in *Johnson v. Smith*, 97 Cal. App. 752, 276 P. 146, it was held that a similar omission in a claim of lien was not fatal, in view of section 1203 of the Code of Civil Procedure, in the absence of any showing of an intent to defraud or resulting injury to an innocent third party.

In reference to the second defect referred to, as to the name of the party to whom the materials were furnished, the respondent relies on such cases as *Madera Flume, etc., Co. v. Kendall*, 120 Cal. 182, 52 P. 304, 65 Am. St. Rep. 177; *Hogan v. Bigler*, 8 Cal. App. 71, 96 P. 97, and *Santa Monica Lumber & Mill Company v. Hege*, 119 Cal. 376, 51 P. 555. On the other hand, the appellant contends that, under section 1203 of the Code of Civil Procedure, this claim must be held sufficient in the absence of any showing of injury. In *Richmond Sanitary Company v. Franklin*, 122 Cal. App. 229, 9 P.(2d) 855, 856; the court said: "Since the enactment of section 1203 of the Code of Civil Procedure many cases have been decided on the authority of that section. No one of them has followed the harsh rule stated in the case of *Santa Monica L. & M. Co. v. Hege*, supra." In *Prince v. Hill*, 170 Cal. 192, 149 P. 578, 580, the court said: "The statute does not require such literal exactness and rigid adherence to precise form as the appellants contend." In that case the court held that the name of the person to whom the materials were furnished was sufficiently disclosed by the allegations of the notice. In *Jarvis v. Frey*, 175 Cal. 687, 166 P. 997, a notice of lien was held to be sufficient where it could be reasonably inferred from statements in the notice to whom the materials were furnished. A somewhat similar rule was followed in the case of *Trout v. Siegel*, 202 Cal. 706, 262 P. 320. In *Consolidated Pipe Company v. Wolski*, 211 Cal. 563, 296 P. 277, 278, it is said: "Liens of mechanics or materialmen will not be held invalid unless they tend to defraud or fail to impart notice."

Assuming, for the purposes of this opinion, that, under the authorities above referred to, the conceded omissions in the notice of lien here in question should not be held to invalidate the lien in the absence of any showing of injury, we are here confronted with a situation somewhat different from that found in any of the cases above referred to. In this case the notice of claim of lien sets forth that the bank is the owner of the property, that the Los Serranos Company erected a building thereon, and that Hartley & Camp Construction Company were the contractors "who engaged with said Los Serranos Company," but does not state to which of the three parties named the materials were furnished. While the complaint alleges that the materials were furnished to the Los Serranos Company, it is not alleged that this company had any interest in the property, and nothing is alleged to indicate any relationship of any kind between this company and the owner of the property, and nothing to indicate any knowledge on the part of the owner that any building was being constructed or any materials furnished therefor. The answer of the owner pleads a lack of such knowledge on its part, and the court found that the Los Serranos Company did not at any time act as agent for

the owner, did not act for the owner in any capacity whatsoever, and that the appellant furnished the material without the knowledge of the owner.

In *Maxwell Hardware Company v. Foster*, 207 Cal. 167, 277 P. 327, 328, we find the following: "Action for the foreclosure of a materialman's lien for building materials furnished defendant Foster in the construction of a building upon real property belonging to the defendant Kates. The court gave judgment in favor of defendant Kates. The plaintiff has appealed. The evidence fails to show that Foster had any authority from Kates to purchase said materials, or to construct said building, or that Kates had any knowledge that the building was being constructed. Without evidence showing that defendant Kates had knowledge of the construction of said building, the real property owned by him and upon which said building was constructed would not be subject to a lien for materials used in its construction. Code Civ. Proc. § 1192. The judgment, therefore, denying plaintiff a lien upon the property of the defendant Kates was properly entered."

[1] A similar situation appears here. While the evidence is not before us, we must assume in support of the judgment, especially in view of the finding referred to, that the evidence fails to show that the Los Serranos Company had any authority from the owner to purchase these materials or to construct the building, or that the owner had any knowledge that the building was being constructed. It may fairly be inferred, from the facts found, that the owner did not know that this building was being erected. The burden is on the appellant to show any error, and we may not assume that error might be disclosed by the evidence, when the same is not presented for review.

[2] While the strict rules applied in some of the earlier cases have been somewhat modified in certain more recent cases, especially through the application of section 1203 of the Code of Civil Procedure, this has occurred in cases where the owner or his contractor had purchased the materials in question where the requisites of the statute had been substantially complied with, and where the notice actually given could be considered equally as effective as a notice more technically correct. But these lien statutes are intended, not only for the protection of a materialman, but also of a property owner. *Diamond M. Company v. Sanitary F. Company*, 70 Cal. App. 695, 234 P. 322, 327. In that case the court said: "The Legislature has introduced into the system for the enforcement of liens of mechanics, etc., the only equitable principles which can be invoked in the decision of any case arising under such statute in the rules enunciated in section 1203 of the Code of Civil Procedure and section 14 of the Act of 1911, and unless the case is one which is

subject to the mollifying influence of the rules declared in those sections, then, if the default or neglect be material to the perfection of a lien, it is beyond the remedial scope of equity, in the exercise of its usual powers, to protect the lien claimant against the untoward consequences of what may be and probably was his own neglect."

And in *Norton v. Bedell Engineering Company*, supra, it was said: "The remedy for securing the payment of a claim by means of a mechanic's lien is statutory, and the procedure provided by law must be substantially complied with."

[3] Those requisites which are essential for securing and enforcing such a lien as is here involved are comparatively simple and easily complied with, and no principle of equity demands that the bars be entirely let down in order to enable a claimant to hold an owner who is not shown to have any connection directly or indirectly with the erection of a building on his property, nor any knowledge that materials were being furnished for such a purpose.

Under the circumstances here appearing, we are neither prepared to hold that appellant has brought himself within the provisions of section 1203 of the Code of Civil Procedure, nor that the other findings of the court are not sufficient to sustain the judgment.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 780

Henry GONZALES, Plaintiff and Appellant, v. LOS SERRANOS COMPANY and the United States National Bank of Los Angeles, Defendants and Respondents.

Civ. 193.

District Court of Appeal, Fourth District,
California.

Dec. 23, 1932.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Pollock & Mitchell, of Ontario, for appellant.

Patterson, Bailey & Montgomery, of Los Angeles, for respondents.

BARNARD, P. J.

Except for the name of the plaintiff and claimant, a difference in certain dates and amounts, the essential facts of this case are almost identical with those in the case of

Shafer v. Los Serranos Company & United States National Bank of Los Angeles, 17 P. (2d) 1036, this day decided. One difference is that in this case the notice of claim of lien states that the contractors, Hartley & Camp Construction Company, engaged with the United States National Bank of Los Angeles to erect a building on the property described. However, the complaint alleges that the plaintiff furnished the materials, for the value of which a lien is claimed, to the Los Serranos Company, nothing being alleged in the complaint to in any manner indicate any connection of the Los Serranos Company with the property or the owner thereof. In all other respects the facts and findings in the two cases are essentially the same.

Upon the authority of Shafer v. Los Serranos Company & United States National Bank of Los Angeles, and for the reasons therein set forth, the judgment herein appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 508

PINELLO et ux. v. TAYLOR.
Civ. 8554.

District Court of Appeal, First District, Division 1, California.

Jan. 3, 1933.

Rehearing Denied Feb. 2, 1933.

Hearing Denied by Supreme Court Mar. 2, 1933.

1. Evidence ⇨60.

Generally, every person may assume that every other person will perform his duty and obey law.

2. Negligence ⇨68.

In absence of reasonable ground for thinking otherwise, assumption by person that he will not be exposed to danger through breach of duty of another, or his violation of law, does not constitute negligence.

3. Automobiles ⇨206.

Pedestrian has right to assume that automobile driver will obey traffic rules.

4. Automobiles ⇨217(5).

Pedestrian, in crossing street at intersection, is not required to look continuously to right and left.

5. Negligence ⇨136(9).

Contributory negligence becomes question of law only when court must say that reasonable men can draw but one inference, and that of plaintiff's negligence.

6. Automobiles ⇨245(72).

Contributory negligence of pedestrian, struck by automobile while crossing street

in pedestrian path at intersection with traffic signals, *held* question for jury.

7. Automobiles ⇨217(5).

It is not contributory negligence for pedestrian to fail to look for danger at street intersection, where there is no reason to apprehend it.

8. Trial ⇨253(4).

Instruction on duty imposed upon pedestrian, ignoring rights of pedestrian when traffic signals were in her favor, *held* improper as invading province of jury.

Certain instructions, taken together, in substance, directed jury to return a verdict for the defendant if the plaintiff did not continuously look both to her right and to her left as she proceeded across the street, regardless of fact that there was evidence that she was in the pedestrian lane at the time of the accident and that the traffic signal had closed traffic on the street which she was attempting to cross.

9. Automobiles ⇨246(47).

Plaintiff's instruction on duty required when traffic signal was in her favor at street intersection *held* improperly refused under evidence.

Instruction requested by plaintiff, but refused, would have stated to jury that if they believed from evidence that plaintiff, without negligence, was crossing street at intersection along pedestrian lane when traffic signals or controls were in her favor, the plaintiff was entitled to assume that such traffic signal would be obeyed by automobile driver approaching intersection at time.

10. Automobiles ⇨246(24).

Refusal of plaintiff's instruction on presumption which pedestrian could indulge in, that automobile drivers would obey traffic laws and regulations, *held* error under evidence.

11. Automobiles ⇨160(1), 216.

Both automobile driver and pedestrian are charged with same degree of care, but amount of care exacted of automobile driver is far greater.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by John Pinello and wife against Minnie Jones Taylor. From a judgment in favor of the defendant, the plaintiffs appeal.

Reversed.

Shortridge & McInerney and Henry O. Clausen, all of San Francisco, for appellants.

Charles W. Haswell, of San Francisco, for respondent.

JAMISON, Justice pro tem.

Plaintiffs are husband and wife. This is an action for damages for injuries sustained by the wife, alleged to have been struck by an automobile operated by defendant, while the said wife was attempting to walk across Geary street at its intersection with Ninth avenue in the city of San Francisco.

The case was tried by a jury, verdict was rendered in favor of defendant, a motion for a new trial was denied, and judgment was thereupon entered for said defendant, and from this judgment plaintiffs have appealed.

As grounds for reversal, appellants contend that the court erred in giving a certain instruction for respondent, and refusing three asked for by appellants. In order to determine whether or not the court erred in giving and refusing to give said instructions, a brief review of the evidence is necessary. Geary street runs easterly and westerly, and Ninth avenue northerly and southerly; Geary street being about eighty-two feet wide. At the intersection of said streets there are located traffic "Stop" and "Go" signals, and marked pedestrian lanes leading across Geary street. Appellant Steffana Pinello testified that she lived about half a block south of said intersection on the westerly side of Ninth avenue; that she had lived there for five years, and on many occasions had crossed Geary street at said intersection, and was familiar with the traffic signal located at that point; that on April 2, 1930, about 1:30 p. m., she was returning home from her bank where she had cashed some checks, and was walking along Ninth avenue on its westerly side; that when she arrived at its intersection with Geary street she noticed that the signal was open for traffic on Geary street. After waiting a short time the signal changed and opened for traffic on Ninth avenue, and thereupon she started to cross Geary street on the westerly pedestrian lane. Just before she started to cross she looked to the east and saw respondent's car east on Geary street about one block away. As she left the curb she again looked to the east and saw respondent's car coming nearer, but some distance from the intersection. She did not look again, and when she had proceeded along said westerly lane some eighteen or nineteen feet she was struck by respondent's car, knocked down, and carried by it about ten feet.

Respondent was driving westerly on Geary street at the time of the accident, and it is admitted that no street cars nor automobiles were traveling in front of her, and between her and said intersection, as she approached the same. Mrs. Pinello heard no warning given by respondent prior to being struck.

Frank Dillon was an eyewitness to the accident. He testified that he saw respondent's car strike Mrs. Pinello; that he heard no

warning signal given by respondent prior to the accident; that there was but little traffic on Geary street at the time of the collision; that respondent's automobile struck Mrs. Pinello squarely in the rear and she slid or was shoved some five or ten feet; that Mrs. Pinello was walking in the westerly pedestrian lane when she was struck, some ten or fifteen feet from the north curb of Geary street.

L. A. Watson and W. A. Swain testified that immediately after the accident they saw the position of respondent's car; that it was just west of the westerly line of said westerly pedestrian lane, and at that time they saw some one assisting Mrs. Pinello to get up. Both of the appellants and Luccia Fannucci testified that shortly after the accident respondent said, "I know it was my fault but what can I do now?" None of them heard respondent sound her horn prior to the collision.

Respondent testified that she was traveling westerly on Geary street; that when she arrived at the intersection of Ninth avenue the signal indicated "Go" and she passed across said intersection, and when seventy-five or a hundred feet west of said intersection she saw Mrs. Pinello about five feet in front of her car. When she saw Mrs. Pinello she sounded her horn, and Mrs. Pinello jumped in front of the car and was hit and knocked down. She said she stopped her car within a distance of a foot and a half after hitting Mrs. Pinello. She denied making the statement to which appellants and Luccia Fannucci testified.

Ruth Tabor, a witness for respondent, testified that at the time of the accident she was driving east on Geary street and witnessed same; that respondent's car was some distance west of said intersection at the time of the collision; that Mrs. Pinello came out from in front of an automobile that was parked at the curb; that she (Ruth Tabor) was going east on Geary street when she heard the horn of respondent's car; that Mrs. Pinello threw up her hands and screamed and turned and ran four or five steps toward respondent's car and fell upon her hands and knees; that she was not struck by respondent's car.

Respondent's instruction No. 1, for the giving of which the appellants complain, is as follows: "I instruct you that the law of this state imposes upon a pedestrian, a duty to use ordinary care before proceeding to cross a highway where vehicles frequently pass and repass to see that there is no danger in attempting to cross; likewise, a pedestrian is required to look in both directions to see if any vehicles are approaching and if so, their rate of speed and proximity. This duty imposed by law is not fully performed by merely looking to the left or right as one

steps from the street, but it is imperative during all the time he is crossing."

Then followed an instruction, also requested by respondent, in which the court told the jury that before it could find for the appellants the jury must find that appellants were entirely free from fault proximately contributing to the accident, regardless of how slight such fault might be; that if the jury found the appellants were guilty of such fault a verdict must be returned in favor of respondent.

These instructions, taken together, directed the jury that it must return a verdict for respondent if appellant Steffana Pinello did not continuously look both to her right and to her left as she proceeded across Geary street, and this regardless of the fact that there was evidence that she was in the pedestrian lane at the time of the accident and that the "Stop" and "Go" signals had closed traffic on Geary street.

[1-4] The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he will not be exposed to danger which will come to him only from violation of law or duty by such person. *Averdieck v. Barris*, 63 Cal. App. 495, 218 P. 786; *Harris v. Johnson*, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560. A pedestrian has the right to presume that the traffic rules will be obeyed. *Walker v. Mason*, 109 Cal. App. 361, 293 P. 125; *Dullanty v. Smith*, 203 Cal. 621, 265 P. 814. Nor is a pedestrian required to look continuously to the right and to the left in crossing a street. *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649; *Davis v. Renton*, 99 Cal. App. 264, 278 P. 442; *Nickell v. Rosenfield*, 82 Cal. App. 369, 255 P. 760; *Gett v. Pacific G. & E. Co.*, 192 Cal. 621, 221 P. 376; *Lincoln v. Williams*, 119 Cal. App. 498, 6 P.(2d) 563, 564. In this last-cited case the court said: "It is well settled that it is the duty of a pedestrian, in crossing a street, to use ordinary care under the circumstances, and that the question of whether a pedestrian does use such care is ordinarily a question of fact for the jury. *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649. * * * But, as we have recently pointed out, such continuing duty in the nature of things cannot be said to impose upon the pedestrian the duty to look continuously in all directions at all times. *Maggart v. Bell*, 116 Cal. App. 306, 2 P.(2d) 516."

[5] Contributory negligence is a question of law only when the court is impelled to say from the facts that reasonable men can draw but one inference, and that, an inference pointing unerringly to the negligence of the plaintiff contributing to the injury. *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P.

125; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513.

[6, 7] In the case at bar there is evidence that when Mrs. Pinello was struck by respondent's automobile she was in the pedestrian path on the westerly side of Geary street, and at that time traffic was closed on that street. Such being the case, the question of whether or not she was guilty of contributory negligence was for the jury. It is not contributory negligence to fail to look for danger where there is no reason to apprehend it. *Gornstein v. Priver*, 64 Cal. App. 249-259, 221 P. 396.

[8] We are of the opinion that the trial court erred in giving respondent's instruction No. 1. By this instruction the trial court invaded the province of the jury to the substantial injury of appellants.

[9] Instruction No. 20, asked for by appellants, should have been given. This refused instruction reads as follows: "You are further instructed that if you believe from the evidence that plaintiff, Steffana Pinello, without any negligence on her part was crossing Geary Street at its intersection with Ninth Avenue along and within the pedestrian lane of such intersection, when traffic signals or controls at such intersection showed a 'Stop' traffic signal to traffic moving westerly along Geary Street, I charge you that said plaintiff, Steffana Pinello, was entitled to assume that such traffic signal would be obeyed by a driver of an on-coming automobile being driven in a westerly direction along Geary Street and approaching the intersection at such time."

[10] Instruction No. 21, requested by appellants and refused, reads as follows: "I instruct you that a person lawfully and carefully using a street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume that motor vehicle drivers will obey and abide by the traffic laws and regulations." This instruction was approved in *Dullanty v. Smith*, *supra*, and should have been given.

[11] Also, instruction No. 30, requested by appellants and refused by the court, is a correct statement of the law and should have been given. This instruction is as follows: "I instruct you that while both parties (the automobile driver and the pedestrian) are charged with the same degree of care, the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of a foot passenger." *De Greek v. Freeman*, 108 Cal. App. 645, 291 P. 854.

By refusing to give the three instructions requested by appellants, and by giving instruction No. 1 for respondent, we are of the opinion that the court erred, and we cannot say that, but for these errors, under the facts

of this case, a different verdict might not have been reached by the jury.

The judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

PEOPLE v. FLEMING.*
Cr. 2154.

District Court of Appeal, Second District,
Division 1, California.
Dec. 31, 1932.

Rehearing Denied Jan. 30, 1933.

1. Pledges ⇨31(4).

Pledgee's unauthorized application of pledged bonds to his own use is illegal conversion thereof as between him and pledgor.

2. Embezzlement ⇨11(1).

Wrongful conversion, amounting to embezzlement, exists from moment of pledgee's refusal to comply with pledgor's demand, after paying debt, for return of pledged bonds theretofore illegally applied to pledgee's own use.

3. Embezzlement ⇨11(1).

Broker's use of bonds, pledged by customer as security for price of stock, which broker never purchased, to secure loan to broker, constituted grand theft by embezzlement (Const. art. 4, § 26).

4. Criminal law ⇨434.

Broker's books and sales records, showing that no stocks were purchased for customer pledging bonds as security for price, *held* admissible in broker's trial for grand theft in using bonds to secure loan.

5. Embezzlement ⇨44(2).

Evidence in trial for grand theft of bonds, pledged to corporation of which defendant was president as security for price of stock never purchased by it, *held* to justify inference that defendant knew bonds were wrongfully used as security for loan to corporation.

6. Embezzlement ⇨35.

Evidence of theft of money, paid broker by customer on price of stock, which broker failed to purchase, *held* not fatal variance from allegation of theft of shares of stock (Pen. Code, § 956).

7. Embezzlement ⇨35.

Description of offense in information for theft with sufficient certainty to identify act warrants conviction, though evidence shows theft of property different than that described in information (Pen. Code, § 956).

8. Indictment and information ⇨71.

To sustain conviction, there must be such degree of identity between allegations of indictment or information and facts in evidence as to protect defendant fully from another prosecution for same offense.

9. Embezzlement ⇨22.

Broker, applying to his own use money paid by customer in installments aggregating over \$200 on price of stock never purchased by broker, was guilty of grand theft, though no payment amounted to more than such sum.

10. Indictment and information ⇨125(9).

Different asportations from same owner, prompted by one design, purpose, or impulse, constitute single act warranting conviction of theft, regardless of time.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

E. K. Fleming was convicted of grand theft, and he appeals.

Affirmed.

Clare Woolwine and Cooper & Collings, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Byron Fitts, Dist. Atty., and Frank Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

CONREY, P. J.

Appellant, with two others, was brought to trial before the court, without a jury, on several charges of grand theft, as stated in counts 1, 3, 4, and 5 of the indictment. At the trial the action was dismissed as to the codefendants Phillips and Glanz, and count 5 was dismissed. Defendant Fleming was found guilty on counts 1, 3, and 4. He appeals from the judgment, and from an order denying his motion for a new trial.

In the first count of the indictment it was alleged that on or about April 1, 1930, the defendants and each of them did unlawfully take certain personal property of John L. Brandt, being two \$1,000 bonds issued by the kingdom of the Serbs, Croats, and Slovenes. In the third count it was alleged that on or about May 2, 1930, the defendants did unlawfully take away ten shares of the capital stock of the Chrysler Motor Car Company, of the value of \$591.25, the personal property of G. G. Stewart. In the fourth count it was alleged that on or about May 3, 1930, the defendants did unlawfully take away ten shares of Chrysler Motor Car Company, of the value of \$500, the personal property of Mrs. M. A. Stewart.

The evidence shows that the crimes charged, if they were committed at all, were committed by embezzlement. E. K. Fleming &

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 32 P.2d 593.

Co. was a corporation authorized to transact business as a broker in this state. Stock & Bond Guarantee Company was a corporation authorized to transact business as a broker in this state. Defendant Fleming was the president and actively engaged in the management of E. K. Fleming & Co., which company at the time of these transactions was the principal owner and in control of the Stock & Bond Guarantee Company. Fleming also occupied a like position in relation to this latter company. The several transactions out of which these embezzlement charges grew took the form of purchases of corporation stocks, or agreements for such purchases, from or by agency of one or the other of these brokers and their several customers, Brandt in the first count, G. G. Stewart in the third count, and Mrs. M. A. Stewart in the fourth count; and subsequent sales (or supposed sales) of shares of stock by, or through the agency of, said brokers or one of them, for account of their said customer Brandt.

The several grounds of appeal upon which defendant relies are, that on each count the evidence is insufficient to sustain the decision; that the court erred in admitting in evidence certain books and other documents; that the court erred in overruling defendants' objections to certain incompetent and hearsay evidence; that the court erred in denying defendants' motion for a new trial. The principal questions of law presented by counsel herein relate to the obligations of a broker arising from the deposit of securities in marginal transactions, and to the personal criminal liability of an officer of a corporation for misappropriation of property delivered to the corporation.

First count. (Brandt case.) It is contended that the evidence is insufficient to sustain the decision. On or about March 28, 1930, John L. Brandt called at the office of Stock & Bond Guarantee Company, and there met Jack Williams, sales manager, who represented the company in the ensuing transaction. Brandt delivered to Williams, for the company, a check for \$100 to apply on the purchase of certain stocks, and signed two contracts, numbered 3388 and 3389. These contracts were admitted in evidence (Rep. Tr., pp. 13 and 628), and are before the court. They are agreements signed by Brandt, on printed forms of the Stock & Bond Guarantee Company, showing sales by the company to Brandt, of described shares of stock, and the payment by him of certain small amounts on account of the purchase price. It is in evidence that it was orally agreed between the company (by Williams) and Brandt that the bonds delivered by Brandt to Williams for the company were to be used as collateral, but were not to be sold. It is appellant's contention that these were merely marginal sales in which the company was Brandt's broker; that is to say, that the broker was to

buy for Brandt, and pay for, the shares of stock; that thereby the broker would lend to Brandt that portion of the purchase price not covered by Brandt's cash payment. As security for this loan the broker would hold, as collateral, the purchased shares, together with the bonds received from Brandt. Taking this as the effect of the contracts as a whole, we have the further fact on April 1, 1930, Brandt ordered additional stock purchases, gave a check for \$200, and deposited the two bonds described in the indictment herein. Brandt testified (Rep. Tr., p. 19) concerning this transaction as follows:

"I told him I didn't wish to have those bonds sold; I wanted them for further protection to the purchase. * * * He said that would be all right; he would see they would not be sold.

"Q. Did you say anything to Williams, that you would furnish any additional margin, in case it was called on the purchase of this additional stock? A. I think that question was discussed, and I told him that, if necessary, I could supply additional."

Nevertheless, the evidence is that on the same day, when the bonds were delivered by Brandt to Williams, that is, on April 1, 1930, the Stock & Bond Guarantee Company, by Fleming as its president, borrowed \$1,200 from Western National Bank, and used these bonds as security therefor; also that the borrowed money was credited to the general account of the Stock & Bond Guarantee Company in the bank. Some weeks later a receiver of the Stock & Bond Guarantee Company was appointed. Brandt then made inquiries, and for the first time was informed that the bonds had been used as above stated. Then, finding no other way to recover the bonds, he redeemed them at the bank by paying the amount of the loan. It further appears that the stocks which had been purchased on Brandt's order had been "sold," or at least reported to him as sold, as directed by him, and that the transactions showed a profit. There had been only one call on him for further payment or security, after April 1st, and he had complied with that demand. Before any receiver had been appointed, Brandt's indebtedness to the broker had been paid, and Brandt was entitled to have the Serb bonds returned to him.

On the facts, which in substance were as above stated, the question is presented: Was there an embezzlement of the Serb bonds by the Stock & Bond Guarantee Company, and by appellant as its acting officer in the loan transaction at the Western National Bank?

It is contended by appellant that under the facts of this case there could be no embezzlement. The theory as stated, in substance, is that, when the broker executes an order, in a marginal transaction, he is the customer's agent buying from or selling to a third party;

and that, when he provides funds to complete the order and to carry the securities purchased, he deals with his customer as a principal, advancing his own money and retaining the customer's property as security, with all the rights and obligations which attach to an ordinary loan of money on the security of personal property. The precise point is that, in order to embezzle, one must be a fiduciary agent, and that in the course of business of a broker for a customer in a marginal transaction the broker holds the customer's securities as a creditor holding property in pledge, and not as an agent of the customer. Counsel points to the following statement by Meyer on "The Law of Stockholders and Stock Exchanges" (p. 331), where the writer said: "The broker has the right, as a matter of law, to rehypothecate his customer's securities for an amount not in excess of the customer's indebtedness against such securities. This right exists with respect to securities which the broker has purchased for the customer on margin, as well as with respect to securities which are initially deposited by the customer as margin." Criminal cases are cited which seem to apply the stated rule to prosecutions for embezzlement. Among these are *Buddeke v. State*, 31 Ohio Cir. Ct. R. 529; *State v. Peck*, 299 Mo. 454, 253 S. W. 1019.

[1-3] The general rule is that, as between a pledgee and his pledgor, the pledgee's application of pledged bonds to his own separate use in excess of his rights as pledgee is an illegal conversion of the property. When there has been such conversion and the pledgee has failed to comply with demand made upon him for return of the bonds after payment of the pledgor's debt, "there can be no doubt that from that moment there existed a wrongful conversion amounting to embezzlement." *People v. Tambara*, 192 Cal. 236, 219 P. 745, 747. The question at issue here is thus made to depend upon the particular question as to whether or not in this case it has been proved that the broker, acting through or with participation of the defendant, applied Brandt's bonds to its own use in excess of its rights as pledgee. It may be that, in accordance with the authorities relied upon by appellant, if the Stock & Bond Guarantee Company had actually purchased for Brandt the stocks ordered by him, as in good faith was required by the nature of the transaction, it would have had the right to pledge the Serb bonds as security for a loan at the bank; subject, of course, to Brandt's right to have them returned to him whenever his indebtedness to the broker was paid. But there is evidence which justified the court in finding that no such purchase of stock for Brandt was actually made, and that the conditions which might have authorized the use which was made of the Serb bonds did not exist. In the brief for respondent we find

a careful analysis of the sales records of the Stock & Bond Guarantee Company, and of E. K. Fleming & Co., which appears to accurately summarize the evidence in the record as taken from the books and documents of those corporations. The books also show extensively that these transactions shown in the brief are exemplars of a similar method of doing business, as extensively carried on by these corporations, and by the defendant as their principal executive officer. There was evidence sufficient to show, as stated by counsel for respondent, that in reality there was no purchase or sale of the ordered stocks, and no money advanced for the customer. Each order seems to have been handled entirely as a bookkeeping transaction between Stock & Bond Guarantee Company and E. K. Fleming & Co. and the defendant E. K. Fleming. It follows that neither the defendant or either of his said companies acquired any interest in the securities placed in their hands by Brandt, and that their use of such securities for the purpose of raising money for themselves would constitute grand theft on the theory of embezzlement. The so-called sales were of the character commonly known as "wash" sales, and were in themselves illegal. Const. of Cal., art. 4, § 26.

[4] Appellant assigns as error that the court overruled his objections and received in evidence the before-mentioned books and other records which constitute the numerous exhibits to which in part we have referred. Without going into a detailed description of these documents, let it suffice to say that they were properly received because they furnished appropriate evidence to establish the very facts which, as we have seen, were necessary to develop and establish the precise and crucial fact that the right to pledge Brandt's bonds did not exist. If there were any errors in rulings upon the objections made, assuredly they were of minor importance, and without appreciable effect upon the result of the action.

[5] It is further contended by appellant that there is no proof whatever that he knew of the limitations or restrictions upon the right of Stock & Bond Guarantee Company to pledge the bonds at the time when he caused such pledge to be made, or at all. But there can be no doubt that appellant was the actual and active manager of both companies; that he employed the subordinates through whom he conducted the business of both companies; that "daily sales sheets" were given to him; that he knew not only in general, but largely in detail, the manner in which the business was being transacted. The receiver, MacLeod, testified that, when he told appellant that various persons were claiming that they had paid up for stock which should have been bought, "and that they had bought stock on contracts that were supposed to be bought at the time they bought it; and I asked Mr.

Fleming what the condition was. He said, 'you know as well as I do.' I said, 'What do you mean by that?' He said, 'There is about a quarter of a million short we haven't bought stocks.'" We think that the evidence is sufficient to justify the inference that, at the time when Brandt's bonds were pledged to the bank, appellant knew that the bonds were being wrongfully used in that way. *People v. Epstein*, 118 Cal. App. 7, 4 P.(2d) 555.

[6-8] Counts 3 and 4 of the information differ from the first count in that the thefts charged relate to shares of stock purchased through the broker and not to securities deposited by the customer. The two Stewart transactions described in the counts 3 and 4 and the evidence concerning them are substantially alike. The customer at the time of ordering the shares to be purchased for him paid an installment on account of the purchase price, and from time to time made further payments until the full purchase price was paid, but the stock never was delivered. It is contended by appellant that the evidence is insufficient to prove that the broker ever had actual possession of the stock, and therefore is insufficient to establish the *corpus delicti* of the crime charged. We are in agreement with the contention that the evidence fails to show that the broker ever had actual possession of the stock. On the contrary, in the Stewart transactions, as in the Brandt transactions, it might fairly be inferred from the evidence that the broker never purchased the shares of stock which he was supposed to be buying for the customer. The actual embezzlement consisted in the taking of the money of the Stewarts, and applying it to the broker's own use without completing the transaction, as in due course of business its agreement with the customer required it to do. But appellant further contends that on an information charging theft of described shares of stock he cannot be convicted of theft of the money paid on account of the purchase. It is contended that this would be a fatal variance between the allegations and the proof. To this the reply seems to be sufficient that such difference between the description of property taken as stated in the information and the evidence showing property actually taken is provided for by the Penal Code, as amended in the year 1927. "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission is not material." Pen. Code, § 956. The plain intention here is that, when the offense itself is described with sufficient certainty in other respects to identify the act, a conviction thereof may be sustained notwithstanding the fact that the de-

scription of the property stolen as shown by the evidence is different from the property stolen described in the information. We, of course, do not mean to say that one crime may be charged in the information and an entirely separate crime relating to other property, or relating to an entirely different transaction, may be proved, or that a conviction thus obtained could be sustained. There must be some evidence that the acts constituting the offense of which the defendant is convicted are substantially the same as those referred to in the charge contained in the information. There must be at least such degree of identity between the allegations in the indictment or information and the facts produced in evidence that, when the defendant has been once in jeopardy by reason of such charge, he shall be fully protected from another prosecution for the same offense. Applying this test to the case at bar, it is our opinion that the conviction of the defendant in accordance with the evidence in this case is entirely sufficient to protect him from any subsequent prosecution for theft either of the described shares of Chrysler stock or of the moneys paid by the Stewarts covering the purchase price thereof.

[9, 10] In each of the two Stewart transactions the purchaser made payments which in the aggregate constituted the full purchase price and entitled the customer to the delivery of the stock which was supposed to have been purchased for him, or her. But appellant contends that, since no one of the payments thus made on account of said purchase was of an amount exceeding the sum of \$200, therefore he could not in any event be guilty of any crime greater than petit larceny. It appears, however, that these payments of successive installments upon a single contract did amount to more than \$200 on each contract. The exact time when the misappropriation was completed is not material, and perhaps is not established by the evidence, more than that the installments were paid at certain specified times and that the stock was not delivered when the payments had been completed and delivery was due. We think that the case is controlled by the rule stated in *People v. Mills B. Sing*, 42 Cal. App. 385, 396, 183 P. 865, 869, where it was said: "The law is that, if the different asportations from the same owner are prompted by one design, one purpose, one impulse, they are a single act, without regard to time." Or as was said in *People v. Hatch*, 13 Cal. App. 521, 534, 109 P. 1097, 1103: "It may happen that an aggregate amount may finally be appropriated by one act which was received in many items and at different times."

The judgment and order are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

128 Cal.App. 489

In re BARNES' ESTATE.**BUTTS et al. v. RUSSELL et al.**

Civ. 4810.

District Court of Appeal, Third District,
California.

Dec. 30, 1932.

1. Husband and wife ⇨264.

Evidence sustained finding that all property in name of deceased husband was his separate property; properties acquired during coverture merely representing reinvestment of proceeds of separate property (Civ. Code, § 163).

2. Husband and wife ⇨257.

If purchase price represented reinvestment of separate property, proceeds of sale, though in excess of purchase price, would represent separate property (Civ. Code, § 163).

If the sale price was in excess of the purchase price, it would simply represent profits derived from the investment, and would come under one of three general terms, "rents, issues and profits," of Civ. Code, § 163.

3. Husband and wife ⇨257.

That separate or community property is sold and other property acquired with proceeds does not change original character of property.

The character of property as separate or community property is determined by reference to the nature of the fund with which it is purchased, and, so long as the source can be traced, it retains the character of that source.

4. Husband and wife ⇨257.

In case of confusion of inconsiderable amount of community funds with large amount of separate funds, resulting fund will be separate property.

5. Husband and wife ⇨257.

Where commingling of separate property with community property makes it impossible to trace funds, whole thereof is deemed community property.

In such case, the whole will be treated as community property on the principle that the burden is on the spouse claiming property as separate property to establish character as such.

6. Husband and wife ⇨257.

Where it is impossible to determine what part of value of crop comes from land constituting husband's separate property and what from his exertions, whole is deemed separate property.

7. Husband and wife ⇨264.

Claim of separate property must be established by clear and convincing testimony.

8. Appeal and error ⇨1010(1).

Whether property is separate or community property is primarily for trial court, whose finding, if supported by substantial evidence, will not be disturbed.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of William P. Barnes, deceased, by Lydia A. Russell and others as executors of such deceased, opposed by Claude M. Butts and another, as executors of last will and estate of Emmarene Barnes, deceased, contestants. From an order and decree finding property of deceased to be separate property, and directing distribution thereof as such, the contestants appeal.

Affirmed.

Bryce Swartfager, of Santa Rosa, for appellants.

Gale & Gale, of Santa Rosa, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon appeal by the above-named contestants from an order and decree of the trial court finding the property of the deceased to be separate property, and decreeing its distribution as such.

The record shows that William P. Barnes, deceased, and Emmarene Barnes, also deceased, intermarried on the 27th day of March, 1903, and lived together continuously as husband and wife, until the death of William P. Barnes on the 6th day of November, 1928. On the 25th day of March, 1903, William P. Barnes and Emmarene Butts entered into a prenuptial agreement wherein it was agreed that William P. Barnes would make certain provisions in his will for the maintenance of the children of William P. Barnes by a former wife, and also for the maintenance of Emmarene Butts should she survive William P. Barnes, and that said Emmarene Butts would never claim any greater or other portion of the estate of the said William P. Barnes. Following the execution of this agreement, the parties thereto, as stated, intermarried on the 27th day of March, 1903. Prior to, and on the 27th day of March, 1903, William P. Barnes, now deceased, owned the following separate property: A home ranch consisting of 83.46 acres; a certain other tract of land comprising 89.84 acres; likewise a certain other tract of land situate in East Windsor, Sonoma county, comprising

40 acres; also an interest, in whole or in part, in some eleven lots of land, with buildings thereon, situate in the towns of Sebastopol and Santa Rosa. In addition to the foregoing real estate, the deceased, at the time of his marriage, also was the owner of notes, secured by real estate mortgages, of the face value of \$16,125.

The record does not show the value of the 83.46 acres of land constituting the "home ranch," but it does show the estimated sum of money received from the sale of a number of tracts of land to which we have referred, in the sum or \$41,042.80, which, added to the notes and mortgages, shows that of the separate property possessed by the deceased at the time of his marriage there came into his possession cash and notes to the value of \$57,167.80.

The record shows that during coverture the deceased made sale of nearly all of the separate tracts or lots of land owned by him at the time of his marriage, and received therefor the sum of money which we have just stated. During the period of coverture the deceased also borrowed various sums of money aggregating \$4,650. The record also shows that, between the date of the marriage of said deceased with Emmarene Butts and the date of his death, the deceased acquired, either in whole or a divided interest in 17 tracts of land, for which he paid the aggregate sum of \$40,335. It also appears from the record that some of the buildings owned by the deceased in the town of Sebastopol were destroyed by fire and earthquake after his marriage, and the buildings thereon were restored. Some of the money used in restoring the buildings came from insurance and a portion thereof was borrowed funds.

On the part of the appellants it is contended that the property purchased after the 27th day of March, 1903, is presumptively community property. On the part of the respondents, it is contended that the property acquired after marriage was only property acquired by the reinvestment of funds which the deceased owned at the time of his marriage. It is shown by the record that the deceased engaged in no business, other than looking after his properties, collecting the rents, making improvements thereon, and farming, or having farmed the different tracts of land owned by him at the date of his marriage. There appears to be no direct evidence that the properties purchased during coverture really represented reinvestments of the proceeds of the sale of separate property. But the record does show that the deceased had no other sources of income than the rents, issues, and profits of the property owned by him at the date of marriage; that he was not engaged in any business except looking after and caring for the properties which he owned.

[1, 2] It is also contended by the respondents, and necessarily so found by the court, that the money borrowed by the deceased was borrowed on the faith and credit of the separate property owned by him, even though no mortgage was executed by the deceased to secure the repayment of any such sums. The figures in the record given as to the value of the different properties and the sale value of the different properties show that the deceased received from the sale of his separate properties a sum slightly in excess of the sums paid for the several tracts of property purchased by the deceased during coverture, which justifies the inference on the part of the trial court that the properties acquired during coverture simply represented reinvestments of the proceeds of separate property. Several of the tracts of land purchased by the deceased were sold during coverture, but the selling price is not given. However, that is immaterial, for the simple reason that, if the purchase price represented a reinvestment of separate property, the proceeds of the sale, even though in excess of the purchase price, would represent separate property coming under one of the three general terms found in the Code (Civ. Code, § 163), to wit, "rents, issues, and profits." If the sale price was in excess of the purchase price, it would simply represent the profits derived from the investment.

[3, 4] As stated in 5 California Jurisprudence, p. 294: "The fact that the separate property of either spouse, or the community property, is sold, and other property bought with the proceeds, or that such property is exchanged for other property, does not change the original character of the property. Its character is determined by reference to the nature of the fund with which it is purchased, and so long as its source can be traced, it retains the character of that source." Again, quoting from the text of the same volume, page 297: "In case of the confusion of an inconsiderable amount of community funds with a large amount of separate funds, the resulting fund will be separate property. The principle that controls the courts in following separate property through its various mutations, with what was originally separate property, together with the rents, issues and interest thereon, continues to be separate property."

[5, 6] Again a portion of the text, quoting from the same volume, pages 298-299, we think applicable here, to wit: "Where the commingling of the separate property with community property is such that it is impossible to trace the funds, the whole will be treated as community property, upon the principle that the burden is upon the spouse claiming property as separate property, to establish its character as such. But where

the husband grows crops upon land which is his separate property, and it is impossible to determine what part of the value of the crops come from the land and what part from his exertions, the whole is treated as separate property, upon the principle that applies to improvements upon land."

The record here shows that the deceased received rents, issues, and profits from the different tracts of land, other than city property owned by him at the date of his marriage, but the record is silent as to how much of the profits realized from such sources were due to the exertions of the deceased, and how much attributable only to the land. So far as we have been able to ascertain from the record, the trial court was justified in coming to the conclusion that the deceased did but little farming, but leased the different tracts of farming land owned by him during the entire period of coverture and collected rents therefor.

The facts of this case are very similar to the facts appearing in the case of the Estate of Pepper, 158 Cal. 619, 112 P. 62, 64, 31 L. R. A. (N. S.) 1092. There the deceased was the owner of farming land; also the owner of a nursery; and it was held that the proceeds or profits of the farming land and the nursery constituted separate property. The deceased sold the land owned by him at the time of his marriage, and at the time of his death had a cash account in bank in the sum of over \$50,000 and interest-bearing notes for some \$57,000, and while, presumptively, the cash and notes would be community property, the evidence showing the only sources from which the deceased derived any moneys, it was held that the presumption was overcome, the language of the opinion upon this question being as follows: "While the respondents were unable to trace with exactness the transmigrations of Pepper's acquisitions into the items of property which he left at his death, we think it can hardly be questioned that the record authorized an inference that his entire estate consisted of the proceeds of the sale of property owned by him at the time of his marriage, together with such profits and earnings as he had made in conducting his ranch. It was shown that he held the ranch before his marriage, and had been occupying it under a claim of ownership for many years. * * * [Citing cases]. It was also shown that he had been engaged in no business other than that of conducting the ranch. In this testimony the court had a sufficient basis for the conclusion that whatever Pepper had at his death, over and above the property owned by him when he married, had been acquired in the business or occupation carried on by him on said ranch. * * * The appellant argues with great earnestness that the profits and earnings of such nursery business after marriage must, as matter of law, be held to be

community property. We think this position cannot be sustained." While the court goes on to state that the nursery required skill and industry and attention on the part of Pepper; that any agricultural enterprise requires the labor and skill of some one to insure success; that the resultant product is in part due to the processes of nature operating upon the land, and in part to the intelligent application of manual labor to the soil; that it is, in the nature of things, impossible to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man. The product must be treated as a whole, and, if it is the growth on land separately owned, it is the separate property of the owner of the land.

In the case at bar, the facts disclosed but little, if any, application of labor on the part of the deceased to the farming land owned by him as a part of his separate estate, but, on the contrary, that such lands were rented by him to others.

Appellants call our attention to the case of Provost v. Provost, 102 Cal. App. 775, 283 P. 842, where the question of improvements made upon separate property of one of the spouses, with community funds, is considered, and where it is held that, if the husband deliberately takes community funds and makes improvements upon his separate property, the wife is not deprived of her interest therein, and that such community interest may be appraised and determined. None of such facts, however, appear in this case. The record shows that the deceased owned, as we have stated, thousands of dollars' worth of separate property at the date of his marriage; that the amount of money which went into the improvements of his separate property, other than that directly traceable to the proceeds of his separate property, was inconsiderable; that there was no wrongful or deliberate diversion of any community funds to the uses and purposes of the deceased, even if there were any community funds used by the defendant in making repairs upon the buildings partially destroyed by fire and earthquake.

The facts appearing in the case of the Estate of Caswell, 105 Cal. App. 475, 288 P. 102, 104, relied upon by the appellant, are readily distinguishable from the facts of this case. In the Caswell Case it appears that the appellant aided the deceased in his business by investing a considerable sum of her own separate property; that the business was carried on for a considerable period of time, and the money derived from the business was not simply rents, issues, and profits of separate estates, as we have before us in the case at bar. We do not question the law to be as stated in the opinion in the Caswell Case, where it is said: "Where a husband or wife

owns a business before marriage and continues to conduct it thereafter, the portion thereof attributable to the personal activity, ability, and capacity of the person conducting the business will be regarded as community property. [Citing cases.] Earnings acquired by the industry and skill of either husband or wife are to be credited to the community."

[7, 8] The rule is also well settled that the claim of separate property must be established by clear and convincing testimony. But this is a question primarily for the trial court. We quote from the opinion in the recent case of *Simonton v. Los Angeles T. & S. Bank*, 205 Cal. 252, 270 P. 672, 675, as follows: "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily, as in other cases, a question for the trial court to determine, and, if there is substantial evidence to support the conclusion reached below, the finding is not open to review on appeal"—citing cases.

The record shows that several lots and tracts of land owned by the deceased were conveyed to his heirs by deeds, and no question is raised as to the sufficiency of such conveyances.

Being of the opinion that the record shows sufficient evidence to justify the conclusion of the trial court that the estate involved in this action was the separate property of the deceased, it follows that the decree of the trial court should be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 781

SECURITY TITLE INSURANCE & GUARANTEE COMPANY (a Corporation), Petitioner, v. **SUPERIOR COURT** of the State of California, IN AND FOR COUNTY OF LOS ANGELES, Respondent.

Civ. 8683.

District Court of Appeal, Second District, Division 2, California.
Jan. 12, 1933.

Application for writ of prohibition prayed to be directed to the Superior Court of Los Angeles County to restrain the hearing and determination of a certain civil action.

Swaffield & Swaffield, of Long Beach, for petitioner.

Ray Meacham and J. E. Pawson, both of Long Beach, for respondent.

CRAIG, J.

A receiver having been appointed by the superior court of Los Angeles county at the instance of a creditor of Long Beach Escrow & Title Company, a corporation, in an action founded upon a promissory note, the instant proceeding was instituted praying a writ of prohibition to restrain said court and receiver from marshaling and distributing the assets of said corporation, in such receivership matter.

The principles announced in *Moore v. Superior Court* (Cal. App.) 16 P.(2d) 324, decided November 26, 1932, are in all essentials applicable to the proceeding before us at this time, and require us to hold that the order appointing a receiver and all proceedings had thereunder were null and void.

The writ is granted as prayed.

We concur: WORKS, P. J.; STEPHENS, J.

128 Cal.App. 515

PARAMOUNT SECURITIES CO. v. DAZE
et al.
Civ. 8671.

District Court of Appeal, First District,
Division 2, California.
Jan. 3, 1933.

Mechanics' Liens ⇐260(6).

As against title of purchaser at sale under trust deed, antecedent materialman's lien held barred where materialman, although bringing timely foreclosure action against owner, did not sue trustee or beneficiary under trust deed within statutory period (Code Civ. Proc. § 1190).

Code Civ. Proc. § 1190 provides that no lien given thereby binds any property for more than 90 days unless proceedings be commenced to enforce lien.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Paramount Securities Company against Leo D. Daze and others. From a portion of a judgment in favor of the Soule-Martin Lumber Company, plaintiff appeals.

Reversed, with directions.

Walter B. Kibbey, Wm. H. B. Hammond, and Earl L. Banta, all of Los Angeles, for appellant.

Glen Behymer and B. L. Hoyt, both of Los Angeles, for respondents.

DOOLING, Justice pro tem.

This is an appeal by the plaintiff in a quiet title action from a portion of the judgment decreeing appellant's title to be subordinate to the claim of a mechanic's lien of the defendant and respondent Soule-Martin Lumber Company in the sum of \$539.43. The respondent lumber company commenced to furnish the materials which formed the basis of its claim of lien on April 28, 1925. Thereafter, on May 15, 1925, the property was conveyed by deed of trust to Security Title Insurance & Guarantee Company to secure the repayment of a loan made to the owners by Union Trust Company of Maryland. This deed of trust was recorded the same day. Proceedings were subsequently taken by Soule-Martin Lumber Company to foreclose its materialman's lien which finally resulted in the sale of the property to Soule-Martin Lumber Company on March 18, 1929. In this action neither Security Title Insurance & Guarantee Company, the trustee under the deed of trust, nor Union Trust Company of Maryland, the beneficiary, was made a party. Meanwhile, on November 8, 1928, the property was sold to plaintiff and appellant at a trustee's sale under the above-mentioned deed of trust.

It is appellant's contention that by reason of the failure to make either the trustee or the beneficiary under the deed of trust a party the foreclosure of the materialman's lien could not affect their interest in the property, and that appellant consequently took a title under the trustee's sale free and clear of such materialman's lien, because, in so far as the incumbrance created by the deed of trust was concerned, the materialman's lien was not foreclosed within the period allowed by the statute. Respondent, on the other hand, takes the position that, since the action to foreclose the materialman's lien was commenced against the owner of the property within the statutory period, and as to the owner's rights duly foreclosed, appellant, as the successor in interest of a junior incumbrancer, is not entitled to the benefit of the statute fixing a limitation upon the time within which actions to foreclose such liens must be commenced.

Our statute concerning the enforcement of mechanic's liens is silent as to what persons shall be made parties defendant. It simply provides in general terms that "no lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same. * * *" Code Civ. Proc. § 1190.

The question presented is whether this section should be construed to mean that, in order to perfect the lien as against the interest of a particular person in the property, proceedings must be commenced against such

person within 90 days, or, whether it is sufficient to perfect the lien as against all persons, that proceedings be brought against some one or more persons having an interest in the property within the 90-day period. Or, more specifically, does the commencement of an action against the owner within the 90-day period foreclose a junior incumbrancer from asserting, as a defense against the claim that the lien is binding upon his interest, that no action was commenced against him to foreclose the lien within the period allowed by the code section?

The statute of Idaho (Code Idaho 1932, § 44-510) concerning the enforcement of such liens is in substantially the language of Code of Civil Procedure, § 1190. In *Continental & Commercial Trust & Savings Bank v. Pacific Coast Pipe Co.*, 222 F. 781, the Circuit Court of Appeals for the Ninth Circuit was called upon to decide, under the Idaho statute, the same question presented by this appeal. That court said at page 788 of 222 F.:

"The Idaho statute does not, in terms, prescribe who shall be made parties to the action thereby required to be brought; but we agree with the learned judge of the court below that it necessarily means that it must be brought against all of those whose rights, estates, or interests are claimed to be adverse and subordinate; otherwise they could not be concluded. In the instant case the trustee was manifestly entitled to contest the amount, the validity, and the priority of the lien claimed for labor and material, and, of course, to its day in court for that purpose. But at the time it was called upon to do so the life of the appellant's lien had ended by the very terms of the statute which created it. As said by the court below:

"The argument that the limitation does not apply to a mortgage because the validity and amount of a mechanic's lien may be established in a suit between the claimant and the owner of the property alone, and that the only issue in which the mortgagee is interested, namely, the date or relative dignity of the lien, may be tried out in a subsequent suit to redeem, in so far as it has any force at all, rests upon an erroneous assumption, which is that the mortgagee has no right to question the amount or validity of the claim of lien. These are issues which the incumbrancer, equally with the owner, may raise, and for that purpose the mortgagee is entitled to his day in court. If, for instance, a lien were asserted for the value of material which was never furnished for use in a structure covered by the mortgage, it must be clear that the mortgagee may, by showing the fact, defeat the lien, or reduce the amount thereof." * * *

"So here, the trustee is not bound by the judgment obtained by the appellant against the owner of the property, and the lien of the appellant having, by the express provision

of the statute creating it, ended long prior to the time when the appellant attempted to assert it as against the trustee, we hold that it was then without any life."

The identical question was subsequently presented to the Supreme Court of Idaho in *Western Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho, 497, 185 P. 554, 555. The court, after citing the case above quoted from and two other federal cases [*Utah Implement-Vehicle Co. v. Bowman* (D. C.) 209 F. 942; *D. W. Standrod & Co. v. Utah Implement-Vehicle Co.* (C. C. A.) 223 F. 517], said: "We are satisfied that the construction placed upon the statute by the Federal courts is sound."

In *Davis v. Bartz*, 65 Wash. 395, 118 P. 334, 335, the Supreme Court of Washington said of a similar statute:

"It is the manifest purpose of this statute to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it, if the facts do not warrant the lien. The claimant must accord this opportunity within the time limited, or lose his lien. It is equally manifest that this right of contest is as valuable, and should be as available, to a mortgagee as to the owner. A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority, if the evidence warrants either defense. He is entitled to his day in court upon these matters within the period fixed by the statute.
* * *

"It follows of necessity that any one interested, whether as owner, mortgagee, lien claimant, or otherwise, any one who may defend against the lien, or show by competent evidence that it is not a lien as against his interest, has the right to invoke the statute, if the action be not commenced as against him within the statutory period."

The same question was disposed of by the Supreme Court of Indiana in *Deming-Colborn Lumber Co. v. Union Nat. Sav. & L. Ass'n*, 151 Ind. 463, 51 N. E. 936, 938, in the following language:

"But counsel for appellee contend that, however true it may be that the lien of the lumber company was prior to that of the mortgagee at the time of the foreclosure of the former, yet such priority could last only during the life of the mechanic's lien. * * * The statute [citing it] gives one year from the time when notice is filed in the recorder's office, or, if a credit is given, one year from the expiration of such credit, during which time suit may be brought for the enforcement of a mechanic's lien; and it is there expressly provided that, 'if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void.' If the lien in this case had not been foreclosed within the year given by the statute, it is clear

that it would have been void as to all persons concerned, including the mortgagee. But, while the lien was duly foreclosed as against the owner of the property, yet, as we have seen, the appellee, as mortgagee, not having been made a party to the action, its rights were in no manner affected thereby; that is, appellee's mortgage stands just the same as it would have stood if the mechanic's lien had not been foreclosed within the time prescribed by the statute. In other words, the year given by statute having expired without a foreclosure of the lien, as against the mortgage, the lien itself and the judgment based thereon must be, as to such mortgage, absolutely void."

To the same effect are *Green v. Sanford*, 34 Neb. 363, 51 N. W. 967; *Ballard v. Thompson*, 40 Neb. 529, 58 N. W. 1133; *Standrod & Co. v. Utah Implement, etc., Co.* (C. C. A.) 223 F. 517; *Utah Implement, etc., Co. v. Bowman* (D. C.) 209 F. 942; *Fairbanks-Morse & Co. v. Alaska Palladium Co.* (C. C. A.) 32 F.(2d) 233.

With the exception of certain early cases in our Supreme Court hereafter referred to, the question of the effect of the failure to join a junior incumbrancer as a defendant in an action to foreclose a mechanic's lien has apparently not been considered in this state. However, in *Frates v. Sears*, 144 Cal. 246, 77 P. 905, 906, the court considered the analogous question of the failure of a first mortgagee to join a second mortgagee in an action to foreclose the first mortgage. In a proceeding to foreclose the second mortgage the judgment roll in the action to foreclose the first mortgage was received in evidence over plaintiff's objection "that, to affect or cut off the plaintiff's right to plead the statute of limitations against the Redfield note and mortgage, it was not only necessary for defendant Redfield to commence action upon his note and mortgage within four years from date of maturity against the maker of the same, which he did, but also against the plaintiff, which he did not." The Supreme Court at pages 249, 250 of 144 Cal., 77 P. 905, 906, said: "We think the court erred in overruling those objections. It is clear that plaintiff's interest and rights under her mortgage, antedating, as it did, the Redfield foreclosure, could not be affected by that suit without making her a party thereto. The statute of limitations, and the second mortgagee's right to rely upon it as against the first mortgage, cannot be affected by any agreement or act by or between the mortgagor and first mortgagee to which the second mortgagee is not a party. This is clearly illustrated, and the authorities very fully cited, in *Brandenstein v. Johnson*, 140 Cal. 29, 73 P. 744. And the principle of that case applies here. Redfield has never foreclosed his mortgage as against Frates, and Frates has the right to treat the case as if no foreclosure of the first mortgage had ever been had. This is so laid

down in *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386—a case exactly similar to the one before us. In this Minnesota case a mechanic's lien had been foreclosed, and, though a mortgagee of the property was made a party to that foreclosure suit, no jurisdiction of the person of said mortgagee was obtained; and it was held that the commencement of the action to foreclose the mechanic's lien against the owner of the property did not preserve the lien as against other lienholders or incumbrancers, of whom no jurisdiction had been obtained beyond the statutory period for bringing such an action, and that, in a suit on the mortgage in such a case, the mechanic's lien being barred by the statute, the interest of the plaintiff under his mortgage was prior and superior to the interest of the lienholder, and the latter, as well as the mortgagor, was properly foreclosed by the trial court of all right, estate, or lien in or to the premises, except the usual right of redemption. * * * The appellant here not being bound by the judgment in the foreclosure of the prior mortgage to which she was not a party, and the prior note and mortgage being barred by the statute of limitations at the time they were first set up in the answer of the foreclosure case of the second mortgage, plaintiff's objection upon that ground * * * should have been sustained, and the overruling of that objection was fatal error."

The court added at page 251 of 144 Cal., 77 P. 905, 907: "Certainly, if the second mortgagee has the right to interpose the statute as against the first mortgage when it has run, and the period of limitations has expired, he also at every stage is entitled to have the statute continue to run in his behalf; and this right cannot be cut off midway by the commencement of an action against some person other than the second mortgagee, because * * * his rights cannot be affected by a suit to which he is not a party."

Further support for the general principle announced in the *Frates* Case will be found in *Fuller & Todd Realty Co. v. Superior Court*, 175 Cal. 751, 167 P. 377; *Page v. W. W. Chase Co.*, 145 Cal. 578, 79 P. 278; *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 97 P. 516, and *Lee v. Silva*, 197 Cal. 364, 240 P. 1015.

As opposed to these cases, respondent cites and relies upon *Gamble v. Voll*, 15 Cal. 508; *Horn v. Jones*, 28 Cal. 196, and *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748. In none of these cases, however, was the question of the expiration of the statutory period for foreclosing a mechanic's lien raised or considered by the court. They do, however, recognize that the junior incumbrancer is not foreclosed to dispute the validity or priority of a mechanic's lien by a decree in an action in which he was not a party. Of two of these cases Judge Dietrich said in *Utah Implement, etc., Co. v. Bowman* (D. C.) 209 F. 942,

at pages 947, 948, that: "While certain language is used favorable to the defense, the precise question was not involved, and they are, to say the least, not directly in point. Furthermore, it is to be added, the construction which the defendant places upon the two California cases seems to be out of harmony with the more recent decision in *Frates v. Sears*, 144 Cal. 246, 77 P. 905, where the court cites with apparent approval *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386, which unquestionably supports the plaintiff's contention here."

Hartfield v. Howard, 180 Cal. 376, 181 P. 385, dealt with the question of the adjudication of the rights of a prior incumbrancer without sufficient allegations as to such rights to properly raise the issue of priority and is not in point here.

There are a few cases from other jurisdictions supporting respondent's position, but we think the better reasoning and that most consonant with the position taken by our Supreme Court in *Frates v. Sears*, supra; *Page v. W. W. Chase*, supra; *Holt Mfg. Co. v. Collins*, supra, and *Lee v. Silva*, supra, is with the cases from other jurisdictions hereinabove quoted from.

It results in our judgment that as against appellant's title respondent's lien was barred by the running of the statutory period within which an action could be brought to foreclose its materialman's lien.

The portion of the judgment appealed from is reversed, with directions to the trial court to enter judgment against respondent *Soule-Martin Lumber Company* quieting appellant's title against it.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

128 Cal.App. 305

In re **WOLF'S ESTATE.**

BRICKELL v. TURLEY.

Civ. 4816.

District Court of Appeal, Third District,
California.

Dec. 21, 1932.

As Modified Jan. 6, 1933.

1. Wills ⚭470.

Language employed in will must be liberally interpreted to carry into effect testator's evident intention as expressed in instrument considered as whole.

2. Wills ⚭448, 449.

Construction of will which will avoid partial or total intestacy is favored.

3. Wills ☞558(1).

Description in will of real property is generally sufficient which enables identity of premises to be established or which furnishes means of designating property.

4. Wills ☞565(3).

Devise of house in city by designating house number carries with it lot upon which it is located.

5. Wills ☞560(1).

Property specifically identified in holographic will by reference to established house numbers and name of street in certain city held sufficiently identified.

Will was dated at Sacramento and provided that testatrix gave husband all money in certain banks in such city and house and lot 717 and 719 Tenth street until death, and provided that if any property was left it should go to daughter.

6. Wills ☞490.

Extrinsic evidence that street and house numbers which were mentioned in will as describing property applied to property which testatrix owned at time of execution of will held admissible (Civ. Code, § 1318).

7. Wills ☞490.

Where property devised was referred to by street number, inventory was admissible to show that certain property was only real property which testatrix owned when making will (Civ. Code, § 1318).

8. Wills ☞490.

Where description of property in will is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence (Civ. Code, § 1318).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Sarah Merrill Wolf, also known as Sarah M. Wolf, deceased. Petition by May E. Wolf Turley, opposed by E. J. Brickell, as executor of the last will and testament of Henry C. Wolf, deceased, for partial distribution of a certain double house pursuant to the terms of the will. From a decree of partial distribution, Brickell, as executor, appeals.

Affirmed.

Irving D. Gibson, of Sacramento, for appellant.

Elliott, Atkinson & Sitton, of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a decree of partial distribution of a double house and lot in Sac-

ramento which was made to the respondent pursuant to the terms of an holographic will. It is contended the devise is void on account of a defective description of the property. It is also asserted the court erred in receiving oral evidence identifying the premises since ambiguity does not appear in the language of the will.

Sarah Merrill Wolf died April 10, 1928, leaving surviving her a husband and one daughter. All the property which she owned was located in Sacramento and consists of the house and lot involved in this proceeding, \$2,600 in cash and a cemetery lot. She resided at No. 717 Tenth street in Sacramento at the time she executed her will and until her death. A few days prior to her death she executed the following holographic will:

"Sacramento May 31th 1921

"My last will I revoke all other wills I give to my husband Henry Clinton Wolf All money in Sacramento California and peoples bank and house and lot 717-and 719-tenth street until death and if any left to go to my daughter May E. Wolf-Turley and to May E. Wolf Turley my daughter all my clothes and jewelry and hand painted dishes and one hundred dollars in money and all my silver

"I appoint Henry Clinton Wolf my husband administrator without bonds and want him to have it as soon as I may die

"Sarah Merrill Wolf"

Upon probate proceedings duly instituted, Henry Clinton Wolf was appointed executor of his wife's estate. Before the probating of the estate was completed, Mr. Wolf died. His death occurred November 29, 1929. After his death, his daughter May E. Wolf Turley was appointed administratrix with the will annexed of the estate of her mother. Mr. Wolf left a will. In due time this appellant, E. J. Brickell, was appointed executor of the estate of Henry C. Wolf.

May E. Wolf Turley filed in the estate of her mother, Sarah Merrill Wolf, a petition for partial distribution to her of the double house and lot at 717 and 719 Tenth street in Sacramento, Cal., pursuant to the terms of the holographic will. E. J. Brickell, as executor of the will of Henry Clinton Wolf, deceased, filed an opposition to this petition on the ground that the provision of the will of Sarah Merrill Wolf with respect to the devise of the house and lot is void for lack of description thereof, and that Mrs. Wolf therefore died intestate as to any real property which she may have possessed at the time of her death. At the hearing of the petition for partial distribution, over the objections of the contestant, evidence was received to identify and particularly describe the premises upon which the double house at 717 and 719 Tenth street in Sacramento is situated. It was also shown that she resided in that dwelling house

from the time of the execution of her will to the date of her death, and that she then owned no other real property. Over objection, a deed of conveyance of this same property, which was executed to Sarah M. Wolf October 23, 1902, was received in evidence. The probate court adopted findings to the effect that the testatrix intended to and did devise by the express terms of her holographic will to her daughter, May E. Wolf Turley, subject to a life estate conveyed therein to her husband, Henry Clinton Wolf, her dwelling house and lot at 717 and 719 Tenth street, in the city of Sacramento, Cal.; that this is the same property particularly described in the deed as the "West ten feet (W 10') of North quarter (N $\frac{1}{4}$) of Lot seven (7) and north quarter (N $\frac{1}{4}$) of Lot Eight (8) in the Block bounded by G and H and 10th and 11th Streets of said City of Sacramento, County of Sacramento, State of California."

A decree of partial distribution was entered in accordance therewith. From this decree E. J. Brickell, as executor of the will of Henry Clinton Wolf, deceased, has appealed.

The ground for reversal of the decree is expressed by the appellant in the following language: "The principal and practically the sole question involved here is whether the will of Sarah Merrill Wolf above set forth, contains a devise to the distributee, May Wolf Turley, of the real property described in the decree of distribution appealed from."

We are satisfied the real property which is involved in this appeal is described in the will of Sarah Merrill Wolf with sufficient accuracy to identify and locate the house and lot which the testatrix evidently intended to devise to her daughter. The will was wholly written, dated, and signed in the handwriting of the testatrix without the aid of an attorney. It lacks punctuation. In drawing the will she did not have the assistance of one who is skilled in the use of legal terms.

A reasonable construction of the language of the will persuades us that the lot in question is sufficiently identified as located "in Sacramento, California," and consists of the "house and lot (numbered) 717-and 719-tenth street." By the use of the language "I give * * * All money in Sacramento California and peoples bank and house and lot 717-and 719-tenth street," we think the testatrix meant, "I give * * * All money in Sacramento California and (all money in the) peoples bank (in Sacramento, California) and (my) house and lot (in Sacramento, California, situated at numbers) 717-and 719-tenth street." It is evident the testatrix lacked skill in grammatical construction. She used no punctuation. It seems evident that she was identifying all of her property, both real and personal, as located in Sacramento, Cal. This is in accordance with the fact. This construction does not add to the description or designation of the location of the property

contained in the will. It merely interprets the intention of the testatrix from the rather inartistic language of the will.

[1,2] It is true that in construing the terms of a will the intention of a testator must ordinarily be ascertained from the express language of the instrument, in the light of the circumstances surrounding its execution. *Estate of Sessions*, 171 Cal. 346, 153 P. 231; 26 Cal. Jur. 883, § 199. Nevertheless it is a cardinal rule of construction of wills that the language employed must be liberally interpreted to carry into effect the evident intention of the testator as it is expressed in the instrument considered as a whole. *Estate of Hoytema*, 180 Cal. 430, 181 P. 645; 9 Cal. Jur. 289, § 155. The construction of the will which is insisted upon by the appellant in this proceeding would leave Mrs. Wolf intestate as to the most valuable portion of her estate, the home. The construction of the terms of a will is favored which will avoid partial or total intestacy. *Le Breton v. Cook*, 107 Cal. 410, 40 P. 552; 26 Cal. Jur. 899, § 215.

[3] In construing an instrument to determine whether the description of real property is sufficiently accurate to effect a conveyance thereof the same rules ordinarily apply to both wills and deeds. A description of real property is generally sufficient which enables the identity of the premises to be established, or which furnishes the means of designating the property sought to be conveyed. 18 C. J. 180, § 62; 2 Devlin on Deeds (2d Ed.) 1414, § 1016; *Leonard v. Osburn*, 169 Cal. 157, 146 P. 530, 531; 40 Cyc. 1531; *Holley's Executor v. Curry* (W. Va.) 112 Am. St. Rep. 944, note. In 18 C. J. 180, supra, it is said: "Any description is sufficient by which the identity of the premises can be established, or which furnishes the means of identification."

In the case of *Leonard v. Osburn*, supra, it is said: "Generally speaking, a deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed."

[4] A devise of a house and lot by will which designates the property by reference to established house numbers, and naming the street and city where the property is located, is generally a sufficient description to identify the premises. 40 Cyc. 1531; 2 *Tiffany on Real Property* (2d Ed.) 1668, § 447; *Gilbert v. McCreary*, 87 W. Va. 56, 104 S. E. 273, 274, 12 A. L. R. 1172, note; *Webb v. Carney* (N. J. Ch.) 32 A. 705. Under such a designation the devise of a house carries with it the lot upon which it is located. This is not an uncommon way of identifying city property. There is usually no difficulty in locating the property from such a description. In the case of *Gilbert v. McCreary*, supra, the property devised was situated in Parkersburg, W. Va. The challenged provision of the will read as follows: "I give and bequeath to my daughter

Clara L. Gilbert the house and lot known as No. 114 Tenth street, lot 66 feet front on Tenth street, by 80 feet on alley parallel with Ann street, by 86 feet parallel with Ninth street, by 63 feet to Tenth street at place of beginning." Although the description of the lot by reference to specified dimensions was erroneous, the court held: "The general description is neither legally impossible nor insufficient. Although the lot is not numbered, and the number of the house is not a lot number, it clearly suffices for designation of the subject of the devise. The house is part of the property devised, and its designation in the will as 'No. 114 Tenth street' constitutes an index or means by which it can be found and identified."

[5-8] Extrinsic evidence was competent in the present proceeding to show any circumstances surrounding the execution of the will which throws light upon the intention of the testatrix with respect to the devise of her real property. This property is specifically identified in the will by reference to established house numbers and the name of a street in Sacramento, Cal. It was competent to show by extrinsic evidence that the street and house numbers which were mentioned in the will are the identical ones which apply to the same property which the testatrix actually owned at the time of the execution of the will. The deed was offered for this purpose. It was also competent to show that this was the only real property which she then owned. This was shown by the inventory. These circumstances did not vary the terms of the will. The facts which were shown by extrinsic evidence are not inconsistent with the intention of the testatrix as expressed in the will. No new or different description from that which is mentioned in the will was supplied. The evidence merely supplements the language of the will to furnish a more particular description of the property and to verify the intention of the testator with respect to the devise of the dwelling house to her daughter. With reference to the competency of extrinsic evidence under such circumstances as are here presented, the Supreme Court says, in the case of *Marriner v. Dennison*, 78 Cal. 202, 20 P. 386, 389: "The rule is that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced."

Section 1318 of the Civil Code, as it then existed, applies to the construction of the will in question. It then read: "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations."

In 28 Ruling Case Law 270, § 244, it is said: "In ascertaining the testator's intent the words of the will are to be read in the light of the circumstances under which it was written, and the court may put itself in the place of the testator for the purpose of determining the objects of his testator's bounty or the subject of disposition. It is proper to take into consideration all the circumstances under which the will was executed, including the condition, nature and extent of the testator's property, and his relations to his family and to the beneficiaries named in the will." *Estate of Donnellan*, 164 Cal. 14, 127 P. 166; *Chappell v. Missionary Society, etc.*, (Ind.) 50 Am. St. Rep. 276, note; *Page on Wills*, 974, §§ 818, 819.

We are satisfied that the circumstances which are shown by means of the extrinsic evidence in the present case do not vary the terms of the will. These facts merely aid in ascertaining the intention of the testatrix with relation to the disposal of her real property. There was therefore no error in admitting the evidence.

The decree of partial distribution is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 584

JOHNSON v. SUPERIOR COURT IN AND
FOR FRESNO COUNTY et al.

Civ. 1021.

District Court of Appeal, Fourth District,
California.

Jan. 9, 1933.

Hearing Denied by Supreme Court Mar. 9,
1933.

1. Judgment ⇨497(1).

Judgment of court of record can be attacked collaterally only for want of jurisdiction appearing on record.

2. Divorce ⇨238.

Order allowing alimony to guilty wife in divorce suit, in absence of contract of property settlement, is beyond superior court's jurisdiction (Civ. Code, § 139).

3. Divorce ⇨255.

Interlocutory divorce decree awarding permanent alimony to guilty wife held subject to collateral attack, as to provision for support, as showing award was not based on property settlement (Civ. Code, § 139).

The interlocutory divorce decree contained recital that parties had mutually effected settlement of their property rights and described terms of settlement, but contained no reference to permanent

support. The second paragraph of the decree awarded \$100 per month permanent alimony, and the third paragraph confirmed and approved provisions as to division and settlement of property rights, but there was no other reference in the decree to the contract settling the property rights or to the allowance of permanent support to the wife.

Original proceeding by Clara C. Johnson for writ of mandate to be directed to the Superior Court for Fresno County, and the Honorable T. R. Thomson, judge thereof.

Peremptory writ of mandate denied, and alternative writ discharged.

Strother P. Walton, of Fresno, for petitioner.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for respondents.

MARKS, Acting P. J.

This is an original proceeding instituted in this court wherein petitioner seeks a writ of mandate directing the respondent court and judge to order the county clerk to issue an execution against the property of W. P. Johnson for unpaid installments of an allowance for support given her in an interlocutory decree of divorce in the case of W. P. Johnson v. Clara C. Johnson. This case came before this court on appeal from an order reducing the monthly payments to be made by W. P. Johnson to Clara C. Johnson, petitioner here. *Johnson v. Johnson*, 104 Cal. App. 283, 285 P. 902, 905.

The facts of the case may be briefly summarized as follows: W. P. Johnson instituted an action for divorce from Clara C. Johnson alleging extreme cruelty. On March 14, 1928, he was granted an interlocutory decree of divorce, from which it appeared the parties had made a settlement of their property rights. This settlement was approved by the trial court. In the interlocutory decree Clara C. Johnson was awarded \$100 a month for her support. No appeal was taken from this interlocutory decree. On July 13, 1928, Johnson served and filed a notice of motion to modify the interlocutory decree in so far as it affected the payment of support money. On August 15, 1928, the trial court made an order reducing the payment to \$40 a month. This order was appealed and was reversed for the reason that we could not determine from the record then before us whether or not the provision for the payment of \$100 a month in the interlocutory decree was based on an agreement between the parties. In our order we gave the following direction: "Under the condition of the record before us, we believe that the order modifying the interlocutory decree of divorce should be reversed,

with directions to the trial court to take such future action as may be appropriate under such facts as may be developed at a further hearing." *Johnson v. Johnson*, supra.

On the former appeal, the only question involved was whether or not the trial court could make an order reducing the amount of the support awarded to the defendant. As the divorce was granted to W. P. Johnson, the innocent party, against Clara C. Johnson, the guilty party, because of extreme cruelty, the sole question to be then determined in measuring the power of the court to make the order reducing the award was whether or not the order directing the innocent husband to pay support money to his wife, who was guilty of extreme cruelty, was based upon a valid and binding contract settling the property rights of the parties. If it was, the trial court could not lawfully reduce the award. *Parker v. Parker*, 55 Cal. App. 458, 203 P. 420. If the award for support of the guilty wife was not based upon such a contract, it was error on the part of the trial judge to make any allowance for her support, as an allowance for support after divorce is only made to an innocent wife against a guilty husband "by way of compensation for the deprivation growing out of his own wrong." *Ex parte Spencer*, 83 Cal. 460, 23 P. 395, 397, 17 Am. St. Rep. 266; sec. 139, Civ. Code; *Parker v. Parker*, supra; *Lampson v. Lampson*, 171 Cal. 332, 153 P. 238. If the allowance made in the interlocutory decree was not based upon contract, the trial court had the right in a proper proceeding therefor to relieve the innocent husband from any obligation to pay support money to his guilty wife. *Soule v. Soule*, 4 Cal. App. 97, 87 P. 205; *Gates v. Gates*, 54 Cal. App. 407, 202 P. 151; *Parker v. Parker*, supra; *Smith v. Superior Court*, 89 Cal. App. 177, 264 P. 573; *Johnson v. Johnson*, supra. Our order reversing the order of August 15, 1928, left the case in the same condition that it was prior to making the order reducing the amount to be paid to Mrs. Johnson, with the motion of her husband to modify the interlocutory decree pending and undecided, and with our instructions to take appropriate action under facts to be developed at a further hearing.

The petition for a writ of mandate was filed in this court on June 20, 1932. It recites the rendition of the interlocutory decree of divorce and its finality; that fifty-two months elapsed between the entry of the interlocutory decree and the filing of the petition here; that \$5,200 had accrued under the terms of decree; that \$1,340 had been paid thereon, leaving a balance of \$3,860 unpaid; that petitioner here applied to the respondent judge for an order directing the clerk of Fresno county to issue an execution against the property of W. P. Johnson, and that such application was denied. The petition contains no showing as to whether or not any further proceedings had been had in the re-

pendent court in accordance with our directions in the case of *Johnson v. Johnson*, *supra*.

The answer of respondents was filed here on July 12, 1932. The only important question raised was by the following order: "It appearing to the Court that the plaintiff above named was granted a decree of divorce from the defendant on the ground of the defendant's extreme cruelty towards plaintiff herein, and that in said interlocutory decree of divorce the above entitled court made order providing that the plaintiff should pay the defendant as and for alimony the sum of One Hundred Dollars (\$100.) per month; that thereafter said order was modified by an order of the above entitled court reducing said sum to Forty Dollars (\$40.) per month, and an appeal was taken from said order; that said order was reversed by the District Court of Appeal, Fourth Appellate District, said decision being found in 104 Cal. App. at page 283, 285 P. 902. That pursuant to said decision and the opinion rendered therein this court was directed to take such further action as might be appropriate to determine whether or not said sum of money so awarded in said interlocutory decree was an alimony provision or was based upon an agreement of the parties hereto; that thereafter said matter came on regularly for hearing and evidence both oral and documentary was offered in the above entitled court, Department 4 thereof, and the matter was thereafter regularly submitted for decision; that from the evidence so taken the court finds that no agreement, either oral or written, was ever entered into between the parties hereto relative to the payment by the plaintiff to the defendant of any sum of money whatsoever as alimony, or otherwise; that said provision in said interlocutory decree providing for alimony was not made pursuant to any agreement between the parties hereto. Dated this 8th day of July, 1932."

If this order accomplishes anything it certainly does not dispose of the motion of W. P. Johnson to modify the interlocutory decree in so far as it provided for the payment of support to petitioner. It is nothing more than a finding of fact that the award of support money was not based on contract. It left the interlocutory decree intact with its requirement that he pay \$100 per month to his wife unchanged, and the motion to modify this provision undecided. The question here presented has narrowed itself to this: Does it appear on the face of the interlocutory decree of divorce that the award of support money to petitioner is void?

In considering this question, counsel for petitioner relies upon two grounds: First, our decision in *Johnson v. Johnson*, *supra*, wherein we said that we could not determine from the record then before us whether or not the award was based on contract; and, second,

upon the presumption of the regularity of all judgments of the superior court.

When our decision in the case of *Johnson v. Johnson*, *supra*, was rendered, the record contained the interlocutory decree of divorce, the notice of motion for its modification, and affidavits used on the hearing. In an affidavit filed on behalf of Clara C. Johnson, petitioner here, it was stated, in setting forth the terms of the contract settling the property rights of the parties, "that said settlement provided * * * that plaintiff pay to defendant [petitioner here] for her support and maintenance and by way of alimony the sum of \$100.00 per month, and that all of these matters be embraced in the interlocutory decree of divorce." This uncontradicted statement raised the question in our minds which caused us to reverse the order, with directions to the trial court to take further proceedings to determine this problem. Since our decision the trial court took evidence on this question and found that the alimony award was not based on any "agreement, either oral or written * * * between the parties." This effectually rebuts the statements contained in the affidavit from which we have quoted. The questions presented here were not finally determined in the case of *Johnson v. Johnson*, *supra*.

[1] In considering the second contention of petitioner, we are well aware of the rule, and the multitude of decisions supporting it, that all presumptions are in favor of the legality of a judgment of a court of record and that such a judgment cannot be attacked collaterally because of errors in it, but only on the ground that it was made in excess of jurisdiction, when the lack of jurisdiction appears on the face of the record. *Harlan v. Harlan*, 154 Cal. 341, 93 P. 32; *Lieberman v. Superior Court*, 72 Cal. App. 18, 236 P. 570.

[2] Were this the first time this question had been presented on appeal, we probably would be constrained to hold that the portion of the decree in question was an error of law committed by the trial court not in excess of its jurisdiction. The superior court is given jurisdiction of actions for divorce and may settle the property rights of the parties before it, and, in a proper case, provide for the support of one of the parties. It would seem that the making of the award in question might well be considered within the jurisdiction of the superior court, but that the making of it was error. However, this question is not now open for debate in a District Court of Appeal. The cases already cited, and others, have established the rule that the making of such an order is beyond the jurisdiction of a superior court unless based upon a contract of property settlement. In *re McKenna*, 116 Cal. App. 232, 2 P. (2d) 429; *McKannay v. McKannay*, 68 Cal. App. 701, 230 P. 214.

[3] The interlocutory decree of divorce in its first paragraph contains the recital that the parties had mutually effected a settlement of their property rights with a fairly full description of the terms of the settlement which contains no reference to the permanent support which petitioner now claims. The second paragraph contains the usual recitals that the plaintiff W. P. Johnson is entitled to a divorce on the ground of extreme cruelty. This paragraph concludes with the following: "And it further appearing to the court that the defendant is physically incapable of earning a livelihood by her own labors, it is further ordered, adjudged and decreed that plaintiff pay to the defendant as and for alimony the sum of one hundred (\$100.00) dollars per month, payable on the 15th day of each and every month, commencing on the 15th day of March, 1928." The third paragraph is as follows: "It is further ordered, adjudged and decreed that the provisions hereinabove recited as to the division and settlement of the property rights between the parties hereto be and the same are hereby confirmed and approved." There is no other reference in the decree to the contract settling the property rights or to the allowance of permanent support to the wife. We have concluded that it sufficiently appears from the decree that the award of permanent support to the wife was not based on the contract settling the property rights of the parties, so that we are required to refuse the peremptory writ of mandate sought by petitioner.

The peremptory writ of mandate is denied, and the alternative writ is discharged.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, deeming himself disqualified, does not participate herein.

128 Cal.App. 646

**CITY OF PASADENA v. WELCH, County
Tax Collector, et al.**

Civ. 7507.

District Court of Appeal, Second District,
Division 1, California.

Jan. 13, 1933.

Mandamus ☞ 118.

Mandamus lies to compel tax collector to receive and receipt for taxes legally due on realty owned by city which refused to pay special assessments included on tax bills because illegal.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Application by the City of Pasadena, a municipal corporation, for a writ of mandamus to compel W. O. Welch, as Tax Collector of the County of Los Angeles, and others, to accept payment of certain taxes. From a judgment of dismissal, plaintiff appeals.

Reversed.

Harold P. Huls, City Atty., Leonard A. Diether and W. B. Etheridge, Deputy City Attys., all of Pasadena, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent tax collector.

YORK, J.

This is an appeal from a judgment dismissing an application for a writ of mandamus rendered after an order had been made sustaining respondent tax collector's general demurrer without leave to amend.

The petition for the writ was directed against the tax collector and various improvement districts to compel respondent tax collector to accept payment by petitioner of the sum of \$3,638.62, as taxes legally due upon certain real property owned by the said petitioner and devoted to and actually in use for public purposes. The sum mentioned was tendered to respondent tax collector as payment in full of the entire second installment of all taxes legally due for the year 1929-1930 upon its said property, except, however, the separate and special assessment shown on and included within the said tax bills for special assessments levied by reason of the inclusion of the property within the various improvement districts above referred to, the appellant claiming that the assessments shown on the tax bills for the said improvement districts were wholly erroneous, illegal, and void, for the reason that the assessments for said districts are special assessments, and that special assessments have been held by the Supreme Court of this state to be invalid when assessed upon property owned and held and actually devoted and applied to and in public use by a municipal corporation.

The respondent tax collector refused said tender and declined to receive said sum of \$3,638.62, or any part thereof in payment of said second installment of taxes, or to furnish appellant with the tax receipts requested, for the sole reason that appellant failed and refused to tender the amount or pay the special assessments shown and included in the tax bills for said special districts.

The petition prayed for an alternative writ of mandate to compel the respondent tax collector to accept payment of said sum and to furnish petitioner with written receipts showing payment in full of the entire second installment of all taxes on said property, and to mark each of the items representing the said

second installment of taxes "paid" in the assessment book of said county, or to show cause why respondent should not accept payment and furnish written receipts and mark said items "paid" in said books, and that the court order, adjudge, and decree that the special assessments set forth in the petition were each erroneous, illegal, unconstitutional, and void, and that the writ be made peremptory.

The sum of \$3,638.62 was deposited in court, an alternative writ of mandate was issued, and, upon the return day fixed by said alternative writ, the respondent tax collector appeared and filed a general demurrer to the petition. Said demurrer was sustained without leave to amend, and judgment was entered dissolving and discharging the alternative writ and dismissing the action.

The demurrer raised the question as to whether or not mandamus is a proper remedy by which to compel a tax collector to receive and receipt for a part only of the taxes indicated upon the assessment roll as being due and a lien upon certain property. The respondent maintains that the tax collector is a ministerial officer and without the judicial function to determine the validity of the taxes upon the roll.

The facts stated in the petition for the writ are sufficient to raise the question of the legality of the special assessments itemized upon the tax bills of the appellant.

The case of *Whitmore v. Brown*, 207 Cal. 473, 477, 279 P. 447, holds that, if parties contesting the legality of an item in a tax levy tender a sufficient amount to pay the tax legally due, an original proceeding in mandamus is a proper one to compel the issuance of an official receipt in full; citing *Spring Valley Water Co. v. Planer*, 88 Cal. App. 170, 263 P. 323. The latter case was a proceeding in mandamus involving the validity of certain taxes assessed and presenting the question of the propriety of the remedy sought. The taxes involved in the *Planer* Case were adjudged by the court in the companion case of *Spring Valley Water Co. v. County of Alameda*, 88 Cal. App. 157, 263 P. 318, to be null and void. In the *Planer* Case it was held (page 173 of 88 Cal. App., 263 P. 323, 325): "The evident purpose of the present action was to have determined the validity of the tax involved. When the tax was determined and adjudged to be void, the conclusion followed that plaintiff had made a lawful tender of all taxes due, and it is not disputed here that such tender was lawful and continuing. It seems clear, then, that under the decision quoted [*Perry v. Washburn*, 20 Cal. 318] plaintiff would be entitled to his receipt, as the only claim of the tax collector upon which a denial of the receipt rested was that plaintiff had not tendered the full amount due. To determine the

tax invalid and void as against the property assessed, and then remit plaintiff to a pursuit of statutory remedies would seem useless and unreasonable, particularly when all subsequent proceedings would have as a support the foundation which had already been decreed as void and of no effect. Whatever other remedies might be allowed by statute, it would all come back to the proposition that plaintiff should be relieved from the payment of an illegal and void tax."

The judgment of dismissal is reversed.

We concur: CONREY, P. J.; HOUSER, J.

POHL v. MILLS et al.*
Civ. 4441.

District Court of Appeal, Third District,
California.
Jan. 6, 1933.

Hearing Granted by Supreme Court Mar. 6, 1933.

1. Landlord and tenant §34(2).

Misrepresentation lessors had copyright of sales booths of lemon shape and color held not ground for rescission, where lessee's exclusive right under lease to operate roadside booths of that type had not been interfered with.

2. Fraud §25.

Generally, fraud without damage constitutes no ground for action.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by F. E. Pohl against James Mills, Jr., sometimes known as James Mills, and another, copartners doing business under the firm name and style of Jumbo Lemon Company and another, in which defendants filed cross-complaint. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. T. Belieu, of Willows, and Percy S. Webster, of Stockton, for appellant.

Marvin J. Rankin, of Red Bluff, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1924 James Mills, Jr., and Robert Rankin were employees of the James Mills Orchard Company, a corporation, a large grower of lemons and other citrus fruits in the county of Colusa. In order to stimulate the sale and use of the citrus juices produced

from such fruits, they built and operated what they termed a Jumbo Lemon, being a structure designed in form and color to represent a lemon, to be used as a roadside booth for dispensing nonintoxicating drinks. Thereafter they formed a partnership for the purpose of carrying on the building and leasing of these Jumbo Lemons, and later a corporation was formed which took over the work of the partnership.

In December, 1926, the partnership leased to plaintiff four Jumbo Lemon structures for a period of five years at a stipulated cash rental, together with a royalty upon the gross earnings therefrom.

The present action was brought for the purpose of rescinding these lease contracts, the appellant claiming that fraudulent representations were made by the respondents which induced him to enter into the leases. He alleges that during the negotiations prior to the execution of the leases and in the leases themselves, respondents falsely and with intent to deceive, represented to him that they (the lessors) were the owners of the exclusive right to maintain and operate said Jumbo Lemon structures in California and further represented to appellant that the Jumbo Lemon structure was a structure copyrighted under the laws of the United States by James Mills, one of the respondents. Appellant further alleges that relying upon these representations, he entered into the leases and operated and conducted such roadside booth or structure until he discovered, as he alleges, that none of the defendants were the owners of or had the exclusive or any rights superior to anyone, to make, sell, lease, operate, or maintain said Jumbo Lemon structure and that said Jumbo Lemon structure was not a structure copyrighted by them and that none of the respondents herein was the owner or possessor of any such copyright thereon.

The complaint in brief alleges the execution of four separate lease contracts by the parties; that the plaintiff was induced to execute these leases by the misrepresentations of the defendants; that the plaintiff was without any knowledge of the facts represented to him by the defendants; that the oral and written misrepresentations made by the defendants to the plaintiff to the effect that defendants owned a "Structure Copyright" on the Jumbo Lemon structure itself, and that they had certain exclusive rights therein, were knowingly false, and these misrepresentations were the inducing cause which influenced the plaintiff in making the contracts; that plaintiff took possession of the leased structures under his lease and paid the stipulated lease price, and paid out in addition other sums of money in carrying out the terms of the leases, and that he received certain sums of money in the operation of said stands; and immediately upon discovering the falsity of these misrepresentations made

to him by the defendants, the plaintiff took appropriate steps to rescind the lease contracts, and claimed a lien on the structures for all sums due to him; and that on account of the false representations as to the structures being copyrighted, the rent or sale price placed thereon constituted a fictitious value. The complaint prayed for a rescission of the lease contracts as a result of the fraud, and for restoration to him of all his outlays after giving defendants proper credits for receipts derived from the operation of said booths.

Defendants' answer admitted the execution of the lease contracts, but denied all the allegations of fraud contained in the complaint.

Defendants also filed a cross-complaint with their answer. The first four counts sought damages from plaintiff for his alleged abandonment of the lease contracts and his refusal to proceed to carry out the terms thereof, and damages for alleged conversion of certain personal property leased with said structures. The fifth cause of cross-complaint alleged damages sustained by the cross-complainant for failure to co-operate in running the drink stands and to assist in sustaining a uniform system of operation thereof; failure to take proper care of the drink stands and equipment; and an alleged endeavor to injure the Jumbo system by a course of malicious conduct by broadcasting the fact that the Jumbo Lemon Company had no copyright protection, thus creating dissension among the operators of the Jumbo Lemon stands, for which cross-complainants claimed damages in the sum of \$10,000, all of said alleged acts occurring after plaintiff's attempted rescission of the contract.

The trial court found against the contentions of plaintiff, and awarded to defendants on their cross-complaint damages against plaintiff for the value of certain articles of personal property not accounted for, repair to the booths, loss of profits, and for general damages.

[1] The gist of controversy here is whether the representation that the respondents had a copyright of the structure known as the Jumbo Lemon is a fraud, and, if so, is it an actionable fraud?

In 1925 an application was made to copyright the Jumbo Lemon sales booth, but permission to copyright the structure was denied on the ground that it was merely a sales booth of lemon shape and color and not a work of fine art. Thereafter a photograph of the structure was made and a copyright of such photograph issued thereon to James Mills, Jr.

In the lease contract entered into between the parties to this appeal it is stated: "That whereas the lessors are the owners of the exclusive right to maintain and operate 'Jumbo Lemons' a form of roadside stand for mixing and dispensing non-intoxicating drinks which 'Jumbo Lemon' is a structure copy-

righted by James Mills, and lessors are establishing a chain of said 'Jumbo Lemons' throughout the state of California and other states, and to operate the same through lease contracts, and to maintain a standard system of operation."

There can be no question that neither Mills nor respondents had a copyright upon the Jumbo Lemon, as a structure. The certificate of the copyright is very definite and applies to a photograph only. "Certificate of Copyright Registration. * * * That One copy of the Photograph named herein, not reproduced for sale, has been deposited in the office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years has been duly made in the name of James Mills, Jr., Hamilton City, California. Title of Photograph Jumbo Lemon Booth."

From the testimony of respondents and from the correspondence introduced in evidence it is apparent that the structure itself was neither patentable nor could it be copyrighted. It is therefore obvious that respondents could not in good conscience represent that the Jumbo Lemon was a structure copyrighted, but nevertheless we fail to see where appellant had established a cause for rescission, or, in other words, proved actionable fraud, by proof alone of this fact.

Appellant has cited many cases involving the rescission of contracts for the purchase of real and personal property, but both the pleadings and the contract here before the court are concerned with the rights under a lease, which involve a different rule than that applicable to a sale. Appellant here negotiated for the exclusive right to operate a roadside booth of distinctive type and appearance, being a part of a chain of such booths required to maintain a definite standard of quality and service, and as long as he continued to enjoy those rights he received that for which he bargained.

[2] The complaint shows affirmatively that the lessee entered into the possession of, and operated the leased property under the terms of the contract, but contains no allegation of damages flowing from any breach of the contract on the part of the respondents nor of any infringement or interference with appellant's exclusive right to maintain and operate the same, and it is a general rule that fraud without damage constitutes no ground for action. *Woodson v. Winchester*, 16 Cal. App. 472, 117 P. 565.

"As a general rule, a fraud which causes no injury is not legally cognizable; and it is an essential part of the definition of fraud, as a cause for the intervention of equity, or for a party to take steps to rescind a contract or other obligation into which he has entered, that it should have resulted, or that it will

result, in some loss, damage, detriment, or injury to him." *Black on Rescission and Cancellation* (2d Ed.) vol. 1, § 36.

It is not alleged in the complaint that the exclusive features of the lease were in any manner encroached upon; the grievance of appellant seems to be that the structure he leased was not protected by a copyright. It may be conceded that a copyright protection might be very material in a question of ownership or sale, but we are here dealing with exclusive use and quiet enjoyment and until appellant has alleged and proven interference with this right, no cause of action has been stated.

The cross-complaint is based upon the breach of the lease contract by reason of the abandonment and repudiation of the property when appellant refused to further perform. The court found upon competent evidence the amount of loss and damage thereby sustained by respondents. It needs no citation of authority to uphold the contention of respondent that where the plaintiff in a suit for rescission fails to establish his case that relief may be granted to defendants in accordance with the prayer of his cross-complaint.

Appellant objects to certain findings by the trial court, and if we were to adopt his theory of the case the findings would be subject to the objections cited, but in view of our conclusions as to the right and liabilities of the parties hereto we discover no error in the findings and they are fully supported by the evidence.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

128 Cal.App. 427
LOS ANGELES ATHLETIC CLUB v. CITY
OF LONG BEACH.
Civ. 8663.

District Court of Appeal, First District, Division 2, California.
Dec. 28, 1932.

Rehearing Denied Jan. 27, 1933.

Hearing Denied by Supreme Court Feb. 24, 1933.

1. Municipal corporations ☞719(5).

City, holding title to tide and submerged lands for park and playground purposes and structures promoting commerce and navigation, may cut off portions from access to harbor in aid of fishing and navigation (*St.* 1925, p. 235).

2. Evidence ☞87.

Disputable statutory presumption that official duty was regularly performed becomes

controlling, in absence of contrary evidence (Code Civ. Proc. § 1963, subd. 15).

3. Evidence ⇨83(2).

Court must assume that city officers proceeded under statutory authority to use tide and submerged lands for park and playground purposes in constructing breakwater, unless statutory presumption of regularity is controverted (St. 1925, p. 235; Code Civ. Proc. § 1963, subd. 15).

4. Municipal corporations ⇨719(5).

Amended complaint in action against city to abate breakwater and fill for municipal auditorium on tide and submerged lands *held* insufficient to rebut statutory presumption of regularity (St. 1925, p. 235; Code Civ. Proc. § 1963, subd. 15).

The amended complaint alleged that breakwater extended into ocean about 1,400 feet from shore and fill only 690 feet, but was silent as to purposes to which about four-fifths of tide and submerged land within breakwater outside fill, which attached diagram showed to occupy about fifth of such area, were intended to be devoted.

5. Municipal corporations ⇨721(2).

Construction of municipal auditorium is not inconsistent with dedication or use of site for park or playground purposes, and construction thereof on fill, occupying portion of tide and submerged lands devoted to such purposes, is authorized (St. 1925, p. 235).

6. Pleading ⇨34(3).

While complaint must be liberally construed with view to substantial justice, it must state facts necessary to establish cause of action as against demurrer.

7. Municipal corporations ⇨719(5).

Allegation of amended complaint that breakwater sought to be abated was constructed by city to protect fill for municipal auditorium against ocean waves *held* insufficient to negative statutory presumption of regularity (St. 1925, p. 235; Code Civ. Proc. § 1963, subd. 15).

8. Officers ⇨119.

Complaint charging official misconduct should fairly negative statutory presumption of regularity (Code Civ. Proc. § 1963, subd. 15).

9. Eminent domain ⇨112.

One whose property is proximately damaged by construction of public work is entitled to compensation (Const. art. 1, § 14).

10. Injunction ⇨49.

Corporation owning beach lot, on which it maintained club building, *held* not entitled to mandatory injunction abating massive and expensive breakwater and fill constructed by city because of damage to corporation's property.

11. Eminent domain ⇨268, 276.

Operation of property dedicated to public use should not be interrupted by action to recover possession thereof or enjoin continuance of such use.

12. Estoppel ⇨93(1).

Property owner cannot stand by and see large sums spent on public improvement and then deprive public of benefit thereof by injunction to protect right which may be fully protected by damage suit.

13. Estoppel ⇨114.

Amended complaint, showing that plaintiff did nothing until over six months after city completed breakwater and fill for municipal auditorium, showed laches and conduct estopping plaintiff to sue for mandatory injunction to abate work.

14. Injunction ⇨194.

Corporation, suing for mandatory injunction to abate breakwater and fill constructed by city, *held* not entitled to alternative relief by construction of additional works to protect plaintiff's property.

15. Eminent domain ⇨293(1).

Amended complaint, not alleging presentation of claim to city for damages to property by construction of breakwater and fill, stated no cause of action therefor (Long Beach Charter, § 338).

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by the Los Angeles Athletic Club against the City of Long Beach. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Hunsaker & Cosgrove and John N. Cramer, all of Los Angeles, for appellant.

Nowland M. Reid, City Atty., Geo. W. Trammell, Jr., Asst. City Atty., and Beach Vasey, Deputy City Atty., all of Long Beach, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment of dismissal entered after the sustaining of a demurrer to plaintiff's first amended complaint. It appears from the amended complaint that plaintiff and appellant is the owner of a beach lot bordering on the Pacific Ocean within the territorial limits of the defendant and respondent, city of Long Beach, upon which lot appellant maintains a club building; that respondent has constructed upon the tide and submerged lands of the Pacific Ocean, approximately 1,200 feet westerly of appellant's property, a crescent-shaped breakwater and within this breakwater a fill upon which it is planned to construct a municipal auditorium. It is further alleged that by reason of the con-

struction of this breakwater and its interference with the normal and natural action of the waters of the Pacific Ocean, the beach lands of appellant are being eroded and washed away and its club building is being undermined and endangered. Appellant prays that respondent be compelled to abate and remove this breakwater and fill, or in the alternative erect groynes, bulkheads, breakwaters, or other works to adequately protect appellant's property.

It is appellant's theory as stated in its briefs that the construction of a municipal auditorium upon the tide and submerged lands of the Pacific Ocean is an unlawful use of such lands.

[1] The city of Long Beach holds title to the tide and submerged lands in question under a statute enacted in 1925 (Stats. 1925, p. 235). By the terms of this statute "none of said lands shall be used or devoted to any purposes other than public park, parkway, highway, playground, the establishment, improvement and conduct of a harbor and the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion * * of commerce and navigation."

It will be seen from this quoted language that the city of Long Beach has authority to use portions of these lands for public park, parkway, highway, and playground purposes. This amounts to a legislative determination that portions of such tide and submerged lands may be used for such purposes without interfering with the paramount rights of navigation and fishery. If, in adapting the tide-lands for use in fishing and navigation, "it is found necessary or advisable, in aid of the use, to cut off portions of them from access to the waters of the harbor, that may be done." *Muchenberger v. City of Santa Monica*, 206 Cal. 635, 641, 275 P. 803, 806. We must take it in support of the official action of the state legislature in granting to the city of Long Beach the right to use portions of such tide and submerged lands for park, parkway, highway, and playground purposes that it was found necessary or advisable by the Legislature to cut off such portions from access to the waters of the harbor in aid of the paramount uses of navigation and fishery.

[2-5] There is a disputable presumption declared by section 1963, subd. 15, of the Code of Civil Procedure, "that official duty has been regularly performed." In the absence of evidence to the contrary, this disputable presumption becomes controlling. Under this presumption, unless controverted, the courts are bound to assume that in constructing the crescent-shaped breakwater referred to in the complaint the officers of the city of Long Beach were proceeding under the authority granted them to use portions of the tide and submerged lands for park, highway, parkway,

and playground purposes. The amended complaint, as we construe it, does not allege facts sufficient to rebut this presumption. It is alleged in the amended complaint that the breakwater extends into the ocean at its furthest point about 1,400 feet from the shore and that the fill for the municipal auditorium extends from the shore line only 690 feet, and from a diagram attached to the amended complaint it appears that the fill occupies only about one-fifth of the area enclosed by the breakwater. As to the purposes to which the area of approximately four-fifths of the tide and submerged lands inclosed within the breakwater and not covered by the fill are intended to be devoted the amended complaint is silent. If we assume, as we are bound to do in support of the action of the officers of the city of Long Beach, that this otherwise unoccupied area is to be devoted to park or playground purposes or both, then the use of the tide and submerged lands within the breakwater is entirely consistent with the authority granted to the city of Long Beach unless the construction of the municipal auditorium upon a portion of a park or playground is unlawful. Under the authority of such cases as *Spires v. City of Los Angeles*, 150 Cal. 64, 87 P. 1026, 11 Ann. Cas. 465; *Slavich v. Hamilton*, 201 Cal. 299, 257 P. 60, and *Vale v. City of San Bernardino*, 109 Cal. App. 102, 292 P. 689, we are satisfied that the construction upon a part of a public park or playground or both of a municipal auditorium for the use of the public is not inconsistent with its dedication to or use for park or playground purposes.

[6-8] Appellant points to the following allegation in its amended complaint as showing that the breakwater was constructed for a purpose at variance with the statutory authority of the city of Long Beach: "That said Horseshoe breakwater was constructed by the defendant for the purpose of affording protection to said auditorium fill against the wave action of the waters of the Pacific Ocean at the place of its construction." While a complaint is to be liberally construed with a view to substantial justice between the parties (*Mix v. Yoakum*, 200 Cal. 681, 687, 254 P. 557), it must still as against a demurrer state the facts necessary to establish a cause of action. It is to be observed of this quoted allegation that it neither alleges that the sole or only purpose of the construction of the breakwater was to protect the auditorium nor that the lands enclosed within and protected by the breakwater were not intended to be used for any of the purposes permitted by the statute. It is entirely consistent with this allegation that the primary purpose of the construction of the breakwater was the protection of the area within it for park or playground purposes, and that another and incidental purpose was the protection of the auditorium fill from the action of the waves. It seems to us that a complaint seeking to charge

official misconduct, as this one does, should reasonably be required fairly to negative the presumption of the regularity of official action declared by the Code.

However, the disposition of this question is not necessarily determinative of the rights of the parties. It is alleged in the amended complaint, in effect, that the breakwater interferes with the natural and normal action of the waters of the ocean in such manner as to cause such waters to erode the beach lands of appellant and undermine its clubhouse. It is appellant's position that this is a damage to its property of the character contemplated by section 14, article 1, of the state Constitution, entitling it to relief.

[9] It was settled shortly after the adoption of the Constitution of 1879 that a property owner whose property was proximately damaged by the construction of a public work was entitled to relief under the provisions of section 14, article 1 (Reardon v. City and County of San Francisco, 66 Cal. 492, 6 P. 317, 56 Am. Rep. 109), and this rule has been reaffirmed as recently as *McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.(2d) 139. A case closely in point is *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 P. 899, 900. In that case by the construction of a storm drain as a part of the works of a protection district, waters were diverted onto plaintiff's land to her damage. The Supreme Court said: "The case, therefore, is one wherein property has been damaged by works constructed for public purposes, and no compensation has been provided or paid in advance, as required by the Constitution. Article 1, § 14. In such cases the rule is well established that if the property is not condemned by legal proceedings and the damage paid in advance before the construction of the works, the county is liable for the damage resulting therefrom, and an action will lie against it for the recovery thereof." This case in principle is not distinguishable from the *Elliott Case*.

[10, 11] However, by its amended complaint appellant seeks by mandatory injunction to abate the breakwater and fill which are alleged to have been already constructed. That these works are extensive and that the expense of their construction must have been considerable appears clearly from the amended complaint. It is alleged that said breakwater is constructed of piles with granite rocks placed between said piles and on either side thereof, varying from a width of 30 feet at its base at the points nearest the shore to a width of 120 feet at its base at the portions furthest from the shore, and in height from 8 feet to 38 feet. This massive and completed public improvement appellant seeks to have abated because of the damage to its property. Under such circumstances the rule of law well stated in *County of Los Angeles v. Rindge Co.*, 69 Cal. App. 72, 81, 230 P. 468, 471, would seem to be peculiarly applicable:

"Under the circumstances thus appearing, and the road as constructed having passed into actual public use, an injunction will not be granted to interfere with the enjoyment of that use. Where property has been dedicated to a public use, the operation thereof is in the interest of the public, and should not be interrupted by an action to recover possession thereof or to enjoin the continuance of the use. An extensive review of the cases declaring this doctrine will be found in *Miller & Lux, Inc., v. Enterprise Canal & Land Co.*, 169 Cal. 415, 147 P. 567. In most of these cases the use was one which had become established by consent of the owner or by his passive acquiescence therein; but the rule as declared in these decisions is not based upon the doctrine of estoppel. It rests upon considerations of public policy 'under which the rights of the citizen are sometimes abridged in the interests of the public welfare.'"

[12] This doctrine has been frequently announced in this state, and many of the leading cases are cited and discussed in *Miller & Lux v. Enterprise Canal & Land Co.*, supra. While it has frequently been placed upon the ground of estoppel, it rests more strictly upon grounds of public policy that the property owner cannot stand by and see large sums of money spent upon a public improvement and then deprive the public of the benefit of the expenditure for the protection of a right which may be protected fully by an action for damages. *Gurnsey v. Northern Calif. Power Co.*, 160 Cal. 699, 709, 117 P. 906, 36 L. R. A. (N. S.) 185; *Miller & Lux v. Enterprise Canal & Land Co.*, supra; *County of Los Angeles v. Rindge Co.*, supra.

[13] According to the allegations of the amended complaint the breakwater was constructed in 1929; and this action was not commenced until July 24, 1930. Even if an estoppel must exist, it appears from the face of the amended complaint itself that appellant stood by and did nothing during the entire course of construction and for over six months after the completion of the work sought to be abated. In the absence of pleaded facts legally excusing this inaction, appellant's laches and conduct amounting to an estoppel appear upon the face of the amended complaint.

[14] The alternative relief sought by the construction of additional works to protect appellant's property is beyond the recognized powers of equity and no authority is cited by appellant in support of that portion of its prayer.

[15] Finally appellant claims that its amended complaint states facts entitling it to recover damages. A complete answer to this is found in the failure to allege the presentation of a claim as required by section 338 of respondent's charter. *Crescent Wharf &*

Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

128 Cal.App. 466

GALLAGHER v. FOERST.

Civ. 8593.

District Court of Appeal, First District,
Division 1, California.

Dec. 29, 1932.

Hearing Denied by Supreme Court Feb. 27, 1933.

1. Municipal corporations ⇨8.
Statutes ⇨205.

Effect should be given to all language of charters and statutes, and all provisions upon same subject harmoniously construed.

2. Municipal corporations ⇨459.

Board of supervisors will not be deemed authorized to adopt ordinance regarding street improvement proceedings and assessments, totally ignoring assessment limitations unless such grant plainly appears.

3. Municipal corporations ⇨459.

Board of supervisors' authority to provide by ordinance for street improvement proceedings other than proceedings in charter *held* limited by charter provisions limiting assessments for street improvements (St. 1899, p. 296, art. 6, c. 2, § 33, added by St. 1911, p. 1691, amended by St. 1917, p. 1735).

St. 1899, p. 296, art. 6, c. 2, § 33, added by St. 1911, p. 1691, amended by St. 1917, p. 1735, limiting assessments for street improvements, provided in substance that such amendment should not exceed 50 per centum of the assessed value of the property except in case of installment payment, and in no case should installments exceed 25 per centum of the assessed valuation.

4. Municipal corporations ⇨459.

Street improvement assessment exceeding 50 per centum limitation of charter and ordinance and exceeding 25 per centum limitation of charter relating to installment payments *held* void (St. 1899, p. 296, art. 6, c. 2, § 33, added by St. 1911, p. 1691, amended by St. 1917, p. 1735).

St. 1899, p. 296, art. 6, c. 2, § 33, added by St. 1911, p. 1691, amended by St. 1917, p. 1735, provides in part that no assessment should be levied upon any property for street improvement, which together with all assessments for street improvements that may have been levied upon the

same property during the year next preceding, will amount to a sum greater than 50 per centum of the value at which the property was assessed for municipal purposes, and that in no case should any installment payment of the assessment exceed in amount 25 per centum of such assessed valuation.

5. Municipal corporations ⇨513(4).

Where street improvement assessment exceeded both 50 per centum limitation, and 25 per centum limitation for installment payments, property owners *held* not required to appeal to board of supervisors for relief (St. 1899, p. 296, art. 6, c. 2, § 33, added by St. 1911, p. 1691, amended by St. 1917, p. 1735).

6. Municipal corporations ⇨60.

Board of supervisors cannot acquire indirectly, by ordinance, power expressly withheld by charter.

7. Municipal corporations ⇨459.

Charter limitation on board of supervisors' authority regarding street improvement assessments, providing assessment should not exceed 50 per centum of assessed valuation of property and 25 per centum of such valuation in case of installment payments, *held* mandatory (St. 1899, p. 296, art. 6, c. 2, § 33, added by St. 1911, p. 1691, amended by St. 1917, p. 1735).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Emily F. Gallagher against Wilhelmine Foerst. From a judgment for plaintiff, defendant appeals.

Reversed.

M. James McGranaghan, of San Francisco, for appellant.

A. Dal Thomson, of San Francisco, for respondent.

GEARY, Justice pro tem.

Action by plaintiff for a decree establishing a lien for street work in the sum of \$1,021.44 and interest, performed pursuant to the provisions of ordinance No. 4720, new series (1918), upon the property of defendant in the city and county of San Francisco, state of California. From a judgment in favor of plaintiff, defendant prosecutes this appeal.

There is no dispute about the facts; upon the trial appellant conceded respondent had proved a prima facie case, and stipulated that all of the allegations of the complaint were true. Appellant relies upon an affirmative defense to the complaint alleged in her answer in the following language: "That the assessment set forth in the complaint of the cause herein is invalid and void, by reason

that the assessment was made payable in ten annual instalments, and that each such instalment amounts to a sum greater than twenty-five per centum of the value at which said property was assessed for municipal purposes upon the assessment book of the City and County of San Francisco current at the time of the inception of the proceedings for which said assessment was made."

Appellant bases her defense to the action upon the provisions of the charter of the city and county of San Francisco (1899, p. 296), section 8 of article 6, chapter 2 thereof, and section 33, as added by St. 1911, p. 1691. Section 8 provides in part: "No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding Assessment Book of the City and County."

Section 33 as amended in 1916 (St. 1917, pp. 1708, 1735) provides, in part:

"No assessment shall be levied in pursuance of such ordinance upon any property for street work or street improvements which, together with all assessments for street work or street improvements that may have been levied upon the same property during the years next preceding the inception of the proceedings for such work or improvements, will amount to a sum greater than fifty per centum of the value at which said property was assessed for municipal purposes, exclusive of improvements thereon, upon the assessment book of the city and county current at the time of the inception of such proceedings.

"Such limitation of assessed valuation, however, shall not apply to any assessment made payable in instalments as in this section hereinbefore provided for; *but in no case shall any such instalment payment exceed in amount twenty-five per centum of such assessed valuation.*" (Italics ours.)

It was stipulated by the parties that the assessed valuation of appellant's property is the sum of \$380 and the assessment for street work for which this action was instituted amounts to the sum of \$1,021.44, or 270 per centum of the assessed valuation thereof. By the limitation set forth in the paragraph of section 33 above, the annual assessment for street work or improvement was limited to the sum of \$95; whereas, in the instant proceeding it actually amounted to the sum of \$102.14, or \$7.14 per annum in excess of the charter limitation relied upon by appellant.

In addition to those portions of section 33 of article 6, chapter 2, of the charter hereinbefore set forth, there are other provisions in

seeming conflict therewith, the effect of which, respondent contends, is to remove the limitation of assessment in the proceeding under consideration. Section 33 confers upon the board of supervisors authority to provide street improvement proceedings by ordinance, independent of the procedure set up in the charter. Other material parts of the section read as follows:

"The provisions in this Article relating to and providing for street work or street improvements in the City and County and providing for the payment of the costs and expenses thereof, shall not be deemed exclusive, but the Board of Supervisors may, and it is hereby empowered so to do, pass an ordinance by a vote of at least fifteen of its members, which may from time to time be revised or amended by a like vote, providing for street work or street improvements in the City and County and for the payment of the costs and expenses thereof; and, in and by such ordinance, it may declare and designate the kinds of such work or improvements.

"Said Board is authorized and empowered to order such street work done or improvements made under such proceedings as it may in such ordinance provide, and to assess, in such manner and by such method as it may in and by such ordinance prescribe and provide. * * * By and in such ordinance said Board may provide for fully and completely exercising the powers which are hereby conferred as to such street work or street improvements and the assessment and collection of the costs and expenses thereof; *and the provisions of such ordinance shall not be governed or limited by the provisions of this Article inconsistent or in conflict therewith.* * * *" (Italics ours.) (Thereafter appears the portion of the section relied upon by appellant, hereinbefore set forth, and section 33 closes in the following language):

"The provisions of this section shall not be construed to limit or restrict any method or system enacted by any such ordinance as herein provided for street work or street improvements in the City and County to the provisions of such ordinance so enacted, and shall not be held to exclude any other method or system provided in this Charter for such work or improvements." (As amended, 1916, Stats. 1917, pp. 1708, 1735.)

Pursuant to the authority thus granted by the two provisions of section 33 of the charter last referred to, the board of supervisors enacted Ordinance No. 4720 (new series), known as the Street Improvement Ordinance of 1918. By section 20 of this ordinance it was provided: "No assessment shall be levied upon any property, which together with all assessments for street improvements that may have been levied upon the same property during the year next preceding the inception of the proceedings for such improve-

ments, will amount to a sum greater than fifty per centum of the value at which said property was assessed for municipal purposes, exclusive of improvements thereon, upon the assessment book of the City and County current at the time of the inception of such proceedings; except, however, as in this ordinance hereinafter provided. *Any such assessment levied in excess of such limitation shall be void only as to such excess. A failure to appeal to the Supervisors for a correction of such assessment, as in this Ordinance hereinafter provided for in the case of appeals, shall be deemed a waiver of such excess so levied.*" (Italics ours.)

The assessment levied herein is in excess of the 50 per centum limitation of the charter and ordinance provisions, and also in excess of the 25 per centum limitation of the charter provision relating to payment for street work in ten annual installments as is the case herein. By the language of section 33, article 6, chapter 2, of the charter, was there conferred upon the board of supervisors authority to enact an ordinance whereby the provision of the charter limiting installment assessments may be in effect ignored, and the assessment rendered valid by failure of the property owner to appeal therefrom?

[1-3] The conflict in the language of section 33, article 6, chapter 2, is more apparent than real. Article 6, chapter 1, of said charter (St. 1899, p. 284), relates primarily to the board of public works and the duties and responsibilities thereof. Chapter 2 of said article (St. 1899, p. 292) is entitled "Improvement of Streets," and thereafter follows a detailed procedure for street improvement under authority of the board of public works. The procedure therein outlined is complete in and of itself. Finally, bringing chapter 2 of said article to a close, is section 33 (as amended 1916), above mentioned and referred to. It will be observed that the words at the beginning of the section read: "The provisions of this article * * * shall not be deemed exclusive, but the Board of Supervisors may, * * *" etc. This language is followed shortly by the phrase: "* * * And the provisions of such ordinance shall not be governed or limited by the provisions of this Article inconsistent or in conflict therewith." Thereafter and near the end of said section is set forth the admonition: "* * * but in no case shall any such instalment payment exceed in amount twenty-five per centum of such assessed valuation." It is a fundamental rule of construction of charters, or statutes, that effect should be given to all the language thereof, and all provisions upon a subject are to be construed harmoniously. *Crowe v. Boyle*, 184 Cal. 117, 129, 193 P. 111; *Law v. San Francisco*, 144 Cal. 384, 389, 77 P. 1014; *McQuillin, Municipal Corporations* (2d Ed.) vol. 1, § 356. Section 33 of article

6, chapter 2, is plainly a grant of power authorizing the board of supervisors to provide by ordinance for other street improvement proceedings than is set forth in said article. The very power granted thereby is limited, however, by the provision "but in no case," etc. Unless this phrase is given this effect, it has no purpose in the section whatsoever. Without this phrase there is no charter limitation of assessment for street improvement and the board of supervisors may adopt an ordinance totally ignoring assessment limitations of every nature. Unless the grant of such authority plainly appears, it will not be deemed to exist for "a doubtful power is a power denied." *McQuillin, supra*, § 363; *Kellar v. City of Los Angeles*, 179 Cal. 605, 610, 178 P. 505; *Uhl v. Badaracco*, 199 Cal. 270, 248 P. 917, 921, 922. Hence, by the terms of the charter as amended, the authority of the board of supervisors to otherwise provide for street improvement proceedings by ordinance is expressly limited so that the assessment for street improvement shall not exceed 50 per centum of the assessed valuation of the property affected by the improvement, except when the assessment is made payable in installments, and, in case of installment payments, the payment shall in no case exceed 25 per centum of such assessed valuation. (Italics ours.)

[4-6] The assessment appealed from is void on its face, being in excess of the charter limitations applicable thereto. Nor was appellant herein required to appeal to the board of supervisors. The board of supervisors cannot acquire indirectly by ordinance a power expressly withheld by the terms of the charter. The rule declared in *City Street Improvement Co. v. Pearson*, 181 Cal. 640, 648, 185 P. 962, 966, 20 A. L. R. 1317, is applicable here: "The charter says that an assessment for this amount shall not be made, except it be payable in annual installments. The curative provision of the ordinance, if allowed the effect contended for, would, in effect, declare that a valid assessment for this excessive amount can be made, although payable immediately and not in installments, provided no objection thereto is made until after the work is done. *The prohibition of the charter against such assessments would thus be evaded and defeated.* * * * With respect to the curative provision here involved, we think it must be held that it was not intended to allow a disregard of the jurisdictional acts which the ordinance itself expressly declares shall be mandatory. Our conclusion is that the assessment against the property of *Pearson* was void." (Italics ours.)

Respondent cites several cases in support of his position, among them being *Fay Improvement Co. v. Hanlon*, 193 Cal. 709, 227 P. 482, 483; *City Construction Co. v. Kenny*, 83 Cal. App. 240, 256 P. 601. These cases are

not in point. At the time the assessments in those cases were made, section 33 of article 6, chapter 2, did not contain the mandatory provision that *in no case should any assessment installment exceed 25 per centum of the assessed valuation of the property affected*. The section at that time merely provided that the charter limitation of 50 per centum of the assessed value should not apply where the assessments were made payable in installments. The courts held in those cases that installment payments of the assessments in question were available to the property owner if he sought the benefit thereof, and that the property owner having failed to take advantage of the provision for installment payments, he would not be heard to complain that the assessment was void because it exceeded the 50 per centum limitation, and was not payable in installments. "[Appellant] cut himself loose from the privilege which he now invokes," *Fay Improvement Co. v. Hanlon*, supra. In the instant case, however, the assessment not only exceeded the 50 per centum limitation, but likewise exceeded the 25 per centum limitation for installment payments. Even had appellant herein filed the bond provided for by section 34, part 2, of the ordinance to secure the benefit of installment payments, she would still have found herself confronted with an excessive assessment. Under these circumstances appellant need not have appealed to the board of supervisors for relief. The objection to the assessment is jurisdictional, and the curative provisions of section 20 are of no effect. As was further said by the Supreme Court in *City Street Improvement Co. v. Pearson*, supra: "Curative provisions in a law of this charter may cure any defect that does not go to the jurisdiction of the board over the proceeding. It has been said that they may cure any defect arising from the omission of any step in the proceeding which the Legislature might have itself omitted from the law, if it be a thing not essential to due process of law, or necessary to comply with some other constitutional prerequisite. *Ramish v. Hartwell*, 126 Cal. 443, 58 P. 920; *Chase v. Trout*, 146 Cal. 359, 80 P. 81. As a general proposition this is a correct statement of the law. The difficulty with its application to the present case is that here the charter, with respect to the powers of the board of supervisors to adopt a procedure ordinance, stands in the place of a Constitution; indeed, it is more stringent, for its provisions on this subject constitute a specific grant of power, and not a limitation upon powers included in a general grant." (Italics ours.)

[7] The charter limitation on the authority of the supervisors concerning assessments for street improvements is not conditional. No authority exists in the charter permitting the board of supervisors to disregard those lim-

itations providing the property owner does, or fails to do, some certain act. On the contrary, the limitation of power in this regard is definite, and mandatory. It is therein plainly declared that the assessment shall not exceed 50 per centum of the assessed value of the property except in case of installment payment, and in no case shall installment payments exceed 25 per centum of the assessed valuation. It is difficult to understand how the limitation of authority could be made more plain. It is a serious matter for a court to declare a street assessment void, bearing in mind the consequences which may result, to the contractor and bondholders; but to uphold the assessment in the present case would be to deprive people of a power they have expressly reserved, and bestow it, in the face of a solemn charter declaration to the contrary, upon their representatives.

In view of the mandate of the charter, the judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 625

In re CHRISTIN'S ESTATE.

CHRISTIN v. ROBINSON.

Civ. 8636.

District Court of Appeal, Second District,
Division 1, California.

Jan. 12, 1933.

1. Appeal and error ⇐1010(1).

Judge's conclusion giving effect to presumption of death after 7 years' absence, where supplemented by even slight facts and circumstances, cannot be disturbed (*Code Civ. Proc. § 1963, subd. 26*).

2. Death ⇐4.

Father's nonclaim of rights accruing to him if living at daughter's death tended to show father's death.

3. Death ⇐4.

Evidence warranted conclusion that, in view of statutory presumption from 7 years' absence, missing person's death was established (*Code Civ. Proc. § 1963, subd. 26*).

Evidence tended to show that missing person, at time of his escape and disappearance from state hospital, was mentally unbalanced; that he was 64 years old, and his physical condition was such that, in opinion of medical superintendent of hospital, he could not have lived over 4 years with best of care in a hospital,

and that, if he had wandered off into mountains, probabilities were that he did not live more than 5 or 6 days, and, if he went into a city, he probably would not live more than from 30 to 60 days unless in a hospital; that after his escape unsuccessful search was conducted in surrounding hills; that none of his close relatives had heard from him for more than 7 years; and that he had made no claim that he was entitled to participate in distribution of estate of his daughter, who died over 5½ years after her father's disappearance.

4. Death ⇨3.

In proceeding for distribution of estate, death of deceased's father before deceased's death, but less than 7 years after father's disappearance, *held* provable as any fact in civil case (Code Civ. Proc. § 1963, subd. 26).

5. Death ⇨1.

Generally, presumption of life continues throughout 7-year period following disappearance (Code Civ. Proc. § 1963, subd. 26).

6. Death ⇨1.

Presumption of life throughout 7-year period is rebuttable by showing that missing person encountered some specific peril, or circumstances intervened quickening ordinary 7-year presumption (Code Civ. Proc. § 1963, subd. 26).

7. Death ⇨1.

To overcome presumption of life throughout 7-year period, evidence need merely make missing person's death at particular time more probable than survival (Code Civ. Proc. § 1963, subd. 26).

8. Executors and administrators ⇨314(12).

In proceeding for distribution of estate, weight of statutory presumption of death after 7 years' absence and evidence indicating that missing person died in less than 7 years *held* for court (Code Civ. Proc. § 1963, subd. 26).

9. Death ⇨4.

In proceeding for distribution of estate, evidence coupled with presumption of death after 7 years' absence warranted judge's conclusion that intestate's father predeceased intestate (Code Civ. Proc. § 1963, subd. 26).

10. Evidence ⇨571(2).

Physician's opinion respecting insanity of missing person at time of his disappearance and probable duration of life *held* entitled to evidentiary weight.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Petition by Emil J. Christin, administrator of the estate of Mildred Christin, deceased, for distribution of the entire estate to him-

self as sole heir, to which objections were filed by William J. Robinson, as next friend of John H. Robinson, contestant. Distribution having been ordered in accordance with the petition, the contestant appeals.

Affirmed.

A. G. Alm, of Los Angeles, for appellant.

Chauncey G. Koits, of Los Angeles, for respondent.

HOUSER, J.

By this appeal the correctness of an order of distribution of the assets of an estate is questioned. The statement of facts which appears in the brief of appellant herein is deemed satisfactory. It is as follows:

"Mildred Christin died intestate on December 17, 1929, leaving as her only heirs at law the respondent Emil J. Christin, her husband, and John H. Robinson, her father, if the latter was alive at the time of her death.

"Respondent as administrator of her estate petitioned for distribution of the whole estate to himself as sole heir and in his petition alleged upon information and belief that John H. Robinson, the father of the decedent, was dead and that his death preceded that of Mildred Christin, deceased.

"Objections to the petition were filed by William J. Robinson, a brother of the said John H. Robinson, appearing as his next friend, denying that John H. Robinson was dead, and further alleging that in the year 1913 the said John H. Robinson was adjudicated an insane person and was committed to Patton State Hospital at Patton, California, where he remained as an inmate until August 31, 1924, when he escaped therefrom; and that the said John H. Robinson has never been restored to capacity and no guardian of his person or estate has ever been appointed.

"Upon the issue so raised a trial was had, at the conclusion of which the court found that the said John H. Robinson escaped from said hospital on or about April 12, 1924, and that at said time he was an insane and demented person; that he has been unheard of for a period of more than seven years; and that he died on or before December 17, 1929. The court thereupon granted respondent's petition for distribution and ordered the whole of said estate distributed to respondent as sole heir of the deceased."

It thus appears that, with reference solely to the question presented to this tribunal, the issue before the trial court was whether John H. Robinson had predeceased Mildred Christin. In order to establish such fact, the administrator of the estate of Mildred Christin apparently relied, firstly, upon the legal presumption set forth in subdivision 26 of section 1963 of the Code of Civil Procedure "that a person not heard from in seven years is

dead"; and, secondly, upon evidence introduced by him for the purpose of proving that John H. Robinson had deceased prior to the expiration of seven years succeeding the date of his escape from the state hospital. Manifestly, if the death of Robinson could be satisfactorily established as of a date preceding the expiration of the seven-year period following his disappearance, as well as preceding the death of Mildred Christin, no necessity would exist for final reliance upon the presumption of his death as provided by the statute. *Western Grain, etc., Co. v. Pillsbury*, 173 Cal. 135, 159 P. 423; *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 P. 348; *Lesser v. New York Life Ins. Co.*, 53 Cal. App. 236, 200 P. 22; and authorities in such cases respectively cited. In that connection, on behalf of the petitioner, it appears by stipulation of the parties that "the said John H. Robinson, the father of said decedent, was by the above entitled court duly adjudicated an insane person in May, 1913, and was committed as such to Patton State Hospital; that the said John H. Robinson escaped from said hospital on April 12, 1924, and was thereafter discharged therefrom as improved on May 14, 1925; that since his said escape from said hospital he has not been seen or heard from by the persons in charge of said hospital, nor by his immediate family, inclusive of his daughter, the deceased Mildred Christin, and Emil J. Christin her surviving husband, nor by the above mentioned William J. Robinson, his brother; and that the said Mildred Christin, deceased, died in December, 1929."

From such stipulation, it becomes apparent that, since less than seven years elapsed after the date of Robinson's escape from the hospital, until the death of Mildred Christin occurred, the seven-year period, which by the provisions of the statute must have elapsed after Robinson's escape, and during which time he was "not heard from," in itself would be inapplicable for the purpose of determining heirship. But, since both at the time when the order which is the subject of this appeal was made, as well as at the time when the petition for distribution of the estate was filed, the seven-year period following the disappearance of Robinson had elapsed, as hereinafter may be made to appear, the seven-year period, together with the statutory presumption relating thereto, becomes material in a determination of the question submitted to this court.

In addition to the stipulated facts, the hospital record of John H. Robinson during the entire eleven years that he was confined in said state hospital was introduced in evidence, which in general terms showed the physical and mental condition of said Robinson from the date that he entered the hospital until the date when he made his escape therefrom. As is shown by the bill of exceptions herein, Dr. H. S. Blossom, who was the medical superintendent of the hospital during

all the said time, in substance testified as follows: "I am a licensed physician and surgeon employed at the Patton State Hospital since 1916. I remember Jack Robinson. He was afflicted with delusions of grandeur, sometimes claiming to be John L. Sullivan or Jack Dempsey, and said that he had shaken hands with God. Such was his mental condition at the time of his escape from the hospital on April 12, 1924. As shown by this record, he was in a very poor physical condition at the time of his escape from the hospital, being afflicted with organic disease of the heart; mitral murmur of the heart; hardened arteries, and fibrous veins. His age was then sixty-four years. When he escaped we searched the surrounding hills for him but failed to find him, and have not heard from him nor anything about him since that time. It is my opinion that if he had remained in a hospital with the best of care he could not have lived more than four years, at most, by reason of his such physical condition. If he wandered off into the mountains the probabilities are that he did not live for more than five or six days, and if he went into a city, possibly thirty to sixty days is the longest he would live, unless in a hospital. The record of the Patton State Hospital shows that on May 14, 1925, Jack Robinson was discharged as improved. He was not at the hospital at that time, and had not been since April 12, 1924. He was discharged as improved merely for the purpose of closing the record of his case."

[1, 2] As hereinbefore has been stated, by the terms of subdivision 26 of section 1963 of the Code of Civil Procedure, the presumption is "that a person not heard from in seven years is dead." And, where it appears that such presumption has been supplemented by an inference arising from a showing of even slight, relevant facts and circumstances, a conclusion reached thereon by the trial court by which effect is given to such presumption cannot be disturbed on appeal. *Kaufmann v. New York Life Ins. Co.*, 44 Cal. App. 313, 186 P. 360; *Brown v. Grand Lodge A. O. U. W.*, 13 Cal. App. 537, 110 P. 351. The circumstances surrounding the disappearance of one, together with additional facts relating to his relationship to others, may be such that persons interested in establishing the fact of death of the missing person may not be required to make any endeavor to ascertain his whereabouts. In *re Estate of Perry*, 58 Cal. App. 420, 425, 208 P. 987. The nonclaimer of civil rights, such as, had Robinson been living at the time of the death of Mildred Christin, would have accrued to him, in itself is a pertinent fact tending to show his decease. *Robinson v. Robinson*, 51 Ill. App. 317.

[3, 4] With reference to the presumption expressed in subdivision 26 of section 1963 of the Code of Civil Procedure "that a person not heard from in seven years is dead," appel-

lant contends that it has no application to one who is insane. No doubt, as a practical proposition, the probabilities are that one entirely bereft of reason, as distinguished from an insane patient of the type to which the records herein disclose that Robinson belonged, would be most unlikely to communicate either with his close relatives or with his intimate friends; but, in terms, the statute contains no exception from the operation of its provisions of even a person of the former class. Taking into consideration the facts relative to the probable mental status of Robinson at the time of his disappearance from the state hospital, his advanced age, and physical condition, the fact that some search was made for him immediately after his escape from the hospital, also the fact that none of his close relatives had heard from him for more than seven years, and that he had made no claim that he was entitled to participate in the distribution of the assets of the estate of Mildred Christin, deceased—a foundation would be laid upon which might rest the legal conclusion that a presumption that Robinson was dead was established. But, although the evidence was sufficient to support the conclusion as to the death of Robinson, the presumption went no farther than that at the end of seven years following his escape from the hospital he was dead. If on the part of interested parties it was contended that Robinson met his death within a shorter period than seven years following his disappearance, to wit, at a time preceding the demise of Mildred Christin, that fact was provable as was any fact in a civil case. 8 R. C. L. 711, 712. See, also, note, 104 Am. St. Rep. 202; Reedy v. Millizen, 155 Ill. 636, 40 N. E. 1028.

In the case of Linneweber v. Supreme Council, etc., 30 Cal. App. 315, 158 P. 229, it appears that on April 18, 1906, at which time an earthquake and fire occurred in the city of San Francisco, the person regarding the date of whose death an issue was raised "was then 75 years of age, and was afflicted with a number of the disabilities which attend old age. He was seen immediately after the earthquake in front of the hotel in which he stayed and which was within the district presently swept by the fire. He disappeared, however, at the time of said fire, and has never been seen or heard of thereafter." With reference to the application of the seven-year period to the disappearance of the person in question, and the assumed fact that of themselves the circumstances surrounding his disappearance were not, in the first instance, sufficient to positively establish the date of his death, the court said: "If it be a fact, as the court found, that James Martin died on April 18, 1906, the finding of the court that James Martin did die on that date is supported by the presumption of death, which by the terms of said section as well as by the general law arises when a period of seven years has elapsed after the disappearance of the person.

By this presumption the fact of the death of said person is proven, but not the date of his death at any particular time during the seven-year period; but the court had before it certain other facts, such as the extreme age and bodily infirmities of the deceased, and also the fact of the peril in which he was when last seen. These would not have been sufficient to establish the fact of the death of James Martin so as to have enabled these plaintiffs to maintain this action during the seven-year period; but they would be sufficient to sustain the finding of the court fixing the date of the decedent's death after the presumption had sufficed to prove the fact of his death."

To the same effect, Reedy v. Millizen, 155 Ill. 636, 40 N. E. 1028.

[5-10] Although the general rule is that the presumption of life continues during the entire period of seven years following the disappearance of a person, such presumption may be overcome by evidence showing either that within such time the missing person was subjected to some specific peril, or that other circumstances or conditions intervened sufficient to quicken the ordinary seven-year period of time necessary to create the presumption of death. Western Grain, etc., Co. v. Pillsbury, 173 Cal. 135, 159 P. 423; Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 P. 348; Lesser v. New York Life Ins. Co., 53 Cal. App. 236, 200 P. 22; note, 104 Am. St. Rep. 202; 8 R. C. L. 713. But, in that regard, it is unnecessary that the evidence be direct or positive, but it need be only of such character as to make it more probable that the person died at a particular time than that he survived. Hancock v. American Life Ins. Co., 62 Mo. 26; Tisdale v. Conn. Mut. Life Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136. The determination of the question as to what weight should be given to the statutory seven-year presumption, as well as to the evidence by which it might be inferred that Robinson had deceased long prior to the expiration of the seven-year period following the date of his escape from the hospital, rested with the trial court. Regarding the latter situation, the evidence to which attention hereinbefore has been directed, although not most satisfactory, is deemed sufficient as a basis for the conclusion reached by the trial court. As hereinbefore indicated, the evidence disclosed the facts that at the time of his escape from the hospital Robinson was sixty-four years of age, insane, and afflicted with such a disease that (in the opinion of the medical superintendent of the hospital) "if he had remained in the hospital with the best of care he could not have lived more than four years at most; * * * if he wandered off into the mountains the probabilities are that he did not live more than five or six days, and if he went into a city, possibly thirty to sixty days is the longest he would have lived, unless

in a hospital." That the opinion of a witness, especially when founded upon relevant and material facts, is entitled to weight in the evidence, is decided in the case of *Dunphy v. Dunphy*, 161 Cal. 380, 385, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230. See, also, 10 Cal. Jur. 971, and authorities there cited.

Since the evidence which related to each of the situations by which it was finally proposed to establish the fact that Robinson's death had occurred prior to that of Mildred Christin was legally sufficient to sustain the finding and the ensuing order, on well-established rules relating to appeals, it follows that the order should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

128 Cal.App. 598

GARRISON et al. v. WILLIAMS et al.

CORKERY v. SAME.

Civ. 8502.

District Court of Appeal, First District, Division 1, California.

Jan. 11, 1933.

1. Automobiles ⇨6.

Statute making automobile owner liable for negligence of one operating it with owner's permission *held* constitutional (Civ. Code, § 1714¼).

2. Automobiles ⇨195(1).

Permission given by automobile owner to husband to use it for pleasure imposed liability upon owner for husband's negligence while operating it (Civ. Code, § 1714¼).

3. Automobiles ⇨245(2).

Presumption that motorist was traveling at lawful speed on proper side of highway is evidence, and should be submitted to jury, unless dispelled by testimony of such motorist.

4. Appeal and error ⇨1170(8).

Court's directing verdict for plaintiff against motorist recklessly driving on wrong side of highway and injuring plaintiff *held* not miscarriage of justice (Const. art. 6, § 4½).

Defendants offered no testimony at trial, but relied upon presumption that defendant driver was traveling at lawful rate of speed and on proper side of highway at all times, which required submission of case to jury. However, undisputed evidence showed recklessness of defendant and his utter disregard of lives and safety of others in leaving his proper side of highway

and deliberately driving automobile at high rate of speed, into face of on-coming traffic, on wrong side of highway.

5. Judgment ⇨326.

Where verdict was for \$15,000, and there was no showing that trial court ordered clerk to enter \$5,000 judgment which was statutory limit of recovery, entry of \$15,000 judgment could not be considered "clerical error" which could be corrected by *nunc pro tunc* order (Civ. Code, § 1714¼).

[Ed. Note.—For other definitions of "Clerical Error," see Words and Phrases.]

6. Appeal and error ⇨1151(2).

Where judgment was excessive under statute, District Court of Appeal would modify it (Civ. Code, § 1714¼).

7. Automobiles ⇨229.

One injured by automobile need not first exhaust remedy against operator before proceeding against owner (Civ. Code, § 1714¼).

8. Husband and wife ⇨209(3).

Husband could recover from automobile owner loss sustained by him arising out of injury to wife.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Two actions by Minnie Garrison and another, and by William J. Corkery and another, against Carl Williams and wife, and others. From a judgment for plaintiffs, defendants Williams and wife appeal.

Judgment modified, and, as modified, affirmed.

Humphrey, Searls, Doyle & MacMillan and Morgan J. Doyle, all of San Francisco, for appellants.

Ford & Johnson and J. Horton Beeman, all of San Francisco, for respondents.

JAMISON, Justice pro tem.

These two actions were brought for damages for injuries sustained in a collision of automobiles. They grew out of the same accident, and for the purposes of trial were consolidated.

A jury trial was had, and a verdict of \$2,500 was returned in favor of plaintiffs Minnie Garrison and J. D. Garrison against Carl Williams and Gladys Williams, and a verdict of \$15,000 in favor of plaintiff Corkery and against defendants Williams, also a verdict in favor of defendant Lee. Judgment was entered for plaintiffs for said respective amounts, and from this judgment defendants Carl Williams and Gladys Williams have appealed.

The undisputed evidence is substantially as follows: Appellants Carl Williams and Gladys

Williams are husband and wife. The automobile that was being operated by Carl Williams at the time of the collision was owned by Gladys Williams as her separate property. Her said husband was driving it with her knowledge and permission, but he was on a pleasure trip of his own and was not acting as the agent of his wife. The collision occurred on August 17, 1930, shortly after noon on the state highway, about one-half mile south of its intersection with the road leading to South San Francisco.

Respondent Corkery was traveling north on said highway in a five-passenger sedan, accompanied by his sister Minnie Garrison and another relative of his, as his guests. At the place where the automobiles collided there were four lanes of travel, two being used by the south-bound vehicles and two by the north-bound. Respondents were proceeding north-erly on the outer easterly or right-hand lane, and were passed by an automobile going in the same direction driven by defendant Lee, who, after passing, swung back into the lane upon which respondents were traveling. While said Lee was passing respondents' automobile, appellant Carl Williams, who was traveling south on said highway in his wife's automobile, left his lane on the westerly side of the highway and started diagonally across same at a speed of from forty-five to fifty miles an hour, in the face of the on-coming traffic going north thereon; and, having reached the easterly side of the said highway, he first struck the Lee car a glancing blow and then collided with the Corkery automobile, which, at the instant of the collision, had come practically to a stop on the extreme easterly edge of the highway.

[1] Section 1714½ of the Civil Code provides in part that: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

Appellants contend that this section is unconstitutional, but this contention has been decided adversely to appellants. *O'Neill v. Williams* (Cal. App.) 15 P.(2d) 879; *Sutton v. Tanger*, 115 Cal. App. 267, 1 P.(2d) 521, and authorities cited.

[2] Appellants next contend that the trial court erred in holding that the permission given by Gladys Williams to her husband to use her automobile imposed any liability upon her for his negligence while operating it under such permission. This contention has also been held to be without merit. *O'Neill v. Williams*, supra.

[3, 4] Appellants offered no testimony at the trial of this case, but they claim that the law

creates a presumption that Carl Williams was traveling at a lawful rate of speed and upon the proper side of the highway at all times, and that this presumption is evidence, and therefore the court erred in directing a verdict against them. That this presumption is evidence and should be submitted to the jury, unless it is dispelled by the testimony of the party in whose behalf this presumption is invoked, seems to be well settled. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; *Mar Shee v. Maryland Assurance Corporation*, 190 Cal. 1, 210 P. 269; *Olsen v. Standard Oil Company*, 188 Cal. 20, 204 P. 393. However, we are satisfied that the jury, under the undisputed facts before it, showing the recklessness of Carl Williams, and his utter disregard of the lives and safety of others in leaving his proper side of the highway and deliberately driving the automobile operated by him, at a high rate of speed, into the face of the on-coming traffic on the east side of said highway, would not have reached a different verdict had the case been submitted to them.

In *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884, 886, the court said: "In the face of this direct and positive evidence, it is hardly conceivable that the jury would have placed any great reliance, if any at all, on any presumption as to plaintiff's conduct, even though they were told by the court that they might do so." And in this same case the court further said that by section 4½ of article 6 of the Constitution, the courts are restrained from reversing judgments on the ground of misdirection of the jury unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

We are of the opinion that, even though the court should have submitted the question of Carl Williams' negligence to the jury, instead of directing the jury to return a verdict, yet under the facts of this case there was no miscarriage of justice, as the jury could not have brought in any other verdict.

[5, 6] Appellants further contend that the judgment for \$15,000 in favor of respondent Corkery is void as being in excess of that provided by law in cases under section 1714½ of the Civil Code. This section provides that for the death of or injury to one person the amount recoverable is limited to \$5,000 to one person in any one accident, and to \$10,000 where more than one person is injured. After this appeal had been taken, the trial court made a nunc pro tunc order amending the said judgment against Gladys Williams in favor of respondent Corkery, by reducing and limiting it to \$5,000. This correction was made upon the ground that the clerk of said court had inadvertently entered the judgment for \$15,000 instead of \$5,000. Appellants contend that this action of the trial court was

erroneous in that the lower court had lost jurisdiction of the action by virtue of the appeal.

In *Lauchere v. Lambert*, 210 Cal. 274, 291 P. 412, 414, the court held that the lower court possessed the power to make and enter a nunc pro tunc order correcting the prior entry and clerical misprision of the clerk so as to make the record speak the truth, notwithstanding the fact that in the meantime an appeal had been made up and certified prior to the making and entry of the nunc pro tunc order and, quoting from *Fay v. Stubenrauch*, 141 Cal. 573, 75 P. 174, the court said: "Nor is the right of the lower court to amend suspended or impeded by an appeal where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause for the purposes of the appeal, but it does not lose jurisdiction of its records"—Citing numerous authorities.

The record in the case at bar shows that the verdict in favor of Corkery was for \$15,000, and therefore the clerk, as he was required to do by law, entered judgment in favor of Corkery for that amount. There is no showing that the trial court ordered the clerk to enter any different judgment. Under these circumstances it can hardly be said that the entry of the \$15,000 judgment was a clerical error of the clerk. However, in this case there were no instructions offered or given calling the attention of the jury to the limitation of damages provided by said section 1714¼ of the Civil Code, nor did appellants object to the form or amount of the verdict, nor did they file a motion for a new trial, nor in any manner call the attention of the trial court to the excessive nature of the verdict and judgment in favor of Corkery. Where, upon appeal, the judgment of the trial court is deemed excessive, this court will modify it. *Webster v. Harris*, 119 Cal. App. 46, 6 P.(2d) 88. Therefore, the judgment in favor of respondent Corkery and against appellant Gladys Williams is modified by reducing same to the sum of \$5,000.

[7, 8] We find no merit in the claim of appellants that respondents should first have exhausted their remedy against the operator of the automobile before proceeding against the owner, nor that the husband of Minnie Garrison cannot recover from the owner the loss sustained by him arising out of the injury sustained by his wife by reason of the said accident.

The judgment as modified is affirmed; each party to pay his own costs on this appeal.

We concur: KNIGHT, Acting P. J.; CASH-IN, J.

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217 Cal. 258

VOWINCKEL v. N. CLARK & SONS.

S. F. 14472.

Supreme Court of California.

Jan. 20, 1933.

1. Boundaries ⚡47(1).

Landowner erecting fence and adjoining landowner impliedly accepting it as marking true boundary line and using property up to it *held* estopped to claim different line.

2. Boundaries ⚡47(1).

Boundary line agreement need not be express to estop parties from claiming different line, but may be inferred or implied from their conduct, especially where condition is acquiesced in for limitations period.

3. Boundaries ⚡33.

Presumption of boundary line agreement may arise from erection of fence or other monument by one or both of adjoining owners and their treatment thereof as fixing boundary line for such time that neither should be allowed to deny correctness thereof.

4. Appeal and error ⚡1071(1).

Error, if any, in court's finding that boundary dispute existed when fence, accepted as marking true line, was erected by one of adjoining landowners, *held* not prejudicial, in view of other findings.

The court found that defendant, for whom judgment was rendered in ejectment, would be entitled to strip of land, inclosed with plaintiff's land by fence, if line were truly located.

5. Ejectment ⚡9(3).

Plaintiff in ejectment must prevail on strength of his own title, not weakness of defendant's title.

In Bank.

Appeal from Superior Court, Alameda County; E. O. Robinson, Judge.

Action by F. W. Vowinckel against N. Clark & Sons, a corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. P. Black, of San Francisco, for appellant.

John L. McNab and S. O. Wright, both of San Francisco, for respondent.

PRESTON, J.

Appeal by plaintiff from judgment for defendant. Action in ejectment. This action marks the culmination of a dispute of long standing over the common boundary line of adjoining properties owned by plaintiff and defendant in Alameda county.

Plaintiff, claiming a small strip of land along said boundary, sought to eject defendant therefrom and to recover damages for the alleged trespass upon and withholding thereof. Defendant answered, denying the various allegations of the complaint and alleging that in 1904 plaintiff erected a high fence to mark the true location of the common boundary; that, notwithstanding said fence inclosed a part of defendant's property, defendant acquiesced in the location of the line so made and in reliance upon it built substantial structures up to the border.

The evidence shows that these parties de-rain title from a common grantor, Benjamin Smith. The property of defendant was deeded by Benjamin Smith to Nehemiah Clark on May 4, 1885, and by the latter to defendant on January 19, 1889. Plaintiff's property was acquired by deed, dated March 17, 1903, from M. E. Russell, a grantee of said Benjamin Smith. The deed to defendant is prior, in point of time by a number of years, to that of plaintiff. The defendant's point of departure is the west line of a natural monument known as the "old Bowman Ditch"; plaintiff's merely the ditch without naming the exact point thereon. The absolute disappearance of this monument and the difficulty of determining, with any accuracy, its precise location and width, if any, rendered uncertain and conflicting later attempts to survey the tract and determine the boundary in question. Ample evidence, however, was adduced upon the trial of this cause to warrant the court in resolving the conflicting claims in favor of defendant. Among other things, the court found that the greater portion of the above-mentioned high board fence, erected by plaintiff about 1904 as the result of a survey made at his direction, is located on defendant's land, and incloses a small strip thereof properly belonging to defendant; that nevertheless said fence was accepted by defendant as marking the common boundary line, and, by application of the doctrines of acquiescence and estoppel, the parties are now barred from claiming that said boundary is other than as fixed and determined by the location of said fence. Judgment, based upon the above and other findings, which are all supported by competent evidence, followed in favor of defendant. Plaintiff appealed.

[1-3] The appeal is without merit. Aside from the question of sufficiency of the evidence, which we have already referred to, appellant's sole claim seems to be that the court erred in finding that, at the time the fence was erected, a dispute existed over the location of the boundary, which was settled by acceptance of said fence as marking the true line, thus bringing into operation in this cause the doctrines of acquiescence and estoppel. Appellant claims that no dispute as yet existed at the time he had the fence made and his

only purpose in erecting it, after survey, was to find and mark where he then believed the true line lay; hence acquiescence and estoppel will not apply. *Mann v. Mann*, 152 Cal. 23, 91 P. 994; *Clapp v. Churchill*, 164 Cal. 745, 130 P. 1061.

There is ample evidence that the exact location of the beginning point of the descriptions in each deed is in doubt. There is also evidence that the exact location of appellant's east boundary, which is respondent's west boundary, was in grave doubt. Appellant in 1904, while this uncertainty existed, procured a surveyor to establish the true line, and, following this survey, he erected a pretentious fence along and one inch within the line so established. This fence has ever since remained, and, although not expressly so doing, respondent impliedly accepted it as marking the true line and has used the property up to that line. These facts seem clearly to warrant the application of the doctrine of estoppel. It is not necessary that the agreement between the parties be an express one. It may be inferred or implied from their conduct, especially where the condition is acquiesced in for the period of the statute of limitations. 9 C. J. 232; *Wheatley v. San Pedro, L. A. & S. L. R. Co.*, 169 Cal. 505, 514, 147 P. 135. "A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both the adjoining owners have definitely defined such line by erecting a fence or other monument on it and that both have treated the same as fixing the boundary between them for such length of time that neither ought to be allowed to deny the correctness of its location." 4 R. C. L. p. 129, § 70; *Board of Trustees v. Miller*, 54 Cal. App. 102, 105, 201 P. 952; *Southern Counties, etc., v. Eden*, 118 Cal. App. 582, 586, 5 P. (2d) 654. The language of *Silva v. Azevedo*, 178 Cal. 495, 499, 173 P. 929, 930, is particularly applicable: "In this case it is apparent that both Silva and Azevedo, thinking that the line fixed by the surveyor was the true boundary described in the deed, accepted such line as the division between their holdings, built a fence upon it, and occupied and improved up to the fence. We have here not only a continued acquiescence in the line so fixed, and an occupation in accordance with it for a period beyond that fixed by the statute of limitations, but the erection of substantial and permanent improvements upon the disputed piece by the defendant. It would be a manifest injustice to permit him to be ousted now merely because the plaintiffs have, by a new survey, discovered that their predecessors and the defendant were in error in the original establishment of the line. 'If the position of the line always remained to be as-

certained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable.' *Young v. Blakeman*, supra [153 Cal. 477, 95 P. 888]."

The above case also declares the proper distinction between the cause before us and the class of cases relied upon by appellant such as *Lewis v. Ogram*, 149 Cal. 505, 87 P. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151, *Mann v. Mann*, 152 Cal. 23, 91 P. 994, and *Clapp v. Churchill*, 164 Cal. 741, 130 P. 1061. Of course, agreements of this type cannot be used where the true boundary line is known. Nor does the case of *Stanford v. Trombly*, 181 Cal. 372, 186 P. 599, apply here. There the fence was arbitrarily located for the convenient use and occupation of the property by the respective parties without any intention of settling a boundary dispute. The court in fact found that (page 373 of 181 Cal., 186 P. 599): "Said fence was not built upon an agreed boundary line between the Riddell tract and the Trombly tract to settle any dispute, uncertainty, or controversy arising over or out of the true location of the dividing line between the said two tracts of land."

[4, 5] But for the purposes of this opinion, if we conceded that the finding above referred to, made in this cause, was open to criticism, yet we would find therein no consolation for appellant. Such error would be nonprejudicial and would afford no ground for reversal of the judgment. The finding could be considered as surplusage in view of the numerous remaining findings which properly uphold the judgment, including a finding which expressly states that, if the fence should not be held to mark the boundary line and "said line were truly located in accordance with the exact measurement thereof, the defendant would be entitled to a narrow strip of land now enclosed by the plaintiff within the enclosure formed by said high board fence. * * *" Without the finding complained of, appellant would still be in the position of having failed to prove his own title to the disputed area, to which respondent is more properly entitled. In short, appellant must prevail upon the strength of his own title, not upon the weakness of respondent's, and the evidence shows not only that appellant has failed to prove his title to the disputed strip, but also that respondent would, but for his acquiescence in said fence, be entitled to a portion of the land within appellant's enclosure.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.

DAVIS v. CHIPMAN.

DOZIER v. SAME.

S. F. 14554.

Supreme Court of California.

Jan. 16, 1933.

Rehearing Denied Feb. 14, 1933.

Brokers $\$=88(2)$.

Where broker, under contract engaging him, could not recover commissions from vendor because not licensed at time of sale, evidence held insufficient to raise jury issue as to whether new oral agreement was consummated whereby broker became entitled to commissions for introducing purchaser.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Actions by Harry F. Davis and by Thomas B. Dozier, Jr., against W. F. Chipman, as trustee of the estate of Josephine A. Phelps, deceased. From judgments of nonsuit, plaintiffs appeal.

Affirmed.

Frederick L. Berry, of San Francisco, for appellant Davis.

Christian F. Kimball and Dozier & Kimball, all of San Francisco, for appellant Dozier.

Cushing & Cushing and W. C. Sharpsteen, all of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment of nonsuit.

The order of nonsuit was made on the second trial of the case after the reversal of a judgment for the plaintiffs entered on the same issues as are here presented. Davis v. Chipman, 210 Cal. 609, 293 P. 40.

The plaintiffs on this appeal contend that the additional evidence introduced together with evidence offered and claimed to have been erroneously rejected by the court, entitle them to have the facts submitted to a jury. On the former appeal it was held that the plaintiffs, not having become licensed real estate brokers until long after the contract of sale of the land involved had been entered into on July 29, 1924, between the defendant, as trustee of the Phelps estate, as seller, and Virgil M. Price, as purchaser, were not entitled to recover a commission. The contract of employment, dated April 24, 1924, pursuant to which the plaintiff Davis on the former trial sought to prove his right to a commission, is quoted in the opinion in Davis v. Chipman, supra, at pages 612, 613, of 210 Cal., 293 P. 40.

All of the evidence introduced on the former trial was considered to be in the case on the second trial. The plaintiffs then introduced new documentary evidence, consisting of a contract dated May 21, 1924, made within the life of the option of April 24, 1924, by the defendant for the sale of the property to Thomas B. Dozier, Jr., but which was forfeited after the first payment of \$1,250 thereunder. The plaintiffs contend that the execution of this contract was an exercise of the option of April 24, 1924, the effect of which was to abrogate and extinguish both the option and commission agreements of April 24, 1924, and, together with other evidence offered by the plaintiffs, was sufficient upon which the jury could base a finding that a new oral agreement had been consummated whereby the plaintiff Davis became entitled to receive a commission from the defendant for introducing Virgil M. Price to him. The plaintiffs must necessarily concede that none of the testimony evidences an express oral agreement but they base their contention on their claim that the jury could infer from the evidence received and the evidence offered and rejected that such an agreement had been effected.

The difficulty with the position taken by the plaintiffs is that writings offered or already in the record conclusively negative any such inference. In a letter to the defendant dated May 13, 1924, which was within the option period, the name of Virgil M. Price was submitted pursuant to the commission agreement as a person with whom the plaintiff Davis had been dealing for the sale of the property under the option agreement. On July 11, 1924, and July 23, 1924, letters to the defendant furnished additional names of prospective purchasers, in the first one of which the name of Virgil M. Price also appeared. Both of the July letters expressly recognized that the names were furnished pursuant to the provisions of the commission agreement of April 24, 1924. The letter of July 30, 1924, to the defendant, signed by both plaintiffs, and stating the terms of payment of the commission on the sale to Price, can be considered in no other light than as an express modification of the commission agreement of April 24, 1924.

The court was justified in concluding that neither the new evidence admitted nor the evidence offered and rejected had any tendency, in view of the competent documentary evidence properly before the court, to prove that there existed between the parties any agreement for a commission other than that of April 24, 1924, as modified. We perceive no error in rejecting evidence offered by the plaintiffs for the purpose stated.

This court on the former appeal held that the plaintiffs were not entitled to recover on

the agreement proved. Nothing new has been presented which would require a different result. The nonsuit was therefore properly ordered.

The judgment is affirmed.

217 Cal. 216

BAKER v. BAKER.
S. F. 14584.

Supreme Court of California.
Jan. 11, 1933.

I. Judgment $\hookrightarrow$ 443(1).

Equity will relieve injured party from effect of judgment procured by extrinsic fraud.

2. Divorce $\hookrightarrow$ 167.

Equity suit to vacate divorce judgment procured by extrinsic fraud could be prosecuted, though fraud was discovered within month after entry of final divorce decree (Code Civ. Proc. § 473).

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Hulda Baker against Lionel L. Baker. From a judgment vacating and setting aside a final decree of divorce, defendant appeals.

Affirmed.

Breed, Burpee & Robinson, of Oakland, for appellant.

Aaron Turner, of Oakland, for respondent.

WASTE, C. J.

Defendant appeals from a judgment vacating and setting aside a certain final decree of divorce theretofore entered in an independent action between the parties hereto. We need not pause to discuss the grounds warranting such relief, for admittedly the vacated divorce decree was the product of extrinsic fraud practiced by the appellant herein. Appellant's sole contention upon this appeal is that respondent has misconceived her remedy. It is the appellant's theory that, having discovered the fraud within one month after the entry of the decree affected thereby, respondent should have moved to vacate in the divorce action, either under section 473 of the Code of Civil Procedure, or by a motion addressed to the inherent jurisdiction of the court to purge its records of judgments and decrees fraudulently procured. The existence of these asserted "exclusive" legal remedies is

said to preclude the institution and prosecution of the present equitable action. With this contention we cannot agree.

[1, 2] It is settled that equity will relieve an injured party from the effect of a judgment procured, as was the decree here vacated, by extrinsic fraud. *Sohler v. Sohler*, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98; *Bacon v. Bacon*, 150 Cal. 477, 481, 89 P. 317; *Simonton v. L. A. T. & S. Bank*, 192 Cal. 651, 656, 221 P. 368; *Jeffords v. Young*, 98 Cal. App. 400, 404, 277 P. 163. The fact that a party injured by a fraudulent judgment may move in the principal action to have the same set aside does not oust equity of its jurisdiction in this particular. The remedies are distinct and cumulative. The decisions are numerous to the effect that a suit in equity to vacate a judgment procured by extrinsic fraud may be prosecuted by the injured party, even though there be available to him in the principal action a motion to vacate under section 473 of the Code of Civil Procedure. *Bacon v. Bacon*, supra, p. 484 of 150 Cal., 89 P. 317; *Estudillo v. Security L. & Trust Co.*, 149 Cal. 556, 563, 564, 87 P. 19; *Baker v. O'Riordan*, 65 Cal. 368, 370, 371, 4 P. 232; *Jeffords v. Young*, supra, pages 406, 407 of 98 Cal. App., 277 P. 163. This rule is well stated in *Bacon v. Bacon*, supra, page 484 of 150 Cal., 89 P. 317, 320; wherein it is declared: "It is true that section 473 of the Code of Civil Procedure provides that, upon motion in the same cause or proceeding, instituted within six months after judgment, a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. This would undoubtedly also include mistake superinduced by the fraud of the other party, and it does provide a new method whereby some relief can be obtained on motion, similar to that here sought by an independent suit. But this provision has never been considered as an exclusive method for the exercise of the equity jurisdiction, nor as an adequate substitute for the right to proceed by action. It is a cumulative remedy, and does not displace the remedy in equity. *Baker v. O'Riordan* [65 Cal. 368, 4 P. 232], supra. We have recently held, not only that it does not displace the equitable remedy, but also that an adverse decision on such a motion does not necessarily bar a subsequent suit to vacate the judgment for the same cause. *Estudillo v. Security L. & T. Co.*, 149 Cal. 556, 87 P. 19. Also, *Freeman on Judgments*, § 511; *Simson v. Hart*, 14 Johns. [N. Y.] 63; *Wistar v. McManes*, 54 Pa. 318, 93 Am. Dec. 700. It follows that the jurisdiction still remains, notwithstanding the provisions of that section."

That a motion to vacate may be made in the principal action independent of and subsequent to the period prescribed in section 473, supra, does not suggest a different con-

clusion. The remedy by way of equitable action, if seasonably pursued, as is the case here, is still available to the injured party. *Aldrich v. Aldrich*, 203 Cal. 433, 438, 264 P. 754. We are not now inclined to overrule or vary, as appellant would have us do, the well-established principle of law announced in the cases above cited, and in others too numerous to mention.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; IRA F. THOMPSON, J.; SHENK, J.; SEAWELL, J.

217 Cal. 242

MOTOR FREIGHT TERMINAL CO. et al. v. BRAY et al.
L. A. 13873.

Supreme Court of California.
Jan. 18, 1933.

Automobiles ☞107(2).

Where autotruck carrier, in violation of statute and cease and desist order by Railroad Commission, continued to carry on business without first obtaining certificate of public convenience and necessity, Superior Court *held* to have jurisdiction to entertain suit for injunction.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by the Motor Freight Terminal Company and another against J. O. Bray, doing business under the fictitious name and style of the Bray Motor Drayage, and others. From an order granting a temporary injunction, the defendant named appeals.

Order affirmed.

Lindsay & Gearhart and B. W. Gearhart, all of Fresno, for appellant.

Wallace K. Downey, of San Francisco, and John M. Atkinson, of Los Angeles, for respondents.

PRESTON, J.

Appeal from order made May 24, 1932, after hearing, granting a temporary injunction restraining and enjoining defendants "from owning, controlling and managing auto trucks used in the transportation of property as a common carrier, for compensation, over the public highways between the cities of Los Angeles * * * and Fresno * * * and

intermediate points * * * In competition with plaintiffs, until defendants shall have first obtained from the Railroad Commission * * * a certificate of Public Convenience and Necessity authorizing them so to do. * * *

Appellant's sole point of law is that, by reason of proceedings had before the Railroad Commission and a cease and desist order made by said commission, the Superior Court was divested of jurisdiction to entertain this suit in equity for an injunction based upon precisely the same grounds which formed the basis of the said cease and desist order.

This contention seems to be entirely without merit. It is true that, in their complaint for injunction and for damages, respondents allege that on July 7, 1930, they complained to the Railroad Commission that appellant and its associates were engaged in the business of transporting property by autotrucks as a common carrier for compensation over public highways between Los Angeles, Fresno, and intermediate points, and were operating in violation of law, in that they did not possess a certificate of public convenience and necessity issued by said commission; that, pursuant to such complaint, extended hearings were had before the commission; that the charge was found to be true, and the commission made an order which became final on March 5, 1931, directing appellant to cease and desist from doing such business until a certificate of public convenience and necessity had been obtained by it; that on May 18, 1931, this court denied an application to review said order; that it became final, and ever since has been, and now is, in full force and effect. But it is also further alleged that, subsequent to said order of the commission, appellant and its associates continued the same business in the same manner as before, and that they threaten to continue said business indefinitely, operating as a common carrier between said termini in defiance of said order to cease and desist and without a certificate of public convenience and necessity authorizing them to operate.

In other words, the complaint comes squarely within the doctrine laid down in the case of *Haynes v. MacFarlane*, 207 Cal. 529, 279 P. 436. The contention of appellant that the so-called cease and desist order is equivalent to an injunction, and that the complaint charges no more than this, if correct, would not avail appellant anything, for, if the cease and desist order covers the identical area covered by the temporary injunction, then appellant is not aggrieved by it; however, if it covers less territory than the injunction covers, the injunction is serving a useful purpose.

As already stated, a fair construction of the complaint shows that the relief is not predi-

cated upon the cease and desist order alone, but is predicated upon the out and out violation of the statute requiring the existence of a certificate of public convenience and necessity, and the reference to the order of the commission serves no real purpose, except as tending to show the wilfulness of the conduct of appellant.

The order appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

Company, in exchange for certain assets, was to receive 50,000 shares of the stock of Majestic Electric Appliance Company, herein called the Appliance Company. The corporation commissioner, however, ordered that 25,000 of such shares be withheld until the Appliance Company should sell 50,000 additional shares to the public at \$10 per share. Thereupon, in May, 1923, A. T. Burch, who was an officer and director of plaintiff Development Company, and owned 80 per cent. of its stock, entered into a contract with defendants, who were partners engaged in selling securities. The object of this contract was to have defendants undertake with the Appliance Company to sell the required 50,000 additional shares, in order that plaintiff might receive its balance of 25,000 shares. Under the Burch contract, defendants were to receive from him 20 per cent. of the selling price of the stock sold, payable in shares. Defendants sold the 50,000 shares, and thereby became entitled to 10,000 shares as compensation. Plaintiff Development Company became entitled to receive its balance of 25,000 shares, and did in December, 1923, secure a release from escrow of 18,706 of said shares. Burch explained his activities to the directors of plaintiff Development Company on December 5, 1923, seeking to have them ratify his contract. Plaintiff, however, refused to deliver the 10,000 shares to satisfy Burch's obligation, and, after some negotiations, a new contract was entered into on February 13, 1924, between plaintiff and defendants. It is this contract which is the basis of the present action. Under its terms, 5,000 shares, recited to be the property of plaintiff, were delivered to defendants as "an advance payment of commissions" for the sale of a further 25,000 shares of Appliance Company stock. It further provides that, should the defendants fail "to complete the program" of selling 25,000 shares "unless prevented from so doing by court action or by action of the Commissioner of Corporations," the 5,000 shares or the proper proportion thereof are to be returned.

At this time, defendants had on hand orders for the purchase of 3,969 shares, which had been taken by them from November, 1923, to February 14, 1924, and these orders were filled from the 5,000 shares delivered under the new contract, and the money was retained by defendants.

Subsequent to that date, and up to May 6, 1924, defendants sold only 210 shares of the 5,000 commission shares, and 160 shares of the 25,000 to be sold for plaintiff. The value of the stock declined, and no further sales were made. Defendants still had 824 shares remaining out of the 5,000 and 23,840 remaining out of the 25,000. On December 1, 1924, the corporation commissioner suspended the permit, and on February 27, 1925, revoked the same.

217 Cal. 272

MAJESTIC ELECTRIC DEVELOPMENT
CO. v. RICE et al.
S. F. 14162.

Supreme Court of California.
Jan. 20, 1933.

I. Brokers ⇨37.

Brokers who stopped selling stock about seven months before corporation commissioner interfered held not entitled to 5,000 shares delivered to them as commissions under contract allegedly entitling them thereto if commissioner's action prevented sale of stipulated number of shares.

2. Brokers ⇨37.

In action for accounting, defendant brokers were properly refused credit for expenses in selling stock under finding that stock was fraudulently obtained.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Majestic Electric Development Company against John H. Rice and others, with a cross-complaint by defendants. Judgment for plaintiff, and defendants appeal.

Affirmed.

Samuel T. Bush and Bertram H. Ross, both of San Francisco, and James Wallace Hughes, of Oakland, for appellants.

August B. Rothschild, of San Francisco, for Raymond A. Burr.

Harry G. McKannay, and Richard Fitzpatrick, both of San Francisco, for respondent.

PER CURIAM.

This is an action for breach of contract and for an accounting. The complaint also contains counts for conversion and money had and received.

Plaintiff, herein called the Development

Some time in 1927 plaintiff made demand on defendants for an accounting, and, upon defendants' refusal, filed this suit. Defendants admitted the sale of 3,969 shares for a gross price of \$39,690, but alleged expenses totaling \$23,628.93, and also filed a cross-complaint alleging that they were entitled to the 5,000 shares and to 5,000 additional shares by virtue of the Burch contract. The trial court found for plaintiff and against defendants on all the important issues, and gave judgment in favor of plaintiff for \$39,690, with interest from June 1, 1924.

[1] Defendants make several points in their appeal, none of which is, in view of the conflict in the evidence, sufficient to warrant a reversal. Their principal contention is that the contract sued upon permitted them to retain the 5,000 shares as their own in the event they were prevented from selling the 25,000 shares by action of the corporation commissioner, and that such prevention actually occurred. Assuming that the contract is to be so interpreted, the testimony of defendant Greisen nevertheless shows that some months prior to the suspension of the permit defendants had stopped selling, and had informed the officers of plaintiff that it was impossible to sell the shares at that time. Difficulties under which the corporation was laboring were said to be the cause. This was in May, 1924, and the permit was not suspended until December, 1924. For approximately six months no shares were sold. The trial court was certainly justified in finding that the action of the corporation commissioner was not the cause of defendants' failure to perform, and hence the conclusion follows that defendants were not entitled to the 5,000 shares under the terms of the contract.

Defendants also contend that the Burch contract was ratified by the directors of plaintiff. Burch so testified, but the minutes of the meeting contain no such recital, and the court undoubtedly questioned Burch's credibility in finding against defendants on this point. Moreover, the execution of the new contract with the plaintiff, which contract stipulated that the 5,000 shares delivered were the property of plaintiff, hardly seems consistent with an admission of liability to defendants for 10,000 shares under the Burch contract.

[2] The court refused to give any credit to defendants for expenses incurred in the sale of the 3,969 shares, finding that the 5,000 shares were obtained by fraud; the defendants never having intended to perform their contract. In view of defendants' conduct in immediately filling past orders, retaining the money, and abruptly ceasing further sales upon various not altogether consistent explanations, we cannot say that the record fails to justify such a finding.

The judgment is affirmed.

HUNGATE v. INDEMNITY INS. CO. OF NORTH AMERICA et al.

Civ. 661.

District Court of Appeal, Fourth District, California.

Jan. 23, 1933.

Hearing Denied by Supreme Court March 24, 1933.

1. Notaries ☞10.

Notary public is required to perform duties with honesty, integrity, diligence, and skill.

2. Notaries ☞11.

Surety on bond of notary public is liable for damages resulting from fraudulent acts committed in performance of his duties.

3. Notaries ☞11.

Notary public and surety on bond are liable for notary's negligence in taking acknowledgment or for making false certificate of acknowledgment.

4. Notaries ☞11.

Act of notary public in forging names of grantors to deed of trust and executing false notarial certificate reciting that grantors personally appeared and acknowledged execution, held to render surety on bond liable.

Surety on bond taken out by notary public contained provision rendering bond void, if notary public shall "well, truly and faithfully perform all official duties required of him by law, and all such additional duties as may hereafter be imposed on him as such officer by any law. * * *

Appeal from Superior Court, Riverside County; Benjamin F. Warmer, Judge.

Action by F. M. Hungate against the Indemnity Insurance Company of North America and another. From a judgment in favor of the plaintiff, the defendant named appeals.

Affirmed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Kelley & Hews, of Riverside, for respondent.

MARKS, J.

Respondent recovered judgment against appellant who was surety on the notarial bond of defendant Wells. This is an appeal from the judgment on the judgment roll.

It appears from the findings that J. C. Williams was the owner of real property in Riverside county; that Frank H. Wells was a notary public with appellant as his surety; that Wells entered into negotiations with respondent for a loan of \$1,000 on the Williams property; that respondent gave Wells a check in the sum of \$1,000 payable to a title compa-

ny, which check was subsequently cashed; that for this money a note in the principal sum of \$1,000, secured by a deed of trust, both instruments bearing the names of J. C. Williams and Mary E. Williams, his wife, as makers of the note and the deed of trust, was executed and delivered to respondent; that the deed of trust had attached to it the usual notarial certificate in words and figures as follows: "State of California, County of Riverside—ss. On this 13th day of January, 1931, before me, F. H. Wells, a Notary Public in and for said County, personally appeared J. C. Williams and Mary E. Williams, husband and wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged they executed the same. Witness my hand and official seal. (Notarial Seal) F. H. Wells"; that Williams and his wife did not sign either the mortgage or the note; that their names were signed to the documents by Wells for the purpose of defrauding respondent out of the sum of \$1,000; that the statements in the certificate of acknowledgment were false and fraudulent; that Wells adopted the name of J. C. Williams as a fictitious name for the purpose of defrauding the respondent.

The bond executed by appellant for Wells contained the following proviso: "Now, if the said F. H. Wells shall well, truly and faithfully perform all official duties required of him by law, and all such additional duties as may hereafter be imposed on him as such officer by any law of the State of California, then the above obligation to be void, otherwise to remain in full force and virtue."

[1-3] It is the sole contention of appellant that the findings of fact do not sustain the conclusions of law or support the judgment.

It has been repeatedly held in California that, when a notary public assumes his office, he is required to perform his duties with honesty, integrity, diligence, and skill. His bond is executed for the purpose of protecting those who may suffer by his dishonesty and the bondsman is liable for damages resulting from the fraudulent acts of the notary committed in the performance of his duties. The notary and his surety are liable for the negligence of the notary in taking an acknowledgment or for making a false certificate of acknowledgment. *Joost v. Craig*, 131 Cal. 504, 63 P. 840, 82 Am. St. Rep. 374; *Anderson v. Aronsohn*, 181 Cal. 294, 184 P. 12, 10 A. L. R. 866.

[4] While the findings of fact are unnecessarily full, those to which we have referred amply support the conclusions of law and judgment. It is apparent from reading the findings that Wells conceived the scheme of defrauding respondent of the sum of \$1,000 and in carrying out his plan forged the names of J. C. Williams and Mary E. Williams to the

deed of trust and the promissory note and executed a false notarial certificate which recited that J. C. Williams and Mary E. Williams were known to him to be the persons whose names were subscribed to the deed of trust, that they personally appeared before him and acknowledged to him that they had executed the same. This certificate was false and was fraudulently used by Wells to defraud respondent out of the sum of \$1,000.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

129 Cal.App. 36
SANBORN v. POMONA PUMP CO.
Civ. 791.

District Court of Appeal, Fourth District,
California.
Jan. 19, 1933.

Appeal and error ⇨644(2).

Respondent, by conduct at time of settlement of bill of exceptions and subsequently, held to have waived all objection thereto (Code Civ. Proc. §§ 649, 650).

Respondent waived any objection, where it appeared that bill of exceptions was settled under provisions of Code Civ. Proc. § 649, not under section 650; that respondent had actual notice of proposed bill of exceptions with copy thereof; and that respondent examined and compared it with original documents and suggested various amendments, all of which were incorporated in engrossed bill of exceptions, together with identical language suggested by respondent for form of judge's certificate thereto, as against contention that court could not consider record because bill of exceptions was not settled and authenticated in accordance with provision of section 650, because bill was settled without notice to respondent, and because judge's certificate thereto was allegedly neither complete nor in proper form.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Samuel Sanborn against the Pomona Pump Company. From an order directing the trial of the action transferred to another county, plaintiff appeals. On motion to dismiss the appeal.

Motion denied.

R. W. Henderson, of Bakersfield, for appellant.

David G. Kling, of Los Angeles, for respondent.

BARNARD, P. J.

This is a motion to dismiss an appeal. On February 1, 1932, the superior court of Kern county, upon motion of the defendant, ordered the trial of the action transferred to the county of Los Angeles, from which order the plaintiff has appealed. On February 9, 1932, counsel for the appellant wrote to the attorney for the respondent, sending him a copy of the proposed bill of exceptions, informing him that the same would be presented to the judge who made the order on February 10, 1932, calling his attention to the provisions of section 650 of the Code of Civil Procedure relating to the right of the adverse party to participate in such a proceeding to settle a bill of exceptions and to the fact that section 649 of this Code is not equally explicit in this regard, and asking him either to consent to the proposed bill or, if desired, to propose amendments thereto. The proposed bill of exceptions was presented to the judge on February 10, 1932. On February 16, 1932, the attorney for the respondent wrote to the attorney for the appellant inclosing a copy of his proposed amendments to the bill of exceptions, stating that he had examined the original papers then in the office of the county clerk in Los Angeles, suggesting a number of minor changes in order to make the proposed bill of exceptions conform to the original documents, objecting to the wording of the proposed certificate prepared for the judge's signature, and proposing a proper wording for said certificate in order, as he said, "to comply with the law."

It appears that each and every one of the amendments asked for was incorporated in the proposed bill of exceptions, including the exact language of the suggested certificate, thus proposed, and the engrossed bill of exceptions was signed by the judge on February 23, 1932. On March 26, 1932, the appellant's opening brief was filed in this court. On July 29, 1932, the attorney for the respondent obtained from this court an order

extending time to file his brief to August 30, 1932, his affidavit including, among other things, the statement that he had theretofore received ninety days' extension of time from the appellant; that his brief was in a large measure prepared; and that the same could be filed within the time allowed. The respondent's brief was not filed within that time, nor at all, and nothing else was done until December 19, 1932, when notice of this motion to dismiss the appeal was filed.

The motion is made and urged upon the ground that the court cannot consider the record here on file for the reason that the bill of exceptions was not settled and authenticated in accordance with the provisions of section 650 of the Code of Civil Procedure and, in particular, because the same was settled without notice to the respondent and because the judge's certificate thereto is alleged to be neither complete nor in proper form.

Not only does it appear that this bill of exceptions was settled under the provisions of section 649 of the Code of Civil Procedure and not under section 650 thereof, but it fully appears that the moving party had actual notice of the proposed bill of exceptions with a copy thereof; that he examined and compared it with the original documents; and that he suggested various amendments, all of which were incorporated in the engrossed bill of exceptions, together with the identical language suggested by him for the form of the judge's certificate thereto. We have then what amounts to an agreed bill of exceptions and it must be held that the respondent, by his conduct at the time of its settlement and subsequently, has waived all objection thereto. It appears from his own statement that the record is essentially correct, and no injury is shown.

Two other minor objections are raised, of which one is shown by the respondent's statement to be immaterial, and the other has been cured by an order made by this court.

The motion to dismiss the appeal is denied.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 541

MESSENKOP v. DUFFIELD et al.
Civ. 4578.

District Court of Appeal, Third District,
California.

Jan. 5, 1933.

As Corrected Feb. 2, 1933.

Hearing Denied by Supreme Court March 6,
1933.

1. Appeal and error ⇨994(3).

Credibility of witness *held* for trial court.

2. Appeal and error ⇨717.

Oral opinion of trial judge cannot be used
to impeach his findings.

3. Appeal and error ⇨1011(1).

Mortgagor *held* bound by finding of trial
court, on conflicting evidence, that she had
not repaid indebtedness and was in default.

Appeal from Superior Court, Los Angeles
County; Ruben S. Schmidt, Judge.

Action by Louis H. Messenkop against
Kathleen Duffield and others, wherein def-
endants filed a cross-complaint. From a
judgment in favor of plaintiff, defendants
appeal.

Affirmed.

D. A. Knapp, of Los Angeles, for appel-
lants.

Alvin W. Wendt, of Los Angeles, for re-
spondent.

TUTTLE, Justice pro tem., delivered the
opinion of the court.

This action was brought to quiet title to a
parcel of land in Los Angeles county. The
court found for plaintiff upon all issues
raised, and judgment was entered accord-
ingly. The appeal is prosecuted from said
judgment.

The grounds relied upon for reversal are
somewhat vaguely stated. Neither in the
topical index nor in any subheading of appel-
lants' opening brief is there any clue to the
position of appellants upon this appeal.
Reading the brief throughout aids little in
this inquiry. We can gather, however, that
appellants seek to attack certain findings of
the trial court, and we shall endeavor to dis-
pose of that contention. Practically the en-
tire time of appellants is occupied with the
presentation of matters which, under the
circumstances, were within the exclusive
province of the trial court.

On April 23, 1927, appellant executed her
note for \$3,600, payable 18 months from date,
together with a trust deed covering the prop-

erty in dispute, in favor of W. L. Milne. There-
after Milne delivered to the trustee a written
declaration of default and demand for sale.
Thereafter, and on March 30, 1928, a notice
of breach and election to sell was duly record-
ed. A sale was had under the terms of said
trust deed, upon August 7, 1928, and respond-
ent bid the property in for the sum of \$2,000.
Thereafter a trustee's deed, reciting all these
facts, was duly executed to respondent. The
trust deed contained the provision that:
"The recitals in such deed or deeds of any
matters or facts affecting the regularity or
validity of said sale shall be conclusive
against the persons as to all matters or facts
therein recited."

At the trial, plaintiff's source of title was
his deed received pursuant to said sale. The
chief contention made by appellant was that
she was not in default, and the sale was
therefore void. She also attempted to prove
that respondent was a purchaser with notice,
and had conspired with Milne to deprive her
of her property through a fraudulent sale.

The complaint is the ordinary form to quiet
title, though plaintiff prays for possession
and the recovery of the rental value of the
lot during the time that appellant has had
possession. The answer denies the forego-
ing allegations, and sets up four affirmative
defenses. The first states that appellant
was not in default when the sale under the
trust deed was had. The second alleges that
the trustee and beneficiary under said deed
were guilty of fraud in making a statement
of the amount due when the notice of inten-
tion to sell under the trust deed was filed.
The third charges that the trustee and bene-
ficiary conducted a fraudulent sale, and "con-
nived together" for that purpose. The fourth
alleges that the transactions relating to the
trust deed are in violation of the Usury Law
(St. 1919, p. lxxxiii). In addition, appellant
filed a cross-complaint, bringing Milne into
the case, and setting forth, in the first cause
of action, page after page of evidentiary mat-
ter purporting to show that, when notice of
sale was recorded and the sale had, the in-
debtedness, for which the trust deed was giv-
en to secure, had been fully paid. The sec-
ond cause of action alleges violation of the
Usury Law, and seeks damages in the sum of
\$3,709.68. The third cause of action seeks
damages on account of the alleged fraudu-
lent sale, in the sum of \$3,000.

[1, 2] Taking up what we conceive to be the
contentions of appellant, it is first urged that
the finding to the effect that plaintiff bid the
sum of \$2,000 for the property, and that
the trustee conveyed the property to the re-
spondent, "are not true to the evidence nor
to the oral opinion of the court." In an en-
deavor to show that Milne was the real pur-
chaser, and not respondent, certain portions

of respondent's testimony upon cross-examination are quoted. The testimony of this witness is branded by appellant as "positive perjury." The attack is made upon the credibility of the witness, a matter with which this court has nothing whatever to do. There is abundant evidence in the record to support this finding. As to the oral opinion of the trial judge, it is no ground for reversal that such opinion is in conflict with the findings. It cannot be used to impeach them. 24 Cal. Jur. p. 924.

[3] Appellant states that finding IX "is in reality but a special pleading, false to any issue of fact or of law in the case at bar." This finding relates to the amount advanced under the trust deed, in the following language: "That said defendant and cross-complainant, Kathleen Duffield, after being given proper credits for all moneys paid upon said note and trust deed by her, was in default on and under said deed of trust." Nine pages of the brief are taken up with an intricate and involved argument upon the facts as appellant sees them. Prior financial transactions, covering a number of years, are given with the most meticulous detail. Unfortunately for appellant, the trial judge did not look upon this evidence in the same light. An examination of the record discloses a conflict in the evidence upon this matter of finances, and the finding in question has adequate evidentiary support.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 696

SHERRIFFS v. HAMMON.

Civ. 8199.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1933.

Rehearing Denied Feb. 15, 1933.

Hearing Denied by Supreme Court March 16, 1933.

1. Banks and banking §40.

Evidence in action for price of bank stock supported court's finding that some was sold in consideration of defendant paying seller's indebtedness to pledgee, and that defendant never purchased remainder.

2. Appeal and error §1011(1).

Evidentiary conflicts were for determination by trial court, whose conclusions appellate court will not disturb.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by J. Sherriffs against W. P. Hammon, as trustee and individually. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. H. Metson, Alex Sherriffs, and Maxwell McNutt, all of San Francisco (E. B. Mering and A. H. Ricketts, both of San Francisco, of counsel), for appellant.

Charles W. Slack and Edgar T. Zook, both of San Francisco, for respondent.

STROTHER, Justice pro tem.

This is an action by plaintiff, as the assignee of Jafet Lindeberg, to recover the sum of \$95,745.21, alleged sale price of 538 shares of the capital stock of Miners' & Merchants' Bank of Alaska. The case went to trial on the issues raised by a third amended complaint and defendant's answer. Upon the conclusion of plaintiff's evidence, plaintiff applied to the court for leave to file a fourth amended complaint "to conform to proof." Leave was granted; the court reserving any ruling as to the conformity.

This complaint alleges Lindeberg's ownership of the 538, out of a total of 1,000 shares of the bank stock; that on September 7, 1922, by an agreement in writing, he sold defendant 250 shares of the stock "at the agreed price of the net asset value or book value thereof as of September 30, 1924"; that by said agreement he gave defendant an option to purchase his remaining 288 shares at the same ascertainable price as the other stock; that the 250 shares were delivered, and that on January 16, 1923, defendant exercised the option to purchase the 288 shares, and received the same. It is alleged, on information and belief, that on September 30, 1924, the net asset value or book value of the stock was \$250 per share, and that on that date there became due to Lindeberg from defendant \$134,500, of which no part has been paid except \$38,754.79, leaving unpaid \$95,745.21, for which judgment is demanded.

Judgment was rendered in favor of defendant, from which plaintiff appeals, bringing up the record in a bill of exceptions.

[1, 2] The court found that the sale of the 250 shares of stock by Lindeberg to defendant in September, 1922, was not at the price and upon the terms alleged in the complaint, but was upon the consideration of the payment by defendant, on March 2, 1922, of the sum

of \$12,500, on account of an indebtedness of Lindeberg to the Anglo-California Trust Company of San Francisco, with interest from that date to September 8, 1922; that Lindeberg gave defendant an option to buy the 288 shares upon substantially the terms alleged in the complaint, but that defendant never exercised the option; that on March 2, 1922, and long prior thereto, Lindeberg was indebted to Anglo-California Trust Company in the sum of \$25,000, as security for which he had pledged 499 shares of the stock of the Alaska bank; that on that date the defendant, at the request of Lindeberg, paid the trust company \$12,500 on account of his indebtedness, and received from the bank, at Lindeberg's request, a certificate for 250 shares of stock of the Alaska bank, which it was agreed defendant should hold as security for the money advanced by him to the trust company on Lindeberg's account; that on or about September 8, 1922, Lindeberg sold the 250 shares to defendant in consideration of the payment to the trust company and interest from March 2 to September 8, 1922; that on November 25, 1922, defendant, at the request of Lindeberg, paid to the trust company the balance of the principal of \$12,500 owing from Lindeberg, with accrued interest, and an assessment of \$50 per share which had been levied on the bank stock, amounting in all to \$25,897.97, and, by agreement with Lindeberg, took over from the trust company, and held as collateral security for the repayment of that amount, the 249 shares of bank stock; that on February 21, 1923, in consideration of the payments so made by defendant, and the purchase from Lindeberg by defendant of certain shares of stock in a mining company for which cash payment was made, Lindeberg sold to him said 249 shares.

The question presented by the record on appeal is whether or not the findings of the court of the sales of the two blocks of stock by Lindeberg to the defendant are supported by the evidence.

There was no conflict in the evidence as to the payments made to the trust company to the account of Lindeberg's indebtedness, or that the several transfers of stock by the trust company to defendant were made as found by the court, and the payment of the stock assessment.

In the latter part of August, 1922, defendant started for Nome, Alaska, where the bank was located, on business in connection with gold mining property owned by a company which he controlled. The bank at that time was in a somewhat precarious condition, and Lindeberg gave him authority to represent his stock in a reorganization of the bank. Evidently there had been, before that time, some talk between the parties of the sale of at least a part of the stock to defendant. Before defendant left San Francisco for

Nome, Lindeberg handed defendant three letters, two addressed to him and one to J. J. Cole, of Nome, a business associate of Lindeberg. One of those to defendant, which was a copy of a letter written to him in June, but which defendant had not received, was as follows: "My dear Mr. Hammon: We would like to interest you in 538 shares of the capital stock of the Miners & Merchants Bank of Nome, Alaska. You can now buy 250 shares thereof at the determined value of its then net assets on September 30, 1924, and transfer will be made to you directly. At this time transfer can be made to you of the balance—288 shares—to be held by you as trustee. This will give you control of the bank and the power to elect directors and officers, you to buy now but pay for the 288 shares on September 30, 1925, at a price based upon the then value of the bank's net assets. All dividends on the 288 shares prior to the actual sale are to revert to me. Yours very truly, Jafet Lindeberg."

The following part of the other letter to defendant—date August 25, 1922—relates to the transaction: "Dear Mr. Hammon: I am now handing you an original letter, addressed to Mr. Cole, referring to our understanding regarding the bank; also copy of a letter on my proposition to you for the future stock purchase, which letter and enclosure you are to hand to Mr. Cole soon after your arrival in Nome. I wish to say now, that you will not be compelled to purchase the second allotment of stock of 288 shares, as you can have the same use and power without actually owning the stock, and I feel that I can hold this stock, if given a little time, and that it will be one of my investments that will at all times pay good dividends."

After arriving at Seattle, whence he was to sail for Alaska, defendant, on September 1, 1922, wrote Lindeberg a letter, the parts relating to the stock transaction being quoted: "Dear Mr. Lindeberg: During the last two days' rush at home I neglected to read your letter of 25th inst., until on the train en route for Seattle, and was rather disconcerted on account of the possible misunderstanding, rather than understanding, between us as you have written Mr. Cole and have stated in your letter to him, and I hasten to bring the matter to your attention before anything further might be done regarding the bank matters. What I tried to explain to you, and thought you acquiesced in, was this: That in case I found it possible to harmonize the bank interests in a manner that would take care of the interests concerned, without further contention, and save the bank from an ultimate collapse, I would be willing to take a direct interest in it, provided you sold to me now the 250 shares that I hold and gave me an option on the 288 shares mentioned in your letter to me of May 15th, 1922, payable in

1924 at the determined value of its then net assets or actual book value. Myself and friends who would be associated with me in such an undertaking could not afford to take up a situation such as exists at Nome on a much different basis. My apprehensions of the distress of the bank, which has been apparent, were confirmed most emphatically here yesterday in Seattle. * * * It will not be possible for me to carry the 288 shares without an option to purchase on a defined basis, because conditions are such that, in case I go ahead, I am likely to need the support of others than myself, which they would not be willing to give unless they might be stockholders of a fair position in the bank. Of course, I am only predicting now and trying to provide for an emergency that I do not fully understand at this time. Trusting you will not hesitate to be frank and direct to the point with me, I beg to remain, Sincerely yours, W. P. Hammon."

On September 8, 1922, Lindeberg telegraphed defendant: "Will sell part now and give option balance confirming your letter first." On February 8, 1923, defendant wrote to Lindeberg the following letter: "Dear Mr. Lindeberg: With reference to the Miners & Merchants Bank of Nome stock that I am taking over from you, I am turning this interest over to the Hammon Consolidated Gold Fields, and it is quite necessary for me to make a definite statement of the obligations and terms of the purchase. The 250 shares that I took up on March 2, 1922, from the Anglo-California Trust Company was delivered to me and the \$50 per share assessment has been paid. I, also, took care of the \$50 per share assessment on the 249 shares held by the Anglo-California Trust Company and paid them \$155.40 covering interest to May 25, 1923. The only point in question now is the time to carry these 249 shares. In my letter to you under date of September 1, 1922, written at Seattle, and to which you replied by wire, it was understood that I was to have an option on this stock to September 1, 1924, after which time I was to pay to your account its then net book or sales value, less, of course, the assessment and the interest on the note advanced, which should be six per cent., the same rate we are now paying the Anglo-California Trust Company. I shall be glad to have a statement from you setting forth the facts as you understand them to be and whether or not the above is in agreement as you understand it. Your kind attention to this will be appreciated. Very truly yours, W. P. Hammon." Again, on January 16, he wrote him a letter containing this paragraph: "The two hundred and fifty shares of stock that I bought outright at Nome have been delivered. The two hundred and fifty shares held by the Anglo-California Trust Company are still held by them, against which they hold my personal note which I can redeem at

any time that I may desire. The note is for their loan to you of \$12,500.00 on the stock and \$12,500.00 which was advanced for the assessment."

Defendant testified that he received no reply to either of these letters, and that in subsequent conversations he mentioned the letters to Lindeberg, and he did not deny receiving them.

On or about February 21, 1923, defendant and Lindeberg met, and the following is defendant's account of what was said at that time, and in a conversation shortly preceding it: "We discussed the subject matter of the letters. He wanted to sell me at that time some of the Pioneer Mining and Ditch Company stock. I told him that I was not interested in the stock and did not care to purchase it. He urged me to do so. I think he asked sixty cents a share for it, and I said to him that in my opinion it was not worth that. I did not want to take it on that basis—I was not interested. I wanted to settle the remainder of the bank stock—the 249 shares. We did not come to any agreement on that day. He came back on February 21, 1923, and I then told him that I would give him forty cents a share for the Pioneer Mining and Ditch Company stock, provided that he would make a definite settlement for the 249 shares of the bank stock. There was then considerable interest which had accumulated and I offered to waive the interest. I made the proposition to take the 249 shares that I held for just the face of the account, without interest, and when I said that I would buy the stock of the Pioneer Mining and Ditch Company on that condition, he said he was ready to make the settlement. I told him that I had already arranged to sell the 250 shares of the bank stock to Hammon Consolidated Gold Fields, and wanted to turn over the 249 shares to the Hammon Consolidated Gold Fields on a definite basis. Mr. Lindeberg wanted to get some more money on the 249 shares, and I said I could not advance any more money on that stock, that that was all it was worth, and that we had purchased other bank stock and nobody had ever received more than \$50 a share, we paying the assessment. I asked him if he wanted to do that, and he accepted it. I waived the accumulated interest and gave him my check for \$500 on account of the Pioneer Mining and Ditch Company stock."

Lindeberg testified on behalf of the plaintiff. The only conflict between his testimony and that of defendant was in his denial that the sale of the bank stock was mentioned in connection with that of the Pioneer Mining & Ditch Company, or that any sale of the bank stock was consummated.

There was ample evidence to support the findings of the court, and, whatever the conflicts in the evidence were, those were for the

trial court to determine, and its conclusions will not be disturbed on appeal.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 649

The PEOPLE of the State of California, Plaintiff and Respondent, v. Ruth HORNBECK, Philip Gargano and Frank Ferrari, Defendants; Frank Ferrari, Appellant.

Cr. 2262.

District Court of Appeal, Second District, Division 1, California.

Jan. 13, 1933.

Hearing Denied by Supreme Court Feb. 10, 1933.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Paonessa, Sayre & Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CONREY, P. J.

Defendant Ferrari, with two others, was tried upon an indictment charging them with the crime of grand theft. At the trial the charge against Ruth Hornbeck was dismissed, and she became the state's principal witness. The other two defendants were convicted, and both appealed. The appeal of defendant Gargano has been dismissed. Ferrari prosecutes this appeal from the judgment and from an order denying his motion for a new trial.

The indictment charged that on the 29th day of March, 1932, the defendants committed the crime of grand larceny by willfully, etc., taking the sum of \$3,338.90, "then and there the personal property of the Million Dollar Theatre, owned and operated by the Circle Theatres, Ltd., a corporation."

The only evidence directly tending to establish the guilt of appellant, Ferrari, is found in the testimony of Ruth Hornbeck. Her testimony proves beyond doubt that she was an accomplice in the commission of the crime. It follows that, in order to justify the conviction of appellant, the testimony of the witness Hornbeck must be corroborated "by such other evidence as shall tend to connect the defendant with the commission of the offense." Pen. Code, § 1111.

Appellant was not by any witness, other than Hornbeck, identified as one of the men present on the scene at the place where the money was taken, and at the time when it was taken. With much care we have examined

the testimony of Hornbeck and of the witnesses other than Hornbeck, in order to determine whether in any manner or degree they tend to connect the defendant with the commission of the offense. We have reached the conclusion that so far as appellant is concerned the story told by said accomplice is without substantial corroboration. This might be amplified into a long account of the testimony of the various witnesses; all to no purpose, for the result would be the same.

The judgment is reversed. The order denying motion for a new trial is reversed.

We concur: HOUSER, J.; YORK, J.

129 Cal.App. 112

WEST COAST BUILDERS, Inc., v. PACIFIC STATES AUXILIARY CORPORATION et al.

Civ. 4738.

District Court of Appeal, Third District, California.

Jan. 21, 1933.

1. Usury $\S$ 76.

That note secured by trust deed was usurious did not affect validity of note as to principal sum to secure which trust deed was executed.

2. Usury $\S$ 130.

Grantee taking subject to usurious trust deed has no cause for complaint of such usury since he was not party to original transaction.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the West Coast Builders, Inc., against the Pacific States Auxiliary Corporation and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Hare & Walden and A. G. Reilly, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (Keith Bullitt, of Los Angeles, of counsel), for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to enjoin the foreclosure of a certain trust deed securing a note executed by a remote predecessor in title. A demurrer to the second amended complaint was sustained without leave to

amend. From the judgment of dismissal entered thereafter, this appeal is prosecuted.

The amended complaint alleges that one Alma C. Tadlock executed a promissory note to the Pacific States Savings & Loan Company, in the sum of \$9,650; that the sum of \$9,650 was not paid or delivered to the said Alma C. Tadlock at the time of the execution of the note, but that there was deducted therefrom and withheld by the said Pacific States Savings & Loan Company a sufficient sum to render the note usurious. The note was secured by a trust deed. After the execution of the note and trust deed, Alma C. Tadlock conveyed the property to Isabell Barnett, subject to the trust deed. Isabell Barnett in turn conveyed the property to the appellant, subject to said deed of trust.

It is further alleged that the plaintiff desires to bid at the foreclosure sale to be had of said property, and is entitled to credit for the amount alleged not to have been received by Alma C. Tadlock.

[1] For the purposes of this decision it may be admitted that the note, as to Alma C. Tadlock, was usurious. This, however, does not affect the validity of the note as to the principal sum to secure which the trust deed was executed. *Finley v. Wyatt*, 113 Cal. App. 233, 298 P. 80; *Duke v. Levy*, 208 Cal. 376, 281 P. 496; *Rice v. Dunlap*, 205 Cal. 133, 270 P. 196; *Davis v. Westphal*, 102 Cal. App. 148, 182 P. 800; *Van Noy v. Goldberg*, 98 Cal. App. 604, 277 P. 538.

[2] Irrespective of whether the note as to Alma C. Tadlock was usurious, the acquisition of title to the real estate covered by a trust deed securing the note does not make the plaintiff privy to the usurious transaction. This question is definitely settled by the case of *Esposti v. Rivers Bros.*, 207 Cal. 570, 279 P. 423, 424. We need only to quote the following from the opinion in that case: "That proposition of law, broadly stated, is that a grantee of property taken subject to a usurious loan, the amount of which is deducted from the purchase price, will not be permitted to complain of usury in the inception of the loan. The respondents, on the other hand, present an amplitude of authority upholding this proposition and showing it to be in this as well as in most other jurisdictions of this country well-settled law." The decisions cited in the *Rivers Case* show that the question is settled in this state beyond controversy, that a grantee, subject to a trust deed such as presented in this case, has no cause for complaint, even though the original transaction to which the grantee is not a party is usurious.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

129 Cal.App. 76

**In the Matter of the Application of David
MATUSOW for a Writ of Habeas
Corpus.
Cr. 2273.**

District Court of Appeal, Second District,
Division 2, California.

Jan. 21, 1933.

Application for writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles, to secure release of petitioner from custody on a commitment for violation of the Mattress Regulation and Inspection Act. Writ discharged; petitioner remanded.

Charles J. Katz and Stanley E. Fox, both
of Los Angeles, for petitioner.

John L. Bland, Deputy City Prosecutor, of
Los Angeles, for respondent.

STEPHENS, J.

This is a petition in habeas corpus, and arises from the following facts: Matusow was a defendant in several cases pending in the municipal court. Each of the complaints in said cases charged the defendant with violating the so-called Mattress Regulation and Inspection Act (St. 1929, p. 978). Attorneys for the prosecution and for the said defendant stipulated that the cases might be tried together and without a jury. The defendant was convicted and sentenced to jail. He claims here that he is illegally in custody because he did not personally join in the waiving of a jury. The respondent, the chief of police, in his return says in effect that defendant did personally waive a jury. This court appointed a referee, who, after taking evidence upon this disputed question of fact, reported that defendant did in fact personally waive a jury in all of said cases. Petitioner objects to the findings of the referee on the ground that they do not conform to the evidence adduced at the hearing before him. We have examined the transcript of the hearing, and, while it is true that there is conflict upon the point, there is ample testimony upon which to base the referee's findings. The referee's findings are approved and affirmed, and, as there is no other question in the case, it follows that our finding is that the said defendant and his attorneys did waive trial by jury on each and every of the several complaints then before the municipal court and upon which defendant was thereupon tried, found guilty, and sentenced.

The writ is discharged, and Matusow, the defendant in the cases herein referred to, is remanded.

We concur: WORKS, P. J.; CRAIG, J.

HERRLEIN et al. v. TOCCHINI et al.

Civ. 8576.

District Court of Appeal, First District,
Division 1, California.

Jan. 12, 1933.

Hearing Denied by Supreme Court March 13,
1933.**1. Action** ⇨6.

Action for declaratory relief in respect to contract to buy stock *held* maintainable although involving disputed oral contracts (Code Civ. Proc. § 1060 et seq.).

2. Action ⇨6.

Statute authorizing declaratory relief, although construed as applying to proceedings involving determination of fact questions, is not unconstitutional as depriving litigants of jury trial (Code Civ. Proc. § 1060 et seq.).

3. Brokers ⇨21.

When stockbroker departs from established custom in executing order, client may repudiate entire transaction, unless broker makes full disclosures.

4. Brokers ⇨24(1).

Notwithstanding broker negotiated buyer's order on "street," without informing buyer that stock exchange prohibited "buyer 60" contracts, buyer could not repudiate transaction where buyer was not harmed by irregularity.

"Buyer 60 contract" is a contract wherein the purchaser not wishing to pay for stock purchased outright buys it at a price in excess of the market and is allowed 60 days' time to pay for stock, payment at expiration of 60-day period being compulsory.

5. Brokers ⇨37.

Whether stock buyer under "buyer 60" contract was informed of and, by failure to object, assented to substitution of broker for original escrow holder *held* for trial court.

6. Evidence ⇨442(1).

Written provisions of contract partly oral and partly written control conflicting oral stipulations.

7. Novation ⇨1.

Escrow agreement, designating parties as "buyer" and "seller," naming price and identifying property, authorized implication that it was sale agreement, as against contention that escrow agreement constituted novation of original oral contract for purchase, and was an option.

8. Contracts ⇨170(1).

Parties can interpret contract requiring construction as they see fit, although interpretation apparently contradicts its ordinary meaning.

Appeal from Superior Court, City and County of San Francisco; Erwin W. Owen, Judge.

Action for a declaratory judgment by Philip G. Herrlein and another against Fred A. Tocchini and others. From a declaratory judgment in favor of plaintiffs, named defendant and another appeal.

Affirmed as modified.

Bianchi & Hyman and C. G. Morse, all of San Francisco, for appellants.

Young, Hudson & Rabinowitz, of San Francisco, for respondents Philip G. Herrlein and Sylvia C. Herrlein.

WOODWARD, Justice pro tem.

This is an appeal by two of the defendants, Fred A. Tocchini and H. J. Tocchini, from a coercive declaratory judgment in favor of plaintiffs.

The factual background of the controversy, being somewhat involved and having unusual ramifications, will be set forth chronologically and at length: On or about May 15, 1928, the appellants, Fred A. Tocchini and H. J. Tocchini, the former being the more active in the transaction, gave a telephone order to Lillienthal, Bremer & Co., brokers, for a "buyer 60" contract covering 200 shares of Bancitaly stock. Prior to said date respondent Philip G. Herrlein had informed Lillienthal, Bremer & Co. that he desired to enter into a "buyer 60" contract as seller. Accordingly, when the brokerage firm received appellants' telephone order, it immediately purchased on the stock exchange for the account of Herrlein 200 shares of the stock specified by appellants. Confirmation of the purchase was forwarded to Herrlein, who, in due time, paid for same with his personal check. The stock was thereafter indorsed and left with the brokers for sale to appellants under the terms of the contract requested. Appellants were duly informed, in writing, of the purchase of said stock and they immediately deposited the sum of \$12,000 with Lillienthal, Bremer & Co. to protect the seller. A member of the brokerage firm then prepared an escrow agreement, which, after some delay, was duly signed by Sylvia C. Herrlein (acting as agent for her brother Philip G. Herrlein) and appellant Fred A. Tocchini. The agreement, together with the cash deposit, was forwarded to Wells Fargo Bank & Union Trust Company, as escrow holders. The escrow agreement is as follows:

"San Francisco, May 16, 1928. To Wells Fargo Bank & Union Trust Co., Union Trust Office. The undersigned, Fred Tocchini, hereinafter called the Buyer, hereby deposits with you the sum of \$12,000.00, and the undersigned, Sylvia C. Herrlein, hereinafter called the seller, hereby deposits with you 200 shares

of Bancitaly Corporation; said money together with said shares of the Bancitaly Corporation is to be held by you in escrow on the following terms and conditions:

"1. Upon deposit with you by the Buyer of the total sum of \$45,657.50 including the sums hereinabove mentioned on or before July 16, 1928, said total sum is to be paid to the seller and said shares of the Bancitaly Corporation are to be delivered to the buyer.

"2. Whereas the undersigned as between themselves have agreed that the buyer shall at all times keep a deposit of 25% of the market value of the security in escrow. You shall forthwith, upon notice from Lillienthal, Bremer & Co., that said Buyer has failed to meet the requirements as above stated, pay to the Seller the sum of \$1,600.00 plus the difference between the market price on the date you receive the notice and the total sum specified in paragraph No. 1, together with 200 shares of Bancitaly Corporation, and pay to the other party any balance of the deposit made by such other party.

"F. A. Tocchini, Buyer
"Sylvia C. Herrlein, Seller."

Thereafter on June 18, 1928, the Wells Fargo Bank & Union Trust Company advised the brokerage firm that it had decided not to act as escrow holder and returned the cash deposit, together with the stock and the agreement, to the brokers. Respondent Lillienthal, Bremer & Co. at all times thereafter retained in its possession the stock and all papers pertaining thereto. During the month of June, 1928, the brokerage firm, because of fluctuations in the price of the stock, called upon the appellant Fred Tocchini, from time to time, to furnish additional collateral in order that his "buyer 60" contract would be protected. In each instance appellant complied with the demand, depositing in all 263 shares of Bancitaly stock, including 110 shares which the trial court found did not belong to either of appellants. During the latter part of June of the same year, after the stock had suffered an appreciable decline in price, Fred Tocchini called upon the brokerage firm and requested a copy of the escrow agreement, which was furnished him. Thereafter on July 3, 1928, appellants made a written demand upon Lillienthal, Bremer & Co. for a return of all stocks previously deposited with the said firm. On October 25, 1928, respondent Herrlein made written demand upon Fred Tocchini that he pay the purchase price of the stock covered by his "buyer 60" contract. Appellants thereupon declined to proceed further with the transaction and respondent Herrlein made demand upon the brokerage firm that it sell sufficient of the collateral, which, with the cash deposit of \$12,000, would equal the purchase price of the stock, to wit, \$45,657.50. The brokers refused to comply with the demands of any of the parties, with the result that the Herrleins filed an action

against appellants and the brokerage firm wherein they prayed for a coercive declaratory judgment, defining the legal rights and duties of all the parties.

The trial court found that on May 16, 1928, the defendant Fred A. Tocchini had agreed to purchase 200 shares of Bancitaly stock from Philip G. Herrlein for the sum of \$45,657.50, said sum to be payable by defendants at any time within sixty days after the date of said sale; that concurrently therewith and for the purpose of securing the payment of said purchase price and of insuring the delivery of said stock, the plaintiff Sylvia C. Herrlein and the defendant Fred A. Tocchini agreed that said 200 shares of capital stock of Bancitaly Corporation, should be deposited by said defendant with the Wells Fargo Bank & Union Trust Company as escrow holder, and that in order to carry out the intention of said parties an escrow agreement was prepared by defendants Lillienthal, Bremer & Co. and signed by plaintiff Sylvia C. Herrlein and defendant Fred A. Tocchini; that Fred A. Tocchini defaulted in the payment of the purchase price of said stock; that defendant Fred A. Tocchini is indebted to plaintiff Philip G. Herrlein in the sum of \$45,657.50 with interest thereon from the 16th day of July, 1928, at the rate of 7 per cent. per annum, less any dividends received by plaintiff on any of said stock held by defendant Lillienthal, Bremer & Co.

Parenthetically, it may be observed that there is no dispute as to the technical meaning of a "buyer 60" contract. It is a contract, according to the uncontradicted testimony of Max P. Lillienthal, wherein the purchaser, not wishing to pay outright for the stock, buys it at a price in excess of the market, and is allowed sixty days' time to pay for the same, payment at the expiration of said sixty days being compulsory.

[1] The first point relied on for reversal is that the trial court had no jurisdiction of the action. In support of this contention it is urged that declaratory relief, as provided for in part 2, title 14, chapter 8, of the Code of Civil Procedure, is not applicable to disputed oral contracts and hence was not available to plaintiffs in the present action. The point is without merit. Appellants cite the case of *Transport Oil Co. v. Bush*, 114 Cal. App. 152, 1 P.(2d) 1060, as containing the proper construction of our declaratory relief statute. A careful examination of this case reveals that the language relied on by appellants is dicta. Moreover, in the later case of *Tolle et al. v. Struve et al.* (Cal. App.) 12 P.(2d) 61, 62, the same question is elaborately considered and determined adversely to appellants' position here. In that decision the court declares: "We do not feel called upon to follow appellant into the field of foreign legislation and decision on this point, nor to engage in

an analysis of the provisions of our own declaratory relief statute, for the reason that we consider this question to be definitely foreclosed by the decision of our own Supreme Court in *Hess v. Country Club Park* [213 Cal. 613], 2 P.(2d) 782. In that case the plaintiff, who held certain real property under a deed containing certain restrictive provisions, sought and secured declaratory relief adjudging that by reason of the change in condition and character of the neighborhood, it was no longer suitable for residence purposes, and hence the restrictions were no longer binding or enforceable. The sole question involved in that proceeding was dependent upon the determination of a question of fact. * * * Unless the Supreme Court sees fit to recede from the position taken in this case, which seems entirely improbable, it can be no objection to a proceeding for declaratory relief that it involves and depends upon the determination of a question of fact."

[2] Nor do we believe that the statute, as thus construed, is unconstitutional, as claimed by appellants, in that it deprives litigants of a jury trial. In the present case appellants did not demand a jury trial; moreover, in their separate answers each joined the plaintiff in a prayer for declaratory relief. In this connection, though, it may be pointed out that the constitutionality of the statute was upheld in *Blakeslee v. Wilson*, 190 Cal. 479, 213 P. 495. And it may also be noted that section 1061 of the Code of Civil Procedure, also held to be constitutional by the *Blakeslee* Case, *supra*, confers broad jurisdictional powers on the trial court under which it may prevent the abuses of which appellants seem to be apprehensive.

[3-5] Appellants next attack the escrow agreement on the ground that said agreement was a nullity. In this connection it is urged that when *Lilienthal, Bremer & Co.* received appellants' verbal order for a "buyer 60" contract the brokers should, pursuant to well-established principles of law applicable to such transactions, have informed their client that "buyer 60" contracts were no longer permitted on the floor of the stock exchange; that the brokers failed to do this and, without authority from appellants, negotiated the order on the "street." The method thus adopted by the brokers is vigorously assailed by appellants as being so clearly violative of the verbal order of purchase as to entitle appellants to repudiate the transaction. It is argued that, when "buyer 60" contracts were previously permitted on the floor of the exchange, custom required the purchasing broker actually to take title for his client, receiving back the stock as a pledge for the unpaid balance. Instead of advising appellants of the real situation, namely, that "buyer 60" contracts had been inhibited by a rule of the stock exchange, the brokers, according to appellants, attempted to consummate the trans-

action in the form of an executory agreement wherein they actually bought the stock for Herrlein, rather than appellants, and held it for him at all times. In other words, so it is strenuously urged, they acted both as principal and agent in the same transaction. This, it is contended, was a breach of duty and, in the absence of a full disclosure of all the circumstances of the transaction, entitled appellants to repudiate. That appellants did attempt to repudiate after the stock had declined in price is not denied. Undoubtedly when a broker, in executing an order, departs from established custom, or rules of practice universally adhered to, he is legally obligated to make full disclosures of his conduct to the client, or else the client may repudiate the entire transaction. *Gilman Stock Exchange Law*, p. 136; *Dos Passos on Stock Brokers*, p. 376; *Duff v. Duff*, 71 Cal. 513, 12 P. 570; *Marye v. Strouse* (C. C.) 5 F. 483; *British American Assurance Co. v. Cooper*, 6 Colo. App. 25, 40 P. 147. It is admitted that appellants were not informed of the change in rules of the stock exchange. Assuming then that the transaction was irregular in this respect, it still does not appear that appellants suffered any detriment by reason of the irregularity. The evidence clearly reveals that it made little difference to appellants whether the order was filed on the floor of the stock exchange or in the "street." Moreover, the trial court found, in effect, that there had been a ratification of the brokers' acts by the appellants and we cannot say, as a matter of law, that the evidence does not sustain the finding. The escrow agreement, which appellant *Fred A. Tocchini* admitted he read and signed, was ample notice that he was actually dealing with Herrlein as seller. Since the record discloses that appellant had been a party to similar transactions on previous occasions, it is difficult to believe that he was not fully coversant with every step in the transaction. A second irregularity, which appellants claim warranted a repudiation of the transaction, even as against Herrlein, was the alleged failure of *Lilienthal, Bremer & Co.* to advise appellants of the refusal by *Wells Fargo Bank & Union Trust Company* to act as escrow holder. The evidence discloses that ten days after the trust company had receipted for the property, it decided not to act for the parties any further and thereupon returned the agreement and collateral to *Lilienthal, Bremer & Co.* Appellants testified that they did not learn of the trust company's action until just before the present suit was commenced. On the other hand, *Max P. Lilienthal*, a member of the brokerage firm, testified that after the disastrous drop in prices on June 11th, *Fred A. Tocchini* came to his office and demanded a copy of the escrow agreement; that he signed and handed appellant a copy of said agreement and then advised him that, since the trust company had refused to act any further in the matter, the

firm of Lillenthal, Bremer & Co. was holding the agreement and collateral; that appellant voiced no objection to this arrangement. The trial court evidently determined that the appellants not only had been informed of the trust company's action, but, by failure to make objection, had actually given assent to the course pursued by the brokers. It is scarcely necessary to cite the well-known rule that where the evidence is conflicting it is within the province of the trial court to pass upon its weight and sufficiency. *Jennings v. Weibel*, 204 Cal. 488, 268 P. 901; *Reay v. Butler*, 95 Cal. 206, 30 P. 208. We may add that the fact that appellants, after being furnished with a copy of the escrow agreement, deposited additional collateral with Lillenthal, Bremer & Co. to protect the contract, furnishes some evidence that they were willing to proceed with the transaction notwithstanding the fact that Lillenthal, Bremer & Co. had supplanted the trust company as escrow holder.

[6, 7] Appellants further contend that the escrow agreement, even if not a nullity, was not susceptible to the construction placed upon it by the court below. This contention is based on the assumption that, while the original oral contract was for the outright purchase of the stock, the subsequent escrow agreement constituted a novation, or, at least, a modification thereof. In this connection appellants urge that said escrow agreement, being in writing and signed by the parties, entirely superseded the prior oral stipulations, and that the agreement, in its last analysis, was nothing more than an option to purchase. Respondents, on the other hand, while admitting that the instrument was inartificially drawn, suggest that it may be regarded merely as an awkward and ineffectual attempt of the parties to reduce their oral stipulations to writing. The question here arises, What is the legal effect of the written instrument? If the contract between the parties was partly oral and partly written, as suggested by respondents, and which seems to have been the theory of all parties at the trial, since evidence was received, without objection, as to the terms of the oral agreement, then, of course, the writing would stand as against any of the oral stipulations in conflict therewith. *Standard Box Company v. Mutual Bisquit Company*, 10 Cal. App. 746, 103 P. 938; *Peterson v. Chaix*, 5 Cal. App. 525, 90 P. 948. The trial court, therefore, necessarily concluded that there was no such conflict. It cannot be denied that the escrow agreement was clumsily drawn and that paragraph three thereof lends color to appellants' claim with respect to an option. Then, too, there is no explicit promise on the part of respondent Herrlein to sell, or on the part of the appellant Tocchini to buy. Moreover, it is admitted by respondents that the provision therein for the payment of \$1,600 is erroneous, this

amount, being Herrlein's profit on the transaction, having been included in the purchase price of \$45,657.50. It is manifest, therefore, that the agreement is ambiguous in several particulars. However, it seems not to be so lame with respect to the mutual obligations of the parties as appellants profess to believe. The parties are designated as buyer and seller, the price is named and the property identified. In these circumstances it may be implied that Herrlein agreed to sell and that Tocchini agreed to buy. *Gregg v. McDonald*, 73 Cal. App. 748, 239 P. 373; *Du Brutz v. Bank of Visalia*, 4 Cal. App. 201, 87 P. 467, 469. Construing paragraph two with the subject-matter preceding it, it would appear that the parties, in addition to all their stipulations, and somewhat apart from them, sought to deal with the contingency of a falling market should it occur before the due date of the obligation. In other words, the gravamen of the provision is that at all times before July 16, 1928, the buyer shall keep on deposit cash or collateral equal to twenty-five per cent. of the market value of the securities in escrow. This does not seem an unreasonable precaution for insertion in a sale agreement, as distinguished from an option, when it is remembered that the seller's profit on the transaction had been definitely fixed, while the buyer's pecuniary opportunity was limited only by the gullibility of the speculative public. Taking the entire transaction by its four corners, the trial court concluded that the deposit was intended solely as security for performance by the buyer of the principal obligation. In other words, the trial court found from all the evidence that the escrow agreement was not intended by the parties as a novation or modification of the oral contract.

It may be observed that while counsel on both sides indulge in much speculation and conjecture as to the terms of the transaction, as evidenced by both the oral and the written agreement, appellant Fred A. Tocchini appeared not to have entertained the slightest doubt. He frankly admitted on cross-examination that when he ordered a "buyer 60" contract he knew he would have to take the stock at the expiration of sixty days, and that the only reason he did not do so was because he lacked the necessary funds. We quote the following excerpt from his testimony:

"Q. You say that Mr. O'Connell told you it [the escrow agreement] was a buyer 60 contract for 200 shares? A. Yes, sir. * * *

"Q. Now, you knew it was a buyer 60 contract, didn't you? A. Yes. * * *

"Q. And you knew that it meant that you had obligated yourself to purchase 200 shares of Bancitaly stock and to pay for it within 60 days? A. Yes, sir.

"Q. And with that knowledge you told Mr. O'Connell to go ahead and make this deal

for you? A. To buy 200 shares buyer 60.

* * *

"Q. Why didn't you go ahead and take the 200 shares? A. Because I never had the money to pay for it.

"Q. Is that the only reason you did not do it, because you did not have the money to pay for it? A. Yes, sir.

"Q. Why did you make a demand upon Lillenthal, Bremer & Co. to return to you the \$12,000 for 263 shares of stock? Was it because you did not have the money to pay for the 200 shares? What is your answer? A. Yes, sir."

[8] It thus appears that appellant himself claimed no modification of his oral contract. On the contrary, he reaffirmed it, as it were, and gave the entire transaction a practical construction—a construction consistent with his previous conduct. When a contract requires construction the parties thereto have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275; *Work v. Associated Almond Growers*, 102 Cal. App. 232, 282 P. 965.

It is conceded by respondents that the trial court should not have allowed interest on appellants' deposit of \$12,000. The judgment should be modified accordingly, and as so modified is affirmed.

We concur: KNIGHT, Acting P. J.; CASH-IN, J.

128 Cal.App. 635

MENNING v. SOURISSEAU.

Civ. 8296.

District Court of Appeal, First District, Division 1, California.

Jan. 13, 1933.

1. Appeal and error ⇨1010(1).

Statute authorizing appellate court to make additional findings *held* not to abrogate general rule that reviewing court is bound by findings, if based on substantial evidence (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

2. Appeal and error ⇨1011(1).

Determination of conflict in evidence is within province of trial court.

3. Appeal and error ⇨1011(1).

Where defendant's testimony, standing alone, uncontradicted, is clear and convincing, appellate court cannot reverse judgment on ground that such evidence is contradicted by other evidence.

4. Reformation of instruments ⇨43.

Every presumption favors view that written instrument expresses true intent of parties (Civ. Code, § 3399).

5. Reformation of instruments ⇨43.

Burden of showing that instrument does not express true intent of parties is on party seeking to avoid plain terms (Civ. Code, § 3399).

6. Reformation of instruments ⇨45(2).

Party seeking reformation of contract on ground of mutual mistake must establish mistake by clear and convincing evidence (Civ. Code, § 3399).

7. Reformation of instruments ⇨45(9).

In lessee's action for damages or specific performance, evidence *held* to support finding that condition that lessor should be able to borrow sufficient money to finance contemplated improvement was erroneously omitted from written lease, warranting reformation (Civ. Code, § 3399).

8. Pleading ⇨236(6).

Granting permission to file amendment to answer, setting out clauses allegedly omitted from lease sought to be reformed, *held* not abuse of discretion, in view of original answer.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by A. Menning against George Sourisseau. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

L. H. Phillips, of Los Angeles, for appellant.

Ewell D. Moore, of Los Angeles, for respondent.

JORGENSEN, Justice pro tem.

This is an action instituted by the plaintiff, appellant here, against the defendant, respondent here, seeking specific performance of a lease, or alternative relief in damages in the sum of \$26,200, in the event he cannot be granted specific performance. In this lease defendant was lessor and plaintiff was lessee, which lease covered three lots owned by defendant in the city of Hynes, in Los Angeles county. The lease was in writing, and leased the said premises to plaintiff for a gasoline service station and garage business for a period of five years. At the time of the execution of the lease on January 26, 1929, plaintiff paid to defendant \$50 for the first month's rent, and thereafter on February 4, 1929, he paid defendant the sum of \$150 for the second and last month's rent. The defendant agreed to erect and place upon said premises certain buildings and improvements. The complaint alleges that defendant failed,

neglected, and refused to comply with the terms of said lease and to erect and place upon said premises said buildings and improvements.

The defense to the action is based on the allegations in the answer to the effect that by mutual mistake, inadvertence, and neglect of both parties to the lease they failed to incorporate in said written lease a provision agreed to by the parties, that is to say, defendant alleges it was agreed between the parties, in order to erect said buildings and make said improvements, that it would first be necessary for the lessor to borrow the money secured by a lien on the property, and that there was to be inserted in said lease a condition wherein and whereby the lessor was to make application for a loan upon said property, the funds derived therefrom to be used to erect the buildings and to make the other improvements upon said property as set forth in the lease, and that the failure of the lessor to procure said loan for said purposes within thirty days from the date of the lease to operate to terminate the lease, and in such event the lessor should forthwith return the deposit of \$200 to the lessee.

There is no question but that defendant failed to erect the buildings and let the plaintiff into possession as agreed, although the record shows that he commenced work upon the same, but the trial court found in favor of the defendant on the special defense above set forth, and further found in effect that defendant had endeavored in good faith to obtain such a loan, but, on account of a suit to quiet title having been instituted, he was unable to procure a loan on the property, that defendant did not know of the pendency of said suit until February 14, 1929, and that he thereafter and on that day offered to return the plaintiff his \$200 deposit, which plaintiff refused to accept. The court gave judgment for defendant and ordered the lease to be reformed in accordance with defendant's contentions, but gave judgment for plaintiff for the \$200 deposited as rent.

[1] The plaintiff claims that the evidence does not support the findings on the special defense above set out. He complains bitterly because the trial court, in dealing with the testimony given by the four parties to the oral conversations leading up to the written lease, rejected the testimony given by himself and his two sons in no uncertain language. He contends that the cardinal doctrine that, where upon a question of fact the testimony in the court below involves a substantial conflict, the action of the court below will not be disturbed, is no longer the rule, since the enactment of section 956a of the Code of Civil Procedure in 1927 (St. 1927, p. 583). There is no merit in this contention. As said in *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, 974: "Neither the constitutional amendment nor section 956a of the

Code of Civil Procedure was intended to abrogate the general rule respecting the powers of the trial court in its determination of questions of fact or the rule that the reviewing court is bound by the findings of the trial court if based upon substantial evidence."

[2] The special defense above set forth was supported in all particulars by defendant's testimony. It is true that it stands unsupported except by some corroborating circumstances, while it was denied by plaintiff's witnesses, but the determination of the conflict was within the province of the trial court.

[3] His testimony standing alone, uncontradicted, is clear and convincing, and this court cannot reverse the judgment of the trial court on the ground that such evidence is contradicted by other evidence. "The only question which we have to decide in respect to the sufficiency of the evidence, is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make out a prima facie case." *Jarnatt v. Cooper*, 59 Cal. 703; see, also, *Roush v. Kirkman*, 42 Cal. App. 115, at page 119, 183 P. 353.

Defendant's testimony is to the effect that, before the agreement was signed, it was agreed that the obtaining of the loan was a condition to be inserted in the lease, and, if the loan was not obtained within thirty days, the lease was to terminate. Not only does it appear in his direct examination, but on cross-examination in response to a leading question and questions by plaintiff's counsel, defendant so testified without qualification, and he further testified that, after the loan failed, he was surprised that the clauses set forth in his amendment to his answer were not in the lease. It appears from defendant's testimony clearly and unequivocally that it was the understanding of both parties to the lease that the clauses in question were to be inserted in the written lease.

The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in civil cases. Code Civ. Proc. § 1844. The trial judge or a jury are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number. Code Civ. Proc. § 2061.

[4-6] Every presumption in equity favors the view that a written instrument deliberately executed expresses the true intent of the parties, and the burden of showing that an instrument does not express the true intent or meaning of the parties is upon him who seeks to avoid its plain terms, and one who seeks the reformation of a contract on the ground of mutual mistake must show the mistake by clear and convincing evidence. *Burt v. Los Angeles Olive Growers Associa-*

tion, 175 Cal. 668, 166 P. 993. The mistake must be a mutual mistake or a mistake of one party which the other knew or suspected. Civ. Code, § 3399.

[7] The defendant was a hotel keeper, had some considerable experience in business matters, and dictated the lease in question to a real estate broker in the presence of the plaintiff and one of his sons. The realty broker then prepared the lease, and it was executed by the parties. The realty broker could not remember anything being said about the loan, and the defendant could not remember anything being said about the loan in the presence of the realty broker, but that does not of itself render defendant's testimony improbable. It may well be that all the parties, when it came to drawing and dictating the lease, forgot all about their agreement to make the lease conditional on obtaining the loan. Defendant's demeanor on the stand, his appearance and his manner of giving testimony, may have been sufficient to convince the trial judge of the defendant's honesty, integrity, and the truthfulness of his testimony. That being true, his testimony alone sustained the burden of proof, overcame the presumption that the written lease embodied the true intent of the parties, and justified the trial judge in his conclusion that the plaintiff and his sons did not tell the truth on the stand.

[8] Appellant also insists that the trial judge abused his discretion in permitting the defendant by an amendment to his answer to set out in *hæc verba* the clauses alleged to have been omitted from the lease. As the answer stood previous to this, the appellant was informed of this contemplated defense. He could not have been taken by surprise, and, moreover, he asked for no continuance of the trial to meet any alleged new issue. The granting of permission to file such amendment to the answer was not error, nor an abuse of discretion.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; OASHIN, J.

128 Cal.App. 550

ELLIS v. BURNS VALLEY SCHOOL DIST.
OF LAKE COUNTY.

Civ. 4662.

District Court of Appeal, Third District,
California.

Jan. 7, 1933.

Hearing Denied by Supreme Court March 6,
1933.

1. Schools and school districts ⇨89.

School district held not liable for injuries to pupil colliding with another pupil

while playing game during physical education period, on theory of negligence or nuisance (School Code, § 2.801, and § 3.730 et seq.).

School district was not liable for injuries to pupil received while playing game during physical education period during school hours on school grounds with teacher in attendance and through no fault of any pupil by colliding with another pupil, on theory of negligence, within School Code, § 2.801, because injured pupil was about 13 years of age and weighed 75 pounds, whereas pupil with whom he collided was 15 years of age and weighed over 200 pounds.

2. Schools and school districts ⇨89.

To make school district liable for injuries to pupil, in absence of violation of law, burden was on plaintiff to prove lack of care commensurate with circumstances or willful injury.

3. Negligence ⇨56(1).

Before negligence can be actionable, causal connection proceeding in unbroken course to point of injury must be shown between negligent act and injury.

4. Negligence ⇨59.

One may not be held responsible for consequences following from act which could not have been anticipated by reasonably prudent person.

5. Schools and school districts ⇨89.

Statute making school district liable for injuries from defective condition of buildings, grounds, and property, held inapplicable to injury to pupil sustained from colliding with another pupil during game (School Code, § 3.730 et seq.; St. 1923, p. 675).

Appeal from Superior Court, Lake County;
Benjamin C. Jones, Judge.

Action by Phillip F. Ellis, Jr., a minor, by Phillip F. Ellis, his guardian ad litem, against the Burns Valley School District of Lake County. Judgment for defendant, and plaintiff appeals.

Affirmed.

Lovett K. Fraser, of Lakeport, for appellant.

H. G. Crawford and Burt W. Busch, both of Lakeport, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, a pupil of the Burns Valley school, was injured during a course in physical education, and as a result thereof, brought this action through his guardian ad litem against the school district. The case was

tried by the court sitting without a jury, and from a judgment in favor of defendant, plaintiff appeals.

Plaintiff was a youth aged about thirteen years, weighing about seventy-five pounds, and was a pupil in the eighth grade of the Burns Valley school. Glenn Baylard, involved in the injuries as hereinafter set forth, was a member of the sixth grade in the same school and was fifteen years of age weighing somewhat over two hundred pounds.

For twenty minutes of each school day all of the pupils of the fifth, sixth, seventh, and eighth grades were compelled to take physical education as a part of the regular school work under the supervision of a teacher in charge of the class. On the day in question the members of the class in physical education were, as a part of the requirements of the course, engaged in playing a running game known as Black Man or King King Calico. The game is played by one of the participants being designated as king and the others then run from one goal line to the other about forty yards distant. It is the object of the king to capture as many of the opposition as possible by tagging them three times, when they in turn, join with the king in attempting to tag the others on the opposing side until all have been captured, those untaged endeavoring to avoid thus being captured. Phillip Ellis, Jr., and Glenn Baylard were on opposite sides and while running across the playing field they collided, which resulted in the injuries to plaintiff complained of.

[1] The question involved is whether a school district is liable in damages for injury to a pupil received while playing a game during the physical education period in school hours on the school grounds with a teacher in attendance, and through no fault of any pupil of the school, by colliding with another pupil, having in mind also the difference in the age, school grade, and weight of the various pupils in the group.

The board of education of each county must, in accordance with article 6 of chapter 1, part 5, division 3, of the School Code (section 3.730 et seq.), prescribe a course of physical education for all pupils enrolled in the day elementary schools during periods which shall average twenty minutes of each school day, compulsory for all pupils except those who may be excused from such training on account of physical disability.

There is no contention in this case of injury resulting from the dangerous or defective condition of any school grounds, equipment, or property, and appellant in order to maintain his action against the district must bring himself within the provisions of section 2.801 of the School Code, which limits the liability of the district to injuries on ac-

count of its negligence. Appellant predicates the asserted negligence of the district on the fact that it compelled appellant, a youth of thirteen years, weighing about seventy-five pounds to join in a running game with a group in which one member was aged fifteen years and weighed approximately two hundred pounds.

[2] Appellant does not charge that respondent violated any general or school law and it therefore devolves upon him to prove either lack of care commensurate with and appropriate to all the surrounding circumstances or willful injury.

California Jurisprudence states the general rule as follows: "But where a person pursues a calling or does an act lawful in itself and not in its nature hazardous or so conducive to harm as to be a nuisance, he may be held liable for injury arising therefrom only when he has been guilty of lack of care appropriate to the circumstances, or of willful injury." 19 Cal. Jur. p. 545.

If we analyze the rule as stated above with reference to the facts before us, we find that respondent was performing a lawful act, viz., giving a course in physical education as prescribed by the school law. The trial court found the game was not hazardous, and although the evidence shows that prior to the accident there were some minor injuries and that children in their play had collided at times, we cannot say that the game as played is inherently hazardous or that any particular peril is attendant upon its play. To so hold would be to bar activity on the school ground, a thing impossible and undesirable and contrary to the very objects sought to be attained by physical education.

Among the aims and purposes of physical education as set forth in the School Code are, among others, to develop organic vigor, to provide neuro-muscular training, to promote bodily and mental poise, to secure the more advanced forms of co-ordination, strength and endurance, and to promote such moral and social qualities as appreciation of the value of co-operation, self-subordination and obedience to authority and higher ideals, courage, and wholesome interest in recreational activities.

Neither can we say the game was so conducive to harm as to be a nuisance, for "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Section 3482, Civ. Code.

Neither can we say that respondent was lacking in the required degree of care for the protection of appellant.

In giving the courses in physical education the school was divided into two groups, the children of the first, second, third, and fourth grades in one group, and the pupils of the fifth, sixth, seventh, and eighth grades

in another group, under the supervision of the teacher of physical education.

The game of tag, from which the game in question is undoubtedly developed, has been played by the children of the race long before the annals of history, and surely a court cannot say that there is anything inherently dangerous in the game nor that the school authorities had not given the proper care or consideration to the welfare of the players. A school cannot be required to exercise greater care than was here shown nor could it be considered necessary or proper to exclude a pupil from play because he was larger or stronger than his fellows. The evidence here also shows that these boys were not pursuing one the other, but were intent upon different objects and came together with sufficient force so that both were cut and bruised. As a matter of common knowledge if two boys of equal size collide they might easily cause the injury here sustained, namely, a broken nose.

An examination of the evidence shows quite clearly that the colliding of the two boys was an unavoidable accident. Upon this subject, the court found: "That said injury was sustained by the said Phillip F. Ellis, Jr., and any and all injuries sustained by him while on the grounds and premises of the said defendant school district were caused by his accidentally coming in contact with one Glenn Baylard while playing a game upon the grounds of the said defendant school district during a period of time allotted to physical education."

The only element then, under which this action could be maintained, is that of willful injury, and if we accept the definition of willful to mean intentional or reckless indifference to the safety of others, or an intentional failure to perform a plain duty, we readily see that the case is entirely lacking in any element of willfulness. Even appellant makes no such contention.

"Proximate cause" has been defined as "that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Baillargeon v. Myers*, 180 Cal. 504, 182 P. 37, 39.

[3] Before negligence can be actionable a casual connection which proceeds in an unbroken course to the very point of the infliction of the injury must be shown between the negligent act and the injury. 19 Cal. Jur. 557. For no matter how negligent a defendant may have been in the abstract, a cause of action is not made out unless that negligence is in some way fastened to the particular injury for which recovery is sought. *Springer v. Pacific Fruit Exchange*, 92 Cal. App. 732, 268 P. 951.

18 P. (2d)—6

[4] The act of the respondent herein complained of must be connected with the act of the boys in running into each other, and it must not only appear that the injury is the natural and probable consequence of the negligent or wrongful act, but that it ought to have been foreseen in the light of the attendant circumstances. One may not be held responsible for those consequences following from an act which could not have been anticipated by a reasonably prudent person.

[5] Appellant bases his right to recovery under the provisions of Act 5619, Gen. Laws (Stats. 1923, p. 675) and the following cases arising thereunder: *Ahern v. Livermore Union High School*, 208 Cal. 770, 284 P. 1105; *Dawson v. Tulare Union High School*, 98 Cal. App. 138, 276 P. 424; *Damgaard v. Oakland High School*, 212 Cal. 316, 298 P. 983; *Maede v. Oakland High School*, 212 Cal. 419, 298 P. 987.

This act provides as follows: Paragraph 2. " * * * School districts shall be liable for injuries to persons * * * resulting from the dangerous or defective condition of * * * buildings, grounds, works, and property. * * * " We do not believe this act is applicable to the instant case and the only act under which appellant might maintain this action is section 1623 of the Political Code as amended in 1923 (St. 1923, p. 298), from which we have heretofore quoted.

An examination of the cases cited above reveal the fact they each dealt with a piece of defective equipment or property. In the *Ahern* Case a boy was injured by coming in contact with a power saw. In the *Dawson* Case the vibration of the floor caused a piano to fall from a "dolly" causing the injury. In the *Damgaard* Case it was an explosion caused by a chemical reaction in a test tube. In the *Maede* Case the oxygen tank exploded. In the case of *Smith v. Martin* (1911) 2 K. B. 775, Ann. Cas. 1912A, page 334, the plaintiff was directed to "poke the fire and draw out the damper," and in complying with the order, her dress became ignited. In the case of *Redfield v. School District No. 3*, 48 Wash. 85, 92 P. 770, a pupil was scalded by the upsetting of a bucket of boiling water carelessly left unguarded. These cases are clearly distinguishable from the present case and are of no assistance in its solution.

We have examined the original complaint filed in this action to which a demurrer on the ground of uncertainty was sustained, but we do not consider that matter at this time in view of the conclusions reached by this court.

For the foregoing reasons the judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

128 Cal.App. 662

MOORE v. SPECIALTY OIL TOOL CO.

Civ. 634.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1933.

Hearing Denied by Supreme Court March 13,
1933.**1. New trial ☞93.**

Statute authorizing new trial upon reporter's death or disability, rendering it impossible to obtain full transcript, is not mandatory, but vests trial court with wide discretion (Code Civ. Proc. § 953e).

Code Civ. Proc. § 953e, provides, in substance, that when it is impossible to have the phonographic report of the trial transcribed by a stenographic reporter because of the death or other disability of a reporter who participated in the trial, the court or judge thereof "shall have power" to order a new trial.

2. New trial ☞93.

Denying motion for new trial, made upon ground that, through death of reporter, it was impossible to obtain full transcript, *held* not abuse of discretion (Code Civ. Proc. § 953e).

3. Appeal and error ☞854(1).

If trial court's action may be sustained on any ground, appellate court must affirm judgment.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Roy H. Moore against the Specialty Oil Tool Company. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

John J. Beck, of Los Angeles, for appellant.

Leonard Evans, of Anaheim, for respondent.

JENNINGS, J.

The appeal herein is presented by the defendant from a judgment rendered in favor of plaintiff for the full amount demanded in the complaint. Since the appeal is taken on the judgment roll alone, it is conceded by defendant that, in accordance with the well-established rule, the court's findings are conclusively presumed to be supported by the evidence produced during the trial. *Ochoa v. McCush*, 213 Cal. 426, 430, 2 P.(2d) 357. Inspection of the findings and of the pleadings filed in the action impels us to the conclusion that the appeal from the judgment must fail. In connection with its appeal herein from the judgment, defendant, however, urges that the court erred in denying a motion for a new trial.

Judgment in respondent's favor was rendered on March 4, 1930. Notice of entry of the judgment was given on March 7, 1930. Written notice of appeal and request for the preparation of a transcript in accordance with the provisions of section 953a, Code of Civil Procedure, was filed on March 15, 1930. Because of the death of the official court reporter who had reported a portion of the testimony given during the early part of the trial, and the inability of other reporters to read the shorthand notes of the deceased reporter, it was impossible to prepare a full, true transcript of the testimony which was given. A transcript purporting to contain a full and correct record of the proceedings, with the exception of that portion reported by the deceased reporter, was prepared and was presented to the judge who had presided during the trial. Respondent objected to the certification by the court of the transcript, and the objection was sustained. Appellant thereupon filed with this court a petition for a writ of mandate directed to the judge who had tried the cause requiring him to certify to the correctness of the transcript prepared and presented as aforesaid. Appellant's petition for the writ was denied, and an application to have the cause heard in the Supreme Court was denied on November 27, 1931. *Specialty Oil Tool Co. v. Ames*, 117 Cal. App. 283, 3 P.(2d) 977. On October 23, 1931, more than 19 months subsequent to the entry of judgment, appellant gave notice of its intention to move for a new trial on the ground that it was impossible to have prepared a full transcript of the proceedings which had occurred during the trial of the action because of the death of the reporter. The notice thus given stated that it would be based on the provisions of section 953e of the Code of Civil Procedure. The record herein shows that the motion was heard November 6, 1931, and that it was denied. On December 7, 1931, appellant applied to this court for a writ of mandate directing the trial court to grant appellant's motion for a new trial on the ground that the provisions of section 953e, Code of Civil Procedure, are mandatory. The application was denied on December 9, 1931.

In support of the appeal from the court's order denying the motion for a new trial, it is urged, first, that the provisions of section 953e, Code of Civil Procedure, are mandatory; and, second, that, if it be held the provisions of the above-cited section are not mandatory and serve to repose in the trial court a discretion in the matter of granting or refusing a new trial, then, under the circumstances which here appear, the court abused its discretion.

Prior to 1931 a trial court was without jurisdiction to grant a new trial in a case where, because of the death of a court reporter who had participated as a stenographic

reporter during the trial, a reporter's transcript could not be prepared. *Diamond v. Superior Court*, 189 Cal. 732, 210 P. 36, 39. The Legislature of California in 1931 added a new section to the Code of Civil Procedure numbered 953e (St. 1931, p. 410). This section is in the following language: "Death or disability of reporter. When it shall be impossible to have the phonographic report of the trial transcribed by a stenographic reporter as provided by section 953a of this code because of the death or other disability of a reporter who participated as a stenographic reporter at the trial, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been or is to be taken and to order a new trial of the action or proceeding."

[1, 2] The very language of this statute indicates a clear intention on the part of the lawmaking body to authorize a trial court to grant a new trial in a proper case. But this is the extent of the language employed. There is no intimation or suggestion that there is imposed upon the court a duty to grant a new trial. The words "shall have power" are not equivalent to "must." We are of the opinion therefore that the statute under consideration vests in the trial court jurisdiction to entertain a motion for a new trial under the circumstances herein appearing, and a discretion to grant or refuse such motion. Nor is it a violent assumption that the discretion thus conferred is a wide discretion. The granting or denial of motions for new trial generally is a matter in which the trial court is vested with so wide a discretion that its abuse must be made clearly to appear before an appellate court is warranted in disturbing its action. In the instant case the trial court had heard all of the evidence produced during the trial, and upon the evidence thus presented had arrived at a decision. It would be anomalous, at least, to anticipate that the court should arrive at a different result upon a retrial where, so far as appears, the evidence would be identical with that which had theretofore been presented. Under the circumstances disclosed by the record, we are of the opinion that no abuse of discretion was committed by the trial court in denying appellant's motion for a new trial.

In the final analysis, the single reason that is suggested for reversal of the court's action in denying the motion is that appellant, through no fault of its own, is penalized by being deprived of the opportunity of having an appellate court review a judgment which it considers erroneous. The reasoning of the Supreme Court in *Diamond v. Superior Court*, supra, furnishes a full and sufficient answer

to this contention. The court there said: "There may be an occasional hardship in denying a new trial in cases such as this. An injustice might easily be worked if the rule were otherwise. Every presumption is in favor of the fairness, impartiality, and regularity of the proceedings of the trial court, which led to the judgment and in denying the motion for a new trial on the grounds enumerated in the statute. The party in whose favor the judgment was rendered, and who successfully resisted the motion for a new trial would, on an appeal, be entitled to the benefit of those presumptions. To permit the application of the rule contended for by the respondent would be to deprive such party of his judgment, and the intendments in its support, and to force him to re-establish his claim, because, it is asserted his adversary has been, without his own fault, deprived of the means of pointing out errors which are said to have been committed on the former trial. *Alley v. McCabe*, 147 Ill. 410, 415, 33 N. E. 615."

[3] The conclusion at which we have here arrived that the trial court is vested with wide discretion in the matter of passing upon motions for new trial made pursuant to the provisions of section 953e, Code of Civil Procedure, has been reached without reference to respondent's contention that the statute is not retroactive, and is therefore not applicable to the situation here presented.

Appellant further urges that the trial court denied its motion solely on the ground that as an appeal had been taken from the judgment the court had thereby lost jurisdiction to grant the motion. Irrespective of whether or not the court entertained such an opinion, the record does not lend support to appellant's voluntary statement in this regard. The record contains what is evidently a copy of the minute order. All that appears therefrom is that the motion was denied. Furthermore, even though the court entertained the opinion suggested and announced it as the reason for denying the motion and assuming further that the court's opinion in this regard was erroneous, it does not follow that the order denying the motion should be reversed. The rule is too familiar to require any comment other than the statement of it that if the trial court's action may be sustained on any ground it is the duty of the reviewing court to affirm the order. It is the court's action in denying the motion which is here reviewable, and not the court's opinion or statement of reasons for its action.

The judgment from which this appeal has been presented is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

DEVANEY v. ATCHISON, T. & S. F. RY. CO.*

Civ. 7184.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1932.

Hearing Granted by Supreme Court Feb. 27, 1933.

1. Evidence ⇨19.

It is common knowledge that freight cars are usually coupled by appliances known as "knuckles," which automatically join and become locked when cars are brought together, and that they are uncoupled by rod which raises pin in coupling.

2. Master and servant ⇨278(6).

Evidence showed that foreman made honest and reasonable effort to uncouple cars from which brakeman fell, and that coupler failed to open, and hence coupler did not comply with Safety Appliance Act (Safety Appliance Act § 2; 45 USCA § 2).

3. Master and servant ⇨111(1½).

Railroad had absolute duty to equip its cars with automatic couplers which could be uncoupled at all times without necessity of men going between ends of cars (Safety Appliance Act § 2 [45 USCA § 2]).

4. Master and servant ⇨293(12).

Instruction that proof of failure of coupler to work at any time showed that railroad violated Safety Appliance Act *held* not erroneous (Safety Appliance Act § 2 [45 USCA § 2]).

5. Master and servant ⇨111(1½).

That coupler whose failure to work caused injury to brakeman worked either before or after occasion of injury did not relieve railroad from liability (Safety Appliance Act § 2 [45 USCA § 2]).

6. Master and servant ⇨111(1½).

Failure of automatic coupler to uncouple produces same legal liability as failure to couple (Safety Appliance Act § 2 [45 USCA § 2]).

7. Master and servant ⇨288(1).

Generally, question of assumption of risk is question of fact for jury.

8. Master and servant ⇨288(1).

When evidence is clear, direct, and undisputed, question of assumption of risk becomes question of law for court.

9. Master and servant ⇨213(3).

Though brakeman might have set brake on top of car without approaching end of car, brakeman did not assume risk of falling on sudden stop of train, where such operation of train was very unusual and unexpected.

10. Master and servant ⇨285(7).

Whether failure of coupler to work was proximate cause of injury to brakeman who

fell from car *held* for jury (Safety Appliance Act § 2 [45 USCA § 2]).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by William M. Devaney against the Atchison, Topeka & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant.

Paul Blackwood, of Los Angeles, for respondent.

CRAIG, J.

The respondent, an employee of the appellant, was injured while engaged in the performance of his duties as a railway brakeman in interstate commerce. In an action for damages before a jury, a verdict and judgment were rendered in his favor, from which judgment this appeal was taken.

That the plaintiff fell from the leading car of a freight train which, while backing upon a sidetrack, was suddenly stopped, and that he received permanent injuries, is conceded. The principal issues presented were as to whether or not the accident was proximately caused by a defective appliance, which constituted a violation of the Safety Appliance Act (45 USCA § 1 et seq.), and whether the plaintiff assumed the risk of such a danger as an incident to his employment. The sufficiency of the evidence to justify the verdict and judgment is in these respects strenuously questioned by appellant.

[1] There was undisputed evidence before the jury that the train was backing in an easterly direction for the purpose of placing several cars upon the siding; that the respondent had been directed by his foreman to set a brake on the top of the easterly or leading car when they were separated from the rest of the train, which was attached to a locomotive; that he had walked along the top of the train to a point about six feet from said brake when the foreman, who was proceeding beside the track, reached between the twenty-first and twenty-second cars as though in the act of uncoupling them and signalled the engineer at the rear to stop. It is a common knowledge that freight cars are usually coupled by appliances known as "knuckles," which automatically join and become locked when the cars are brought together, and that they are uncoupled by a rod or lever which raises a pin in the coupling. The foreman testified that he gave the stop signal with one hand and took hold of

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 27 P.2d 635.

the lifter with the other. Another witness testified that the foreman "pulled on it two or three times," though this was denied by the latter. The engineer swore that the circumstances under which the train was moving were such that the coupling could have been opened—and the foreman also admitted that with proper handling the coupler would have opened—separating the cars and permitting them to continue easterly from the train when stopped, if the coupler had been in working order. On behalf of the appellant, evidence as to successful tests of this appliance after the accident was introduced, but it is conceded that they were made while the cars were not being operated and not under the conditions admittedly controlling when the accident occurred. It is insisted that this and much other evidence which need not be recited was wholly insufficient to warrant the jury in finding, as it must have found, that an honest and reasonable effort was made to uncouple the cars, or that the coupling device was defective.

[2] In view of the purpose for which the train was being operated, it is not permitted to invade the province of the jury and hold as a matter of law, as appellant argues, that a preponderance of the "best" evidence established beyond question the existence of a perfect appliance, or that an honest and reasonable effort to uncouple the cars was not or need not have been made by the foreman. We think it sufficient to authorize the jury to conclude that the foreman in performance of his regular duties made such effort, and that the coupler failed to open. In such a case it has repeatedly been held as a uniform rule that, "if a coupler fails to work when an honest and reasonable effort is made to operate it, under circumstances and in the manner it is designed to be operated * * * the law is not complied with." *Burho v. M. & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300, 302. While, as said by the Texas Court of Civil Appeals, "it would be manifestly unfair to hold that the carrier had violated the statute until the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective" (*St. Louis, etc., R. Co. v. Bounds*, 244 S. W. 1099, 1102), it was said by the United States Circuit Court of Appeals: "We are convinced that evidence that the lifting pin did not work upon the first effort may be sufficient evidence of an existing defect, if it also appears that the effort was of a character and made at a time when it would have naturally been effective save for a defect." *Penn. R. Co. v. Jones*, 300 F. 525. And in *Philadelphia, etc., R. Co. v. Auchenbach* (C. C. A.) 16 F.(2d) 550, 552, many expressions of the United States Supreme Court are cited in support of the rule that "the test of the observance of this duty is the performance of the appliances. 'The failure of

CAL.REP.17-18 P.2d-21

the coupler to work at any time sustains a charge that the Act has been violated.'"

[3] But it is contended that the same rule does not apply where an automatic coupler fails to couple, as in an instance of its failure to uncouple, and that the mere failure of one to work in uncoupling does not render an employer liable, unless it further appear that the effort to uncouple was of a character and made at a time when it would have naturally been effective except for a defect in the appliance. Although some language to this effect is to be found in the opinion of the Circuit Court of Appeals in *Pennsylvania R. Co. v. Jones*, 300 F. 525, cases we shall cite later dispose of the contention that a different rule applies to uncoupling than to coupling cases. Concerning the above contention, an instruction given makes the law clear as to under what circumstances the coupler must be proven defective to create liability. It reads: "If you believe from the evidence in this case that a proper attempt was made to uncouple the cars upon which the plaintiff was riding, and that the automatic coupler between the said cars failed to work, and that by reason of the same the cars upon which the plaintiff was riding were not uncoupled from the rest of the train * * * then I instruct you that it was immaterial whether said coupler was operated prior to or after the said occurrence." But complaint is especially stressed that a certain instruction, numbered XX, was erroneous, in that in effect it declared that the mere failure of the coupler to work must be taken by the jury as a violation of the act and would require a verdict in favor of the plaintiff. This part of the instruction reads: "Under the Safety Appliance Acts of Congress it was the absolute duty of the defendant to equip its cars with automatic couplers which could be uncoupled at all times without the necessity of men going between the ends of the cars, and proof of a failure of a coupler to work at any time sustains the charge that said law was violated by the said defendant." As to this portion of the instruction, a mere reference to the act itself is sufficient to satisfy us that it was the absolute duty of the defendant to equip its cars with automatic couplers which could be uncoupled at all times without the necessity of men going between the ends of the cars. We quote from the statute: By the second section (27 Stat. 531, c. 196 [45 USCA § 2]), it is provided that "it shall be unlawful for any common carrier * * * to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." In *Chicago, B. & Q. R. Co. v. United States*, 220 U. S.

559, 31 S. Ct. 612, 615, 55 L. Ed. 582, it was said: "We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it." And further: "It cannot then be doubted that this court in the Taylor Case [210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061] considered the scope and effect of the safety appliance act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the 2d section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that nonperformance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and ascertaining their condition from time to time. That the Taylor Case, as decided by this court, has been so interpreted and acted upon by the Federal courts generally, is entirely clear, as appears from the cases cited in the margin."

[4-6] We find no error in the statement in the instruction that "proof of the failure of a coupler to work at any time sustains the charge that said law was violated by the said defendant." It clearly is the law that the fact that a coupler whose failure to work has caused an injury worked either before or after the particular occasion on which it did cause such injury does not in any way relieve the employer from liability. Such relief might result if the defendant's responsibility were based upon common-law grounds, but issuing out of the statutory provisions of the Safety Appliance Act here involved, and from these alone, the only question is whether or not the coupler worked where its attempted use was of a character and at a time when it would naturally have been expected so to do except for a defect—in other words, where the attempt to uncouple the car was a proper one—and not whether on some other occasion this particular coupler would work or may have worked. However, we are of the opinion that there is no merit in the contention that the failure of an automatic coupler to uncouple does not

produce the same legal liability as a failure to couple, and that decisions in coupling cases are not applicable. The following are all instances where the evidence showed a failure of couplers to work, and in each instance the decisions were cited to the effect that "under the Safety Appliance Acts the failure of a coupler to work at any time sustains a charge of negligence on the part of the carrier." Some of these cited decisions involved a failure of the appliance to couple and some to uncouple: *Chicago, I. & L. R. Co. v. Stierwalt*, 87 Ind. App. 478, 153 N. E. 807; *Holz v. Chicago, M., St. P. & P. R. Co.*, 176 Minn. 575, 224 N. W. 241; *Northcutt v. Davis*, 113 Kan. 444, 214 P. 1113; *Sacre v. St. L. Merchants' Bridge Term. R. Co.* (Mo. Sup.) 260 S. W. 85. The above-quoted language is from *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 31 S. Ct. 612, 55 L. Ed. 582, and is quoted with approval in *Northcutt v. Davis*, supra.

[7-9] Some evidence is quoted and argument is devoted to the various other positions on the train and methods which the respondent might have adopted in applying the brake without approaching the end of the car at a time when a sudden and unexpected stop might precipitate him to the ground. It is contended that, having such option and having adopted the latter course, he assumed the risk attendant upon the duty assigned him. There is no evidence, nor is it asserted, that the respondent had reason to anticipate the existence of the defect in appellant's appliances or the danger impending. As a general rule, "the question of assumption of risk is a question of fact for the jury (16 Cal. Juris. p. 1080, and cases cited). The only exception to this rule is that, when the evidence in the case is clear, direct, and undisputed, the question of assumption of risk becomes a question of law for the court." *Mappin v. Atchison, etc., R. Co.*, 198 Cal. 733, 247 P. 911, 915, 49 A. L. R. 1330. "It is not the law that, if there are two ways of doing a thing, the servant must choose the safer way at his peril. * * * If at the time of the injury he had no knowledge of the peril to which he was subjected, he is entitled as a rule to be compensated by the employer." *Williams v. Charleston & W. Carolina R. Co.*, 121 S. C. 23, 113 S. E. 300, 302. Since there was evidence which, if believed by the jury, would justify it in finding that the operation of the train at the time in question was "very unusual and unexpected," it cannot be said that the risk was such as the brakeman must be held to have assumed.

[10] Concerning appellant's contention that the failure of the coupler to work was not the proximate cause of the injury, it is sufficient to say that under any circumstances this was a matter of fact for the jury to determine under proper instructions. In this

instance the evidence was of such character as to have warranted the jury in concluding that the coupler was defective or that its failure to work was the proximate cause. The jury was properly instructed as to the definition of the term "proximate cause," and the general rules relative to that term and their application to the evidence in the instant case. Without considering the instructions individually, it may be said that in our opinion they correctly state the law.

We think the instructions given to the jury need not, in view of what has been said herein upon like questions, be further discussed. A careful review of the record convinces us that error does not exist.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

128 Cal.App. 640

GLORIA v. A COLONIA PORTUGUESA
et al.
Civ. 8355.

District Court of Appeal, First District, Division 1, California.

Jan. 13, 1933.

1. New trial $\S$ 161(4).

Respondent's failure to file consent to modification of judgment within time specified in order conditionally denying new trial rendered alternative portion of order granting new trial effective immediately on lapse of such time.

2. New trial $\S$ 163(1).

When trial court enters conditional order granting or denying new trial, its jurisdiction is exhausted, and thereafter it may not modify order except for inadvertence or mistake in entry thereof.

3. Libel and slander $\S$ 18.

Newspaper cartoon picturing ass in grotesque form intended to represent lecturer, with writing by innuendo charging lecturer with dishonestly accepting money, *held* libelous (Civ. Code, $\S$ 45).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by William S. Gloria, also known as Guilherme S. Gloria, against A Colonia Portuguesa, a corporation, and others. From a judgment against named defendant and another, named defendant appeals.

Proceedings relating to modification of judgment after order granting new trial, had

become final annulled. Appeal from original judgment dismissed.

See, also, 114 Cal. App. 268, 299 P. 807.

Alberto Moura and Louis B. De Avila, both of Oakland, for appellant.

Alfred J. Hennessy, of San Francisco, for respondent.

GANS, Justice pro tem.

Respondent was awarded damages in an action for libel instituted against A Colonia Portuguesa, a newspaper, Arthur V. Avila, its editor, and several others, but which was dismissed during trial as to all defendants except the newspaper and its editor, against whom the damages were awarded, and the newspaper has appealed.

The verdict of the jury was that respondent recover from the newspaper \$10,000 compensatory and \$1,000 punitive damages, and from the editor \$5,000 compensatory and \$5,000 punitive damages. Judgment was entered accordingly, and on May 28, 1931, the court made and filed the following order on motion for a new trial: "It appearing to the satisfaction of the court that the damages awarded are excessive and that the verdict is irregular in attempting to apportion compensatory damages between the defendant A Colonia Portuguesa, a corporation, and Arthur V. Avila, now therefore it is ordered that if within five (5) days plaintiff files his written consent to a modification of the judgment so that the same will award as compensatory damages the sum of \$2,000.00 against said defendants jointly and severally and as punitive damages the sum of \$1,000.00 against the defendant Arthur V. Avila, alone, the judgment shall be so modified accordingly and said defendant's motion for a new trial be and it is hereby denied. Otherwise, if plaintiff fails to file said written consent within five (5) days said defendant's motion for a new trial will be and it is hereby granted on the ground of the insufficiency of the evidence to justify the verdict rendered herein." Respondent made no attempt to comply with the condition imposed by said order within the five days succeeding the filing thereof; but on June 4, 1931, the seventh day after the order was filed, he filed a written consent to the modification of the judgment, and thereupon the clerk made the following entry: "June 4, 1931 No. 114450 Judgment modified to read \$2,000.00 against said defendants, jointly and severally and \$1,000.00 against defendant Arthur V. Avila."

[1, 2] Appellant contends that respondent's failure to comply with the condition imposed by said order within the five-day period succeeding the filing thereof made effectual and absolute, at the expiration of such period of time, the alternative portion of said order granting a new trial; and that consequently

whatever was done thereafter by plaintiff or the clerk relating to a modification of the judgment was a nullity. We are of the opinion that such contention must be sustained. The well-settled rule is that, when a trial court makes and causes to be entered a conditional order granting or denying a motion for a new trial, its jurisdiction is exhausted, and thereafter it has no power to change or modify the order except for inadvertence or mistake in the entry thereof (*Holtum v. Greif*, 144 Cal. 521, 78 P. 11; *United Railroads v. Superior Court*, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199; *Compton v. Northwest Engineering Co.*, 116 Cal. App. 523, 2 P.(2d) 1014); and that, unless the party upon whom the condition is imposed complies with such condition within the limitation of time fixed therefor, the alternative portion of the order becomes operative and final at once, at the expiration of such period of time (*Holtum v. Greif*, supra; *Brown v. Cline*, 109 Cal. 156, 41 P. 862; *Taber v. Bailey*, 22 Cal. App. 617, 135 P. 975). Two cases in point from other jurisdictions wherein additional authorities are cited are *Bourne v. Moore*, 77 Utah, 184, 292 P. 1102, and *Plecas v. Devich*, 72 Utah, 578, 272 P. 197.

Respondent does not question the soundness of the foregoing cases, nor does he attempt to answer the contention made by appellant based thereon other than to cite several criminal cases, among them being *People v. Zuvela*, 191 Cal. 223, 215 P. 907, which hold in effect that the failure of a court to impose sentence upon a defendant within the time provided by section 1191 of the Penal Code is an irregularity of procedure which does not operate to the defendant's prejudice, and therefore, in view of the provisions of section 4½ of article 6 of the Constitution, does not serve as grounds for a new trial. But it will be seen at once that the doctrine declared by the cases cited by plaintiff has no application whatever to the situation presented here, for the reason that we are not dealing with any irregularity of proceeding or error on the part of the trial court. The trouble arises solely out of the single fact that respondent failed to avail himself of the opportunity to comply with the condition imposed by the court within the limitation of time granted therefor. And manifestly the giving effect to respondent's belated consent to a modification of the judgment and to the entry of the clerk based thereon would operate to appellant's prejudice, because by doing so it would necessarily nullify the order granting a new trial, which, subject to the exceptions above mentioned, can be reviewed and set aside only on appeal. *Holtum v. Greif*, supra.

Some suggestion is made by respondent to the effect that the time for compliance with said conditional order did not start to run until he received notice of the making and

filing thereof; and in this connection he states in his brief that on account of two intervening holidays he did not receive such notice until June 1, 1931, which was but three days prior to the date on which he filed his written consent to the modification of the judgment. It is expressly set forth in the written consent signed and filed by respondent, however, contrary to the statement made in his brief, that "notice was received on May 29, 1931." Therefore, regardless of the question of whether respondent was entitled to notice of the entry of the conditional order, it affirmatively appears that he did not comply with the condition imposed thereby even within five days after receiving notice of the entry of said order.

[3] Appellant urges a number of other points for reversal, but, in view of the conclusion we have reached on the foregoing question, it will be necessary to consider only those which may have a bearing on a retrial of the action. The first of these is that the complaint does not state facts sufficient to constitute a cause of action, and that "the innuendo pleaded and the innuendo attempted to be proved are entirely different and for that reason no recovery can be had." We find no merit in the point. The essential facts alleged in the complaint in support of which evidence was introduced at the trial were as follows: Respondent is a native of Portugal, and the publisher of another newspaper printed in the Portuguese language and having wide circulation among the Portuguese people. He is also a writer, linguist, and lecturer, and holds prominent positions in several Portuguese societies, being the author of much of the ritualistic work thereof. The appellant newspaper, which is also published in the Portuguese language, and has a large circulation among the people of that nationality, questioned the integrity of a person holding an office in one of said societies and the respondent's newspaper came to his defense. During the bitter controversy growing out of the affair, the appellant newspaper published a cartoon of an ass in grotesque form, which the complaint alleges, and the evidence shows, was intended to portray and represent respondent, and that it was so understood by many readers of the appellant newspaper. Printed with the cartoon was certain reading matter, published in the Portuguese language, which by innuendo charged respondent with corruptly and dishonestly accepting money for defending said member, who by innuendo was referred to as a "wild boar," all of which, so the complaint alleges and the evidence tended to show, was done maliciously and with intent to injure, defame, and disgrace him, and to expose him to hatred, contempt, ridicule, and obloquy, and to injure his good reputation and the business of the newspaper he was publishing. Without further describing the cartoon or the read-

ing matter accompanying the same, it will be sufficient to say that the same constituted a libel, as that term is defined by statute and interpreted by numerous decisions (see section 45, Civ. Code; *Fitch v. De Young*, 66 Cal. 339, 5 P. 364; *Vedovi v. Watson & Taylor*, 104 Cal. App. 80, 285 P. 418; *Bates v. Campbell*, 213 Cal. 438, 2 P.(2d) 383; *Moley v. Bara-ger*, 77 Wis. 43, 45 N. W. 1082; 17 R. C. L. 288), and that the complaint and the evidence were legally sufficient to sustain a judgment for damages in an action for libel. The only other points requiring notice relate to rulings on the admissibility of certain testimony, and we find no substantial error therein.

For the reasons stated, the proceedings taken by respondent in the trial court relating to a modification of the judgment after the order granting a new trial became final and the entry made by the clerk based thereon are annulled; and the appeal taken from the original judgment, which was set aside by the trial court's order granting a new trial, is dismissed, appellant to recover its costs.

We concur: KNIGHT, Acting P. J.; CASH-IN, J.

128 Cal.App. 775

MILLER v. PARKER et al.
Civ. 645.

District Court of Appeal, Fourth District,
California.

Jan. 18, 1933.

1. Limitation of actions Ⓒ182(4).

Though complaint shows that action is barred by limitations, defense is not available unless pleaded.

2. Limitation of actions Ⓒ180(5).

Defense of limitations may not be raised by general demurrer, but must be specifically stated as ground of demurrer.

3. Limitation of actions Ⓒ180(2).

That complaint showed on its face that action was barred by limitations *held* not to justify affirming judgment for defendants who pleaded defense by general demurrer, though defense could thereafter be properly presented.

4. Limitation of actions Ⓒ180(5).

Defendants could not raise defense of limitations by general demurrer, though plaintiff pleaded Nebraska statute to show that action was not barred.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by E. Miller against Avery R. Parker and another. From a judgment of dismissal, plaintiff appeals.

Reversed with direction.

J. A. Gardiner, of Santa Ana, for appellant.

Mathes & Sheppard and James C. Sheppard, all of Los Angeles, for respondent Parker.

JENNINGS, J.

Plaintiff instituted this action to recover from defendant the sum of \$1,090 and interest thereon at the rate of 8 per cent. per annum from July 1, 1927. The complaint is based on a promissory note which is alleged to have been executed by defendant in the state of Nebraska on July 1, 1924, payable one year after date. The note is set forth in *hæc verba* in the complaint. It is also alleged in the complaint that the payee of the note for a valuable consideration and prior to maturity indorsed and delivered it to plaintiff, who is the owner and holder thereof and that no part of the principal of said note has been paid. It is further alleged that the note constitutes a contract which is governed by the laws of the state of Nebraska and certain statutes of limitation of said state which are applicable to actions founded upon contracts are set forth. To the complaint thus drawn the defendant interposed a demurrer on the single ground that it "does not state facts sufficient to constitute a cause of action against this defendant." The demurrer was sustained without leave to amend and judgment was thereupon rendered ordering that the action be dismissed and that defendant recover his costs. From the judgment so rendered plaintiff appeals.

[1-3] It is conceded that the single point urged by respondent in support of the demurrer was that the complaint shows on its face that it is barred by the statute of limitations. It is however, clearly established in California that, even if it appears upon the face of a complaint that the cause of action therein alleged is barred by the statute of limitations, the defense is nevertheless not available unless it is pleaded and that it may not be raised by a general demurrer but must be specifically stated as a ground of demurrer. *Bliss v. Sneath*, 119 Cal. 526, 528, 51 P. 848; *California Safe, etc., Co. v. Sierra, etc., Co.*, 158 Cal. 690, 698, 112 P. 274, Ann. Cas. 1912A, 729; *Murphy v. Stelling*, 8 Cal. App. 702, 706, 97 P. 672; *McDowell v. Title Guarantee, etc., Co.*, 48 Cal. App. 400, 404, 192 P. 103; *Hanley v. Murphy*, 70 Cal. App. 157, 166, 232 P. 767; *Freligh v. McGrew* (Cal. App.) 12 P.(2d) 965. Respondent concedes that such is the rule, but makes the novel contention that, because the complaint shows on its face that the cause of action is barred by the statute, the judg-

ment should be affirmed, since if it is reversed the bar of the statute may hereafter be properly presented and must be sustained, necessarily resulting in the rendition of a judgment in respondent's favor. From which it is argued that the reversal of the judgment herein for the reason that respondent's demurrer was improperly sustained would be entirely ineffectual. It is obvious that to sustain respondent's contention in this regard would amount to complete nullification of the rule that the bar of the statute of limitations may be raised by demurrer only when the complaint shows on its face that the cause of action is barred and that the bar of the statute must then be specially pleaded as a ground of demurrer. One element necessary for the application of the rule is that the defect shall appear on the face of the complaint. If it does not so appear, the defense must be pleaded by answer. A second necessary element is that the defect shall be specifically stated as a ground of the demurrer. The bar of the statute is a special defense, personal in its nature, and reliance upon it must be affirmatively shown to warrant consideration of it by the court. *Bliss v. Sneath*, supra. Furthermore, we cannot assume that this litigation must necessarily terminate in the rendition of a judgment in respondent's favor. It may be that appellant, if permitted so to do, can amend the complaint by the inclusion therein of allegations which will show that the statutory bar is not available to respondent. At all events, the rule which requires that a demurrer, in order to raise the question that the cause of action is barred by the statute of limitations, must specifically state the statutory bar as a ground therefor is too well established in California to permit sustaining respondent's contention.

[4] It is further urged that the rule requiring specific statement of the statutory bar as a ground of demurrer is not here applicable because the complaint pleads the statute of limitations of the state of Nebraska for the express purpose of showing that the cause of action is not barred. In support of the contention thus advanced it is argued that, by pleading the Nebraska statute of limitations in his complaint, appellant specifically made the question of whether or not the cause of action is barred an issue in the case and that having done so a general demurrer is sufficient to raise the defense. It may be conceded that the reason for pleading the Nebraska statutes is for the purpose of showing that the cause of action is not barred by the statute of limitations of that state. If, however, we assume that it is the law of Nebraska with respect to the limitation of actions which governs and that the complaint shows on its face that the cause of action is barred by the Nebraska statute, the situation is no different than if we assume that the law of the forum governs and that the complaint shows on its face

that the action is barred by the California statute. In the latter case, as we have hereinabove shown, the rule is established that the defect of the statutory bar appearing on the face of the complaint must be specified as a ground of demurrer and may not be raised by general demurrer. Since the situation is identical so far as the question of the bar of the statute is concerned, it follows that the same rule is applicable.

It may be observed in conclusion that, if the complaint shows upon its face the existence of defects which may properly be reached by general demurrer, the judgment should be affirmed. Examination of it fails to disclose the presence of such defects and there is no pretense by respondent that any ground for demurrer other than the bar of the statute of limitations appears in the complaint.

For the reasons herein given the judgment is reversed and the court is directed to overrule respondent's demurrer to the complaint.

We concur: BARNARD, P. J.; MARKS, J.

129 Cal.App. 102

TRUEBLOOD v. MARYLAND ASSUR.
CO. OF BALTIMORE et al.

Civ. 4706.

District Court of Appeal, Third District,
California.

Jan. 21, 1933.

Rehearing Denied Feb. 20, 1933.

Hearing Denied by Supreme Court March 20,
1933.

1. Insurance ☞665(5).

Evidence sustained finding that insured's death from acute dilation of heart, due to sudden and unusual exertion when insured fell into whirlpool, resulted from "bodily injuries" received "exclusively * * * through accidental means."

2. Insurance ☞451(1).

Accidental cause need not leave visible external contusions or abrasions, to warrant recovery under accident policy.

3. Insurance ☞451(1).

Bodily injury, within accident policy covering death from bodily injuries, may be external or internal.

4. Insurance ☞665(8).

Finding that insurer, which received notice of accidental death two days before funeral, waived right to demand autopsy, by delaying request therefor until several days after burial, held justified.

5. Insurance ☞549.

Refusal to permit autopsy will not invalidate policy unless insurer makes demand within reasonable time after death.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Jessie V. Trueblood against the Maryland Assurance Company of Baltimore and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

John Ralph Wilson, of San Francisco, and Hawkins & Hawkins, of Modesto, for appellants.

Francis O. Hoover, of Modesto, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The widow and beneficiary of H. A. Trueblood, deceased, obtained a judgment for \$7,500 upon an insurance policy, for the death of her husband which resulted from bodily injuries sustained through accidental means. The insurance company denies liability for two reasons. It asserts that death did not result from bodily injuries received exclusively through accidental means, and that the policy was invalidated by refusal to permit an autopsy upon the remains of the deceased for the purpose of ascertaining the cause of death.

For ten years the deceased had carried an accident policy with the Maryland Assurance Corporation of Baltimore. That policy was in force at the time of his death. In consideration of an annual premium of \$25 the corporation insured the deceased "against loss resulting from bodily injuries, including death resulting therefrom, effected independently and exclusively of all other causes directly through accidental means." It also provides: "The corporation shall have * * * the right and opportunity to make an autopsy in case of death where it is not forbidden by law."

On July 13, 1930, the deceased, in company with several other persons, was engaged in swimming in an irrigation canal near Modesto. The canal was constructed with a drop of about three feet in the bed thereof just below the point where the parties were bathing. At the point of this depression concrete wings existed on either side of the canal, and weir boards were inserted across the narrowest portion of the stream to retard the flow and back up the water for irrigation purposes. Above the dam the water was about three feet in depth. It flowed over the weir boards with great velocity, creating a dangerous whirlpool and undertow. The water was six feet in depth below this drop in the bed of the stream. At this point a narrow footbridge extended across the canal. It was supported in the center by two upright iron rods.

The deceased was forty-four years of age. He weighed 180 pounds. He had a ruddy complexion. He was apparently in good

health and vigor. There is no evidence that he was previously afflicted with any physical ailment. At the time of the accident he was standing above the weir boards beneath the bridge in the shallow water bracing himself against the rapid current and clinging to one of the upright iron rods. John Beard, another bather, stood at this point clinging to the other upright rod. Mrs. Abbott came swimming down the canal to the bridge. She was swept along by the rapid current. All witnesses agree the water was rushing over the obstruction into the whirlpool with great velocity. The deceased warned her against the danger of the current and the depth of the pool. As she came near to Mr. Trueblood he extended his hand in an apparent effort to prevent her from being swept into the whirlpool below. Some witnesses say she caught hold of his arm. Others did not observe this act or see that he managed to reach her. She was swept over the dam. Mrs. Abbott testified in that regard: "I was facing down stream. It was the extreme current that forced me over the drop. * * * May I explain that the water was boiling. * * * There was a whirlpool that would drag one down. * * * I was not able to swim against the whirlpool." She was carried under the water several times by the force of the whirlpool. In an exhausted condition she was finally rescued by her husband some distance below the dam.

It appears that the deceased released his hold on the upright bar to which he was clinging, and in reaching out to prevent Mrs. Abbott from being swept over the dam, he lost his balance and fell into the whirlpool below. Mr. Bond testified: "Mr. Trueblood reached out to help her (Mrs. Abbott) and went over at the same time and they both disappeared under the water." Mr. Beard testified: "There was a very strong current in the stream there. * * * Mr. Trueblood was holding onto the standard, Mrs. Abbott * * * came downstream and either took ahold of Mr. Trueblood's arm or Mr. Trueblood reached out and took hold of Mrs. Abbott's arm. * * * The next thing I noticed was Mrs. Abbott going over the drop, and following her immediately, before she was even out of my sight, Mr. Trueblood went. * * * They went over in * * * a falling position, sidewise. * * * I recall noticing him struggling * * * in the backwash. * * * I saw that he * * * seemed to be having a terrible struggle. * * * He had a very frightened panicky expression on his face. * * * He was struggling desperately and very inefficiently against the backwash." The evidence does not indicate that he attempted to reach Mrs. Abbott or assist her after he fell over the dam. Regarding the accident which caused the deceased to lose his balance and fall into the whirlpool, Mrs. Trueblood, the wife of the deceased, who sat upon the bank of the canal

and witnessed the incident, testified: "He was 44 years, 5 months and 17 days of age. He had always been in very good health. He never complained of any difficulty and he always attended to his business and seemed normal in every respect, never subjected to any seizures or complaint of any sort. About a year after we were married he took out a life insurance policy and had a physical examination. * * * I saw my husband and Mrs. Abbott go over the drop in the canal. * * * When Mrs. Abbott reached him * * * he let go of the support but seemed to brace himself and put out his other hand as though to warn her and she shot over the falls. Then he fell sideways as he went over the falls." After a severe battle with the swift current, the undertow, and the whirlpool, he finally reached the bank and was pulled from the water in an exhausted condition. After reaching land he collapsed and for some time sat upon the ground slumped over breathless and helpless. Later he was assisted to the rear seat of his automobile, where he sat lopped over upon the cushion while his wife drove the car to the home of J. C. Garrison, where the group of swimmers participated in a card party. He did assist in serving refreshments to the guests, and apparently revived to some extent. Every one present noticed his prostrated condition. He urged his wife to go home early. When they left he undertook to drive the car. They had not proceeded far when he remarked: "We'll have to stop. The lights are getting dim or they have gone out, haven't they?" He then pulled the car onto the shoulder of the highway, "drew in a gasping breath and reared clear back against the seat just as hard as he could and then collapsed, fell forward on the wheel," and expired. At the trial of the case, Dr. Gould testified in response to a hypothetical question, "I should say that this man died of an acute dilatation of the heart; brought about by his sudden and unusual exertion while struggling in the water." The coroner certified that the assured died on July 13, 1930, from "cause of death, natural causes, probably acute dilatation of the heart."

The court found that he "died as a result of bodily injuries effected independently and exclusively of all other causes directly through accidental means," and that the insurance company waived its right to an autopsy by failing to demand it within a reasonable time, not having requested such examination until eight days after his death, notwithstanding the receipt of adequate notice of the accidental death of the assured by letter two days after his demise. Judgment was accordingly rendered against the insurance company for the sum specified in the policy. From this judgment an appeal was perfected. The real issue on this appeal is whether

the foregoing findings are sufficiently supported by the evidence.

[1-3] The evidence furnishes satisfactory proof that the deceased did not voluntarily plunge into the whirlpool below the dam to rescue Mrs. Abbott. On the contrary, it appears that he accidentally fell into the pool, and that his violent exertion to extricate himself resulted in acute dilatation of the heart, which subsequently caused his death. There is no evidence that he previously suffered from heart affliction or other organic ailment. On the contrary, there is evidence that he was a strong, healthy man who was not afflicted with any functional disease. We are therefore satisfied the findings of the court that the insured "died as a result of bodily injuries effected independently and exclusively of all other causes directly through accidental means," is adequately supported by the evidence. He accidentally fell into the whirlpool. His violent resistance against the undertow and current of the whirlpool, to save his life, caused acute dilatation of the heart which resulted in death. The accidental falling into the pool was the direct and necessary cause of the violent exertion which resulted in death. Since there is no evidence of previous organic infirmity, and upon the contrary, since affirmative evidence of his previous strength and health free from functional disease appears, it is reasonable to assume he died from bodily injuries sustained directly through an accident independently and exclusively of any other cause.

When death is caused from dilatation of the heart as a direct and immediate result of accidentally falling into a whirlpool of water and the consequent violent exercise of extricating oneself therefrom, it will create a liability under an insurance policy for compensation for death resulting from "bodily injuries * * * effected independently and exclusively of all other causes directly through accidental causes." The swirling force of the water which required violent struggle to escape from the whirlpool caused bodily injury resulting in death just as effectively as though the victim had been struck by a mighty ocean wave and dashed to the beach or upon some hidden rock. The dilatation of the heart was a mere incident resulting from bodily injury, just as apoplexy following the rupturing of a blood vessel might become incident to traumatic injury. The struggle against the force of the water in the present case became the means by which the bodily injury was inflicted. In the case of *Horsfall v. Pac. Mutual Life Ins. Co.*, 32 Wash. 132, 72 P. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846, wherein the policy insured one against death from the effect of bodily injuries caused solely by external, violent and accidental means, it was held the policy created a liability where the insured, who was

fifty-eight years of age, with no previously known ailment, died from dilatation of the heart, caused by trying to lift a 350-pound bar of iron. There is no good reason to doubt that death which is caused by the rupture of or fatal injury to an internal organ as the direct and immediate result of violent exercise to save oneself from the undertow and current of a whirlpool in a stream, is caused by bodily injuries, just as clearly as though the victim were killed by the external blow from a hammer or a fist. This construction of the term "bodily injury" has been applied to death resulting primarily from drowning, infection, sunstroke, strain and freezing. *Kinsey v. Pacific Mutual Life Ins. Co.*, 178 Cal. 153, 172 P. 1098; *Horton v. Travelers Ins. Co.*, 45 Cal. App. 462, 187 P. 1070; *Moore v. Fidelity & Casualty Co.*, 203 Cal. 465, 265 P. 207, 56 A. L. R. 860; *Clarke v. New Amsterdam Casualty Co.*, 180 Cal. 76, 179 P. 195; *Elsey v. Fidelity & Casualty Co. of N. Y.*, 187 Ind. 447, 120 N. E. 42, L. R. A. 1918F, 646; *Richards v. Standard Ins. Co.*, 58 Utah, 622, 200 P. 1017, 17 A. L. R. 1183; *Lickleider v. Traveling Men's Ass'n*, 184 Iowa, 423, 166 N. W. 363, 168 N. W. 884, 3 A. L. R. 1295; *Ashley v. Agricultural Ins. Co.*, 241 Mich. 441, 217 N. W. 27, 58 A. L. R. 1208. Liability for death under the provisions of an accident policy similar to the one which is involved in the present case will attach even though the immediate bodily injury results in septicæmia, apoplexy, or heart failure as a medium through which death ensues. *Horton v. Travelers Ins. Co.*, supra. It is not necessary that the accidental cause shall leave visible external contusions or abrasions of the body. A bodily injury may be either external or internal. If it becomes the direct exclusive cause of death, it creates a liability. We are satisfied the record discloses substantial evidence of an accident which caused bodily injury to the insured person resulting in death independently and exclusively of all other causes. The finding to that effect is therefore adequately supported by the evidence.

[4, 5] The insurance company waived its right to demand an autopsy by failing to request the post mortem examination until three days had elapsed after the burial of the body had occurred, since the company was notified by letter of the accidental death and the likelihood of the presentation of a claim for compensation which communication the company received two days before the funeral and sent a representative to investigate the cause of death on the day of the funeral. It is immaterial that this notice of death and warning of the presenting of a claim for compensation was given to the company through the medium of its own local agent. The insurance policy was therefore not invalidated by a refusal to permit the autopsy, under the circumstances of this case.

The insured died July 13, 1930. Two days

later the Modesto agent of the company wrote a letter addressed to its principal office at San Francisco, which reads in part:

"July 15th, 1930.

"Maryland Casualty Company

"San Francisco, California.

"Gentlemen:—Re: Policy No. AH2452 Harry A. Trueblood.

"Please be advised that the insured under the above numbered policy passed away Saturday night. The circumstances surrounding his death might be considered accidental and we are notifying you in order that you may take the necessary steps under the contract.

* * *

"Will you kindly advise what steps are necessary for the beneficiary to take in order to put this claim before you in proper order?"

* * *

It was stipulated this letter was received by the insurance company at its office in San Francisco the following day. In response to this letter a representative from the claim department of the company visited Modesto on the day of the funeral, which was July 18th, to investigate the claim, but failed to notify the widow of the deceased, or anyone in her behalf, that an autopsy would be required.

It is true the insurance policy provides that "the corporation shall have * * * the right and opportunity to make an autopsy in case of death where it is not forbidden by law." It also provides: "Failure to comply with any of the requirements contained herein shall invalidate all claims under this policy." The insurer may, however, waive the foregoing right to a post mortem examination of the body by its conduct or lack of diligence. An insurance policy may not be invalidated for refusal to permit an autopsy unless the demand therefor is made within a reasonable time after the death. When there is timely notice of death and reason to believe that a claim for compensation therefor will be presented, and ample opportunity to hold an autopsy before the burial of the body, an insurance company may not complain of a refusal to permit the exhuming and post mortem examination of the body when the request therefor is made for the first time two days after the burial. In 7 Cooley's Briefs on Insurance (2d Ed.) 5895, it is said: "If the policy contains a provision that an examination shall be allowed of the body of the insured after his death, a demand for such examination must be made within a reasonable time after the death. * * * In determining whether the demand has been made within a reasonable time, special emphasis has been placed on the propriety of making such a request prior, at least, to the burial of the body." *Wehle v. U. S. Mut. Acc. Ass'n*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598; *United States Fidelity & Guaranty Co. v.*

Hood, 124 Miss. 548, 87 So. 115, 117, 15 A. L. R. 605.

In the case last cited, it is said: "Provisions of contract of this kind which are prepared by the insurer are to be construed most strongly against the insurer and in favor of the insured. Where there is no provision in the contract itself giving the right of an autopsy after interment, the court will construe the provisions to mean that an autopsy must be demanded and performed prior to interment, and, if the insurer desires to avail itself of this privilege, it must so arrange and provide for information to be given of the death prior to the interment."

Circumstances may arise which will entitle an insurance company to exhume and examine the body of an insured person after burial. When the insurance company has no information regarding the death or the cause thereof until after the body has been buried and there is reason to believe the post mortem examination will disclose facts which will release the company from liability, it may be just and proper to hold an autopsy even after burial. There are cases which uphold this declaration of law. But when the insurance company has information regarding the death and reasons to believe a claim for compensation may be made, within ample time to demand the autopsy before the funeral occurs, the right to a post mortem examination is waived by failure to make such demand until after the burial has occurred. In the present case the insurance company was notified July 15, 1930, of the death of Mr. Trueblood, and that "the circumstances surrounding his death might be considered accidental and we are notifying you in order that you may take the necessary steps under the contract." In this communication, the insurance company was also requested to "kindly advise what steps are necessary for the beneficiary to take in order to put this claim before you." After the receipt of this information notifying the company that the cause of death "might be considered accidental," accompanied by warning that a claim was likely to be presented by the request for advice as to how the beneficiary might file a proper claim for compensation, three days elapsed before the funeral occurred. A demand for an autopsy by wire or telephone might have been promptly made from the San Francisco office. A representative could have been sent to Modesto within a few hours after the notice of death was received. Indeed, a representative from the claim department was sent to Modesto on the day of the funeral to make an investigation. No demand for an autopsy was then made. Under the circumstances of this case, we are satisfied the insurance company waived its right to an autopsy by failing to demand an examination of the body before the burial occurred. The policy was therefore not invali-

dated by a refusal to permit the autopsy since the request therefor was not made until two days after the burial occurred.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 680

McNALLY v. CASNER et al., and four other cases.

Civ. 8017.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1933.

Rehearing Denied Feb. 11, 1933.

Hearing Denied by Supreme Court March 13, 1933.

1. Appeal and error ⇨206(2).

That plaintiff's attorney cross-examined witnesses for driver of plaintiff's automobile, who was not party to complaint, *held* not error, at least in absence of objection.

2. Witnesses ⇨240(2).

Permitting leading questions *is* within judge's discretion.

3. Damages ⇨171.

That plaintiff left hospital because he lacked money and did not work for six weeks *held* competent as bearing on seriousness of injuries, as against contention that court permitted testimony of financial condition.

4. Trial ⇨43.

Judge must exercise reasonable care to exclude immaterial and possibly prejudicial evidence.

5. Trial ⇨76.

Counsel by timely objection must call court's attention to improper questions.

6. Appeal and error ⇨882(7).

Counsel at whose request judge, having stopped improper questioning of his own motion, struck out testimony and admonished jury to disregard it, could not properly charge error.

7. Witnesses ⇨374(1).

Asking cross-defendants' witness whether he had refused to answer inquiries of cross-complainant's attorney concerning accident and had suggested to cross-defendants' counsel other witnesses *held* proper as tending to show bias.

8. Trial ⇨29(3).

Judge's remark, justified by testimony, that witness had made contradictory statements, *held* not error.

9. Trial ⇨244(4).

Instruction that jury could consider physical facts after automobile collision *held*

properly refused, there being no reason for emphasizing such facts.

10. Trial ⇨252(20).

In death action, instruction that administrator could not recover for loss of deceased's support by heirs *held* properly refused as inapplicable to evidence.

11. Automobiles ⇨246(47).

In action involving automobile collision at or near intersection of city street and highway, instructions containing statutes concerning intersection, obstructed intersection, residence district, lawful speed on highway, and reckless driving, *held* warranted by evidence (St. 1923, p. 517, as amended).

There was evidence that collision in question occurred in or at intersection of street and highway in certain city, and was within district calling for limitation of speed as announced by highway signs, and that one of automobiles involved was being driven in reckless manner.

12. Appeal and error ⇨1066.

Although there was no evidence in automobile collision case of failure to stop and give aid, error, if any, in reading statute imposing such duty, *held* harmless; parties involved being unable to give aid (St. 1923, p. 517, as amended).

13. Death ⇨99(4).

In death action on behalf of deceased's husband and minor child, \$10,000 *held* not excessive.

Appeals from Superior Court, San Mateo County; H. D. Gregory, Judge.

Action by Frank McNally against Lucille Casner and J. Harris, in which both defendants filed separate cross-complaints against Tony Silva, who filed his cross-complaint against the other cross-complainants, this action being consolidated for trial with an action by Donald C. Brooks, as administrator of the estate of Nora Silva, deceased, against the original defendants in the first action. From judgments for plaintiff in each action and for cross-complainant Tony Silva, defendants and cross-defendants Casner and Harris appeal.

Affirmed.

O'Connor, Fitzgerald & Moran, of San Francisco, and J. E. McCurdy, of San Mateo, for appellants.

Kirkbride, Wilson & Brooks, of San Mateo, for respondents Tony Silva and Donald C. Brooks, administrator of Nora Silva's Estate.

Theodore J. Savage, of San Francisco, for respondent Frank McNally.

STROTHER, Justice pro tem.

These actions are for damages for injuries received in an automobile collision. Tony Silva, cross-defendant and cross-complainant in one of the actions, was driving plaintiff's car north on the state highway through San Mateo. Plaintiff was sitting by Silva, and Silva's wife, Nora, was sitting in the rear seat. Defendant, cross-complainant, and cross-defendant Harris was driving defendant cross-complainant, and cross-defendant Lucille Casner's car south on the highway. The cars collided at or near the intersection of Sixteenth avenue in the city of San Mateo with the highway, at 2 o'clock in the morning.

The plaintiff McNally brought the action against Lucille Casner and J. Harris, charging them with negligence causing the collision and consequent injuries to plaintiff. The defendants Casner and Harris filed separate answers, and by leave of court, cross-complaints against Tony Silva, to which he answered and thereafter, by leave of court, amended his answers, and filed a cross-complaint against defendants Casner and Harris, to which they answered.

Nora, wife of Tony Silva, was killed in the collision, and thereafter Donald C. Brooks was appointed, and qualified, as administrator of her estate, and instituted an action against Lucille Casner and J. Harris, on behalf of her heirs—her husband and minor child—to recover damages for the death of Nora Silva. Issue was joined in this action, and the two actions were consolidated for trial.

Upon the submission of the case the jury brought in a verdict in favor of plaintiff, assessing his damage at \$5,000; brought in a verdict in favor of cross-complainant Tony Silva, and assessed his damages at \$3,000; and brought in a verdict in favor of Brooks, as administrator, for \$10,000. Judgments were entered in accordance with these verdicts, in favor of the respective parties, against defendants and cross-defendants Casner and Harris, from which they have appealed.

The errors in law assigned by appellants are: (1) Incorrect rulings on the admissibility of testimony; (2) prejudicial comment by the judge on testimony; (3) erroneous instructions to the jury.

[1-3] The first specification of error relating to the evidence is that the attorney for plaintiff was permitted to cross-examine the witnesses for Tony Silva who was not a party to the complaint. Appellants made no objection to this cross-examination, and it is not made to appear that their interests were in any way prejudiced by it. The second specification is alleged error in permitting counsel for Silva to ask leading and sugges-

tive questions of his witnesses. The permitting of such questions is always within the sound discretion of the court, and here, as in the precedent instance, the court was given no occasion to rule, as counsel for appellants made no objection to any of the questions. The same is true as to the next specification; that the court permitted testimony as to the financial condition of the plaintiff. The plaintiff left the hospital about two weeks after the accident and testified, without objection, that he was not well at that time, and left because he had no more money and had to look after his children, and did not go back to his work until a month and a half later. This evidence was competent, as bearing upon the question of the seriousness of plaintiff's injuries, and, even if it had been objectionable, the court was given no opportunity to rule upon its admissibility. Again, plaintiff's counsel elicited from him, by a series of questions, that his wife was insane, and had been for four years, and still was, in the Agnews Hospital. To these questions appellants' counsel did not object, but the court intervened and stated that that was not a proper matter for the jury to consider, whereupon appellants' counsel asked the court to strike it out, which was done, and the jury admonished to disregard it.

[4-6] It is, of course, the duty of the trial judge to exercise reasonable care to see that evidence which is not only immaterial, but may be prejudicial to the rights of a litigant, does not get before the jury. But it is equally the duty of counsel by timely objection to call the court's attention to the evident impropriety of the questions. When, as in this instance, the judge of his own motion promptly stopped the examination and did everything possible to remove any prejudicial effect from the minds of the jury, it is hardly becoming to assert that he was guilty of error. If the practice were permitted, it would be possible to refrain intentionally from making objections in order to lay ground for reversal.

[7] The final exception as to the evidence is that the court erred "in permitting counsel for respondent Tony Silva to exceed all reasonable bounds in attempting to show bias on the part of the witness Cooper," one of appellants' witnesses, not concerned in any manner in the accident. The questions objected to were the refusal of Cooper on two occasions to answer inquiries of Silva's attorney as to the facts of the accident, which the witness admitted; whether he had not suggested to appellants' counsel other witnesses at the trial of another action growing out of the collision, to which the witness answered that he did not remember. Manifestly this examination was proper as tending to show the bias of the witness.

[8] In the course of the trial the court asked some questions of Cooper, one of defendants' witnesses, and said that the witness had made contradictory statements as to the identity of a car involved in the accident, to which defendants' counsel objected. A reading of the testimony of the witness fully justifies the remark of the court.

[9] Appellants assign as error the refusal to give an instruction to the effect that the jury was at liberty to consider the physical facts at the point of collision after the accident, and to draw reasonable and fair conclusions and inferences therefrom. There was no more reason for emphasizing those particular facts than any others appearing in evidence. All of the evidence was before the jury for their consideration in deciding the case.

[10] Refusal of the court to instruct the jury that the administrator of the estate of Nora Silva could not recover damages for loss of support by her heirs in the absence of evidence that she had contributed to their support is assigned as error. No evidence was introduced, or attempted to be introduced, of loss of support, nor was there any such allegation in the complaint. As there was no evidence to which such a declaration of law could apply, the court properly refused it. The court did, however, elsewhere clearly instruct the jury precisely to the effect requested by defendant.

[11] In giving its instructions the court read to the jury the sections of the California Vehicle Act (St. 1923, p. 517, as amended) describing an obstructed intersection, a residence district, an intersection, and the lawful rates of speed on a public highway; also, those parts of the act relating to reckless driving, and the duty to stop and give aid. It is objected that there was no evidence to which these provisions of the act would apply. There was evidence that the collision occurred either in, or right at, the intersection; that it was within a district calling for a limitation of speed; and that the highway signs announced that fact. The testimony of the defendant Harris estimated his speed at anywhere from twenty-five to thirty-three miles an hour, and there was evidence from which the jury might infer that he was driving in a reckless manner. They could hardly have arrived at their verdicts without so finding. The instructions on these points were, therefore, properly given.

[12] As to the part relating to stopping and giving aid, while it is true there was no evidence of such failure, yet, as the defendants were stopped, and were in no condition to give aid, it cannot be conceived that the jury considered that in arriving at their conclusions.

[13] It is claimed by appellants that each of the several judgments against them was excessive. Without going into any detailed exposition of the evidence, it is sufficient to say that the amounts found by the jury were justified by the undisputed facts.

The judgments are affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 567
SMELLIE et al. v. SOUTHERN PAC. CO.
et al.*
Civ. 4668.

District Court of Appeal, Third District,
California.
Jan. 9, 1933.

Rehearing Denied Feb. 8, 1933.

Hearing Denied by Supreme Court March 9,
1933.

1. Appeal and error ⇨1099(3).

Former holding that negligence and contributory negligence were for jury is not binding, where evidence on new trial is different.

2. Appeal and error ⇨1001(1).

Jury's implied findings will not be disturbed on appeal, where supported by substantial evidence.

3. Appeal and error ⇨1048(6).

Denying cross-examination by railroad of codefendant automobile host concerning drinking of liquor by deceased guest killed in crossing collision *held* harmless (Code Civ. Proc. §§ 2048, 2055).

Denying such cross-examination was harmless, because the matter had not been inquired about in direct examination, nor was it indirectly involved therein, and because the railroad might have called its codefendant as its own witness to prove the affirmative defense of deceased's alleged intoxication, and the matter was fully developed by examination of other witnesses.

4. Appeal and error ⇨1064(1).

Instruction that railroad's failure to ring bell or sound whistle upon approaching crossing would render it liable *held* prejudicial error in action for death of automobile guest (Civ. Code, § 486).

Such instruction was prejudicial error, because it failed to inform the jury that the negligent omission to ring the bell or sound the whistle must have been the proximate cause of the accident, and because it failed to inform the jury that, if the deceased was guilty of contributory negligence, no liability would attach, even

though railroad company had failed to ring bell or sound whistle.

5. Trial ⇨296(3).

Instruction that failure to ring bell or sound whistle upon approaching crossing would render railroad liable *held* not cured by subsequent instructions on proximate cause and contributory negligence (Civ. Code, § 486).

The jury were instructed generally that negligence on part of railroad company must have been the proximate cause of the accident, and that plaintiffs could not recover if deceased was guilty of contributory negligence. These instructions, however, were not applied to failure to ring the bell or sound the whistle, and the jury had theretofore been told that, if railroad failed to ring the bell or sound the whistle, it was liable.

6. Railroads ⇨351(9).

Refusal to instruct that statute did not require railroad to sound whistle and ring bell, but that ringing of bell was sufficient, *held* error (Civ. Code, § 486).

7. Trial ⇨296(3).

Instruction that railroad owed duty to operate trains with due regard for safety of persons using city crossing *held* not prejudicial, in view of other instructions limiting necessity to exercise of reasonable care.

8. Appeal and error ⇨757(4).

Instructions not related to subject-matter of challenged instructions need not be printed in appellant's brief (Rule VIII, Rules of the Supreme Court and District Courts of Appeal).

9. Appeal and error ⇨1050(1).

Testimony of minor children concerning their poverty and having to quit school *held* prejudicial error in action against railroad for father's death.

10. Railroads ⇨347(1).

Admission of time-table limiting speed of trains *held* error in action against railroad for death of automobile guest.

Admission of time-table was error, because it was for employees only, there was no proof that deceased knew of its existence or that railroad habitually operated its trains in accordance with such time-table, and because negligence in operation of trains, so far as general public is concerned, depends upon the law and not upon rules of railroad.

Appeal from Superior Court, Madera County; Leon E. Gray, Judge.

Action by Lillie D. Smellie and others against the Southern Pacific Company and

another. From judgment for plaintiffs, the named defendant appeals.

Reversed and remanded.

W. H. Stammer, of Fresno, for appellant.

Conley, Conley & Conley, of Fresno, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiffs recovered judgment for damages for the death of Robert S. Smellie which resulted from a collision between a passenger train and an automobile in which he was riding as a guest. The Southern Pacific Company has appealed.

At the time of the accident which resulted in the death of Robert S. Smellie, he was riding as a guest in a Reo truck which was being driven by the owner thereof. The truck was struck by a passenger train at a crossing in the city of Madera. It was then broad daylight. The atmosphere was clear, and the pavement was dry. The train was entering the station from the south. It was traveling on the main track at a rate of speed of from twenty-five to sixty miles an hour. A side track extended parallel with the main track at a distance of about thirteen feet westerly therefrom. A freight train had just passed the crossing traveling in a southerly direction. The freight train obscured the view of the driver of the truck. The deceased said: "It's all clear, let's go." Thereupon the truck passed the rear end of the freight train and drove onto the main track, where it was struck by the north-bound passenger train. Smellie was killed, and the driver of the truck was seriously injured. There is some evidence that both the deceased and the driver of the truck had been drinking intoxicating liquor. At the first trial of the cause a nonsuit was granted. Upon appeal from the judgment which was rendered accordingly, the cause was reversed by the Supreme Court on the ground that the question of contributory negligence of the deceased was a problem for the determination of the jury. A more complete statement of the facts is contained in the opinion of that court. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, 539. The cause was again tried, and a jury rendered a verdict in favor of the plaintiffs in the sum of \$25,000. From this judgment the Southern Pacific Company has appealed.

It is contended the judgment should be reversed because the evidence shows the deceased to have been guilty of contributory negligence as a matter of law by encouraging the owner of the truck to attempt to cross the main track ahead of the passenger train by saying, "It's all clear, let's go," and by riding in the machine when both the driver thereof and the deceased had been drinking intoxicating liquor. It is also asserted the court erred in admitting evidence of a mere rule of the railroad company limiting the

speed of the train within the city limits, and in admitting evidence of the poverty of the plaintiffs, and in limiting the cross-examination of plaintiffs' witnesses upon the subject of intoxication. The giving and refusing of certain instructions are also challenged as erroneous.

[1] The respondents assert that the former decision of the Supreme Court in this action to the effect that the evidence established neither the negligence of the railroad company nor the contributory negligence of the deceased, as matters of law, becomes the law of this case, and required the cause to be submitted to the jury for its determination. It is therefore claimed the rendering of a judgment upon this trial in favor of plaintiffs with the implied findings that the railroad company was guilty of negligence and that the deceased was not guilty of contributory negligence are conclusive upon this appeal. It is true that in successive appeals the determination of all issues which were formerly decided upon substantially the same evidence will be controlling on the court in a subsequent appeal as the settled law of the case. 2 Cal. Jur. 944, § 555; 4 C. J. 1093, § 3075; 2 R. C. L. 223, § 187; *United Dredging Co. v. Ind. Acc. Comm.*, 208 Cal. 705, 712, 284 P. 922. Upon the former appeal it was contended that the declaration of the deceased just before the truck was driven onto the main track where the accident occurred that "It's all clear, let's go," established contributory negligence as a matter of law. After reviewing the facts as they appeared in the former record, including the above statement of the deceased, the Supreme Court said: "Under these circumstances, we think it was for the jury to say as a matter of fact, and not for the court to hold as a matter of law, whether the deceased was guilty of contributory negligence."

The former appeal was taken from a judgment of nonsuit. We are unable to say that decision was rendered upon substantially the same evidence which was adduced at the second trial. At least there is substantial evidence in the present record, which did not appear in the former trial, to the effect that both the deceased and his companion, the truck driver, had been drinking intoxicating liquor just prior to the accident. This evidence of intoxication on the part of the deceased was properly considered by the jury at this trial, upon the issue of contributory negligence. The present record contains enough additional evidence which was not adduced at the former trial to require this court to hold that neither the negligence of the railroad company nor the contributory negligence of the deceased were established as the settled law of this case.

[2] Independently of the application of the doctrine of the law of the case, in view of the former decision of the Supreme Court, we

are impelled to hold there is substantial evidence supporting the implied findings of the jury that the railroad company was guilty of negligence which proximately contributed to the injuries which resulted in the death of Smellie, and that the deceased was not guilty of contributory negligence. The judgment may therefore not be disturbed on this appeal for lack of evidence to adequately support it.

[3] The sustaining of plaintiffs' objection to defendants' cross-examination of the codefendant Ireland regarding the alleged intoxication of the deceased was harmless, and does not constitute prejudicial error. The questions to which objections were sustained did not apply to any facts which were developed in the direct examination of the witness, and, assuming the witness would have testified that Smellie had been drinking intoxicating liquor, that fact was fully developed by other witnesses. The evidence thus sought to be elicited would have been cumulative, and the sustaining of the objections of plaintiffs were therefore harmless.

In the course of the trial the codefendant Ireland was called by the plaintiffs as a witness under the provisions of section 2055 of the Code of Civil Procedure. In the examination in chief he was asked no question relative to the use of intoxicating liquor either by himself or his companion Smellie. On cross-examination by the defendant railroad company, he was fully examined without objection regarding his own use of liquor and positively denied that he had been drinking intoxicating liquor. He was then asked: "Do you know whether Mr. Smellie had had any intoxicating liquor that day?" To this question the plaintiffs objected on the grounds that it was improper cross-examination and incompetent, irrelevant, and immaterial. In support of these inquiries counsel for the railroad company made it very clear its only purpose in propounding these questions was to establish an affirmative defense of contributory negligence which might be indicated by a showing of drunkenness on the part of the deceased. This was an affirmative defense. It was not a legitimate cross-examination of any fact which was developed by the examination in chief. The cross-examination of a witness is confined to facts which are elicited in the examination in chief or which are indirectly involved therein. Section 2048 of the Code of Civil Procedure provides: "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith. * * *" The railroad company had a right to call this man as its own witness and inquire as to the use of intoxicating liquor by the deceased in support of its affirmative defense of contributory negligence. Under the circumstances of this case, the challenged questions were not within the proper realm of cross-examina-

tion. Objections to these questions were therefore properly sustained.

Moreover, assuming the questions were within the proper scope of cross-examination, the sustaining of the objections was harmless, for the reason that the use of liquor, to some extent, by the deceased, was fully developed by other witnesses. Mrs. Oddoul testified that she saw the accident and promptly went to the deceased and bending over his body she "noticed an awful odor. * * * It smelled like wine to me, like sour wine." Miss Lichtl, the superintendent of the hospital to which both Mr. Ireland and Mr. Smellie were immediately taken for care after the accident occurred, testified in response to a similar inquiry, "I noticed they both had liquor on their breath." Dr. Dearborn, a physician who examined the deceased shortly after the accident occurred, testified in that regard, "He had the odor of alcohol on his breath." Dr. Ransom, a physician who was also called as a witness by the railroad company, testified that he examined the deceased immediately after the accident occurred and smelled "a pretty heavy odor of alcohol on his breath." To the further question as to whether he would say Mr. Smellie was under the influence of liquor he replied, "I do not remember particularly, no."

It has been frequently held that the exclusion of evidence is harmless when the fact sought to be elicited is adequately shown by other competent testimony. 2 Cal. Jur. 1022, § 608; Silvey v. Harm, 120 Cal. App. 561, 573, 8 P.(2d) 570, 575.

[4] The following instruction which was given to the jury at the request of the plaintiff is erroneous. It is based on the provisions of section 486 of the Civil Code and is expressed in the following language: "A bell must be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same. The corporation operating the railroad is liable for all damages sustained by any person, and caused by its locomotives, and train of cars, when the provisions of this section are not complied with."

The foregoing instruction contains a declaration of absolute liability on the part of the railroad company for a mere failure to ring the bell or blow the whistle as required by statute, regardless of whether such failure became the proximate cause of the accident and regardless of whether the deceased was also guilty of contributory negligence. Under this instruction, if the deceased had observed the engine approaching at a high rate of speed only a short distance away and had persuaded the driver of the truck to take a

reckless chance to cross the track ahead of the swiftly moving train, the jury was informed the railroad company was liable for all damages sustained, provided only the bell was not rung or the whistle blown as required by the statute. Clearly this is not the law. The instruction is fatally defective in two particular respects. It fails to inform the jury that the negligent omission to ring the bell or blow the whistle must become the proximate cause of the accident to create a liability on the part of the company. It also fails to inform the jury that, if the deceased was guilty of contributory negligence, no liability would attach even though the company was guilty of negligence in failing to comply with the statute.

[5] It is true that the jury was elsewhere correctly instructed in general terms that negligence on the part of the railroad company which will create a liability against it must have been the proximate cause of the accident, and that the plaintiffs may not recover damages if it also appears that the deceased was guilty of contributory negligence. These principles, however, were not applied to the failure to ring the bell or blow the whistle. In no other instruction was the failure to comply with the provisions of section 486 of the Civil Code referred to. To specifically point out this particular omission and characterize it as negligence, declaring without reservation or exception that it created a liability against the company, would be misleading to the jury. This defect was not remedied by the other general instructions. *Keena v. United Railroads of S. F.*, 57 Cal. App. 124, 207 P. 35; *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 278, 201 P. 599, 602. In the case last cited it is said: "Respondent's contention that this instruction was cured because of other instructions on the subject of proximate cause and contributory negligence cannot be maintained. The jury were elsewhere instructed, at defendant's request, that unless the plaintiff proved the negligence of the railroad company, and that such negligence proximately contributed to the injuries sustained, there could be no recovery. * * * The difficulty is that when the court specifically instructed the jury that in a certain state of facts they must bring in a verdict for the plaintiff, the jury has the right to assume that the court in that instance is determining as a matter of law that such negligence was the proximate cause of the injury, and that there was no contributory negligence."

In *Lawrence v. Southern Pacific Co.*, 189 Cal. 434, 442, 208 P. 966, 969, it is said: "This court has uniformly held that instructions relating to the failure of a defendant to perform a duty imposed by statute as constituting actionable negligence should embrace the limitation that the omission must have contributed directly to the injury."

[6] In the present case the prejudicial effect of the challenged instruction was aggravated by a refusal to give to the jury an instruction which was offered by the railroad company in which it was correctly pointed out that the provisions of section 486 of the Civil Code did not require both the blowing of a whistle and the ringing of a bell, and upon the contrary declared that the ringing of a bell as provided by the section was a sufficient compliance with the statute. This instruction should have been given. The ringing of the bell became an important issue in the trial of the case. There was a conflict of evidence on this subject. The plaintiffs' evidence in support of the theory that no bell was rung was negative in form. Witnesses testified in effect that they heard no bell rung. On the contrary, several witnesses testified positively that the bell was rung automatically and constantly until the crossing was reached.

The following instruction was given to the jury at the request of the plaintiffs: "It was the duty of the Southern Pacific Company, a corporation, to run the train in question on its tracks across the Ninth Street crossing in the city of Madera, with due regard for the safety of persons who might be using said crossing."

[7] It is insisted by the appellant this instruction is erroneous because it disregards the well-established standard of reasonable care which is imposed upon a railroad company in the operation of its trains. In view of other instructions which were given to the jury clearly limiting the necessity to the exercise of reasonable care only, we think the language of this instruction which requires the operation of trains "with due regard for the safety of persons who might be using said crossing" is not misleading.

[8] In response to the assignments of error in giving and refusing instructions, the respondents assert the appellant has waived its right to rely upon these defects by its failure to print in its brief all instructions bearing upon the particular subjects involved therein, as provided by rule VIII, Rules of the Supreme Court and District Courts of Appeal. This contention is not supported by the record which is before this court. Our attention is called to no instructions given or refused which involve the provisions of section 486 of the Civil Code, except the two above referred to. Both of these instructions were printed in the appellant's brief. This court rule does not require the printing of instructions which are not related to the subject-matter included in the challenged instructions. The appellant did not waive its right to assign the giving and refusing of these instructions as error by failure to comply with the provisions of the above-mentioned court rule.

[9] The court permitted the plaintiffs to testify, over repeated objections on the part of the defendant railroad company, to their poverty and consequent inability to complete the education of the minor children of the deceased. This evidence of poverty and inability to pay for an education of minor children and the necessity of taking them from school and setting them to work to contribute to the necessary family support would tend to influence the verdict of the jury by prejudice or sympathy. In suits for damages for the death of a parent the authorities are uniform in holding that evidence of the poverty and changed financial condition of the family since the demise should be excluded.

Over the objections of the defendants, Le Roy Smellie, the minor son of the deceased, was permitted to testify that prior to the death of his father he had planned on a college education, and that since his father's death he was compelled to work to carry on his college course; that after his brothers finished their high school course it was necessary for his three brothers to go to work to supply the needs of the family. Le Roy testified in that regard:

"Q. Was it necessary for them to do that, in order that the family home could run?
* * * A. Yes sir.

"Q. What did they do with their earnings?
A. They turned it in to keep the home going.

"Q. Turned it in to your mother? A. Yes sir."

This admission of testimony constituted prejudicial error. *Mahoney v. S. F. & S. M. Ry. Co.*, 110 Cal. 471, 42 P. 968, 43 P. 518; *Green v. Southern Pacific Co.*, 122 Cal. 563, 55 P. 577; *Story v. Green*, 164 Cal. 768, 130 P. 870, Ann. Cas. 1914B, 961; *Steinberger v. Cal. Elec. Garage Co.*, 176 Cal. 386, 168 P. 570; *Johnston v. Beadle*, 6 Cal. App. 251, 91 P. 1011; *Ensign v. Southern Pacific Co.*, 193 Cal. 311, 321, 223 P. 953; *Simoneau v. Pac. Elec. R. Co.*, 166 Cal. 264, 275, 136 P. 544, 49 L. R. A. (N. S.) 737.

[10] The admission in evidence of the time-table of the railroad company as proof of negligence was erroneous. This time-table contained specified limitations of the speed at which trains were to be operated. It provides that "Within the city limits of Madera, between * * * Sugar Pine and Winery Spurs," the speed of trains is limited to ten miles an hour. Ninth street, where the accident occurred, is located within this zone in which the speed of trains is limited by the terms of the time-table to ten miles an hour. Upon the time-table, the following statement is clearly printed: "For the government and information of employees only, and not intended for the use of the public." This time-table was received in evidence over the objection of the railroad company. The record contains no evidence that the deceased, the

driver of the truck, or the public in general either knew of this limitation of speed or relied upon it in crossing the railroad track within that district. There is no evidence that it was the custom of the railroad company to limit the speed of its trains to ten miles an hour within that district. It seems unreasonable to assume it applied to regular passenger trains. The evidence is conflicting regarding the actual speed of the train just prior to the accident. The engineer said they were traveling at their usual speed of twenty or twenty-five miles an hour. Some witnesses testified the train was traveling fifty or sixty miles an hour. There is no statute or ordinance of the city of Madera limiting the speed of trains within that city. It is therefore clear the reception in evidence of the time-table would give the jury the impression that the operation of trains at any speed in excess of ten miles an hour within the district where the accident occurred constituted negligence on the part of the railroad company. Unless the time-table, which amounts to mere private rules of the company for the use of its employees, furnishes competent evidence of reasonable care, it is not entitled to be received in evidence under the circumstances of this case. A carrier may not fix the standard by which its negligence may be determined. In the absence of statute or an ordinance upon the subject, the rate of speed which will be deemed to be excessive and therefore negligent depends upon the surrounding circumstances. It is the sole province of the jury to determine from the particular facts of the case what conduct constitutes negligence.

There is an apparent conflict of authorities respecting the competency of private rules of operation as evidence tending to establish negligence. Many cases relative to the competency of private rules may be reconciled by distinguishing between those suits in which an employee seeks to recover damages from his employer for injuries sustained in the course of his employment by failure to enforce rules or customs known to the employee and relied upon by him from that other class of cases wherein a stranger seeks compensation from a carrier or other industry for injuries resulting from the violation of private rules not intended for the use or benefit of the general public, and the existence of which is neither known to nor relied upon by the injured party. There is good reason for the uniform principle that masters are bound to furnish their employees with reasonably safe apparatus with which to work, and to adopt and enforce reasonable rules of operation for the protection of their servants. 1 *Sherman & Redfield on Negligence* (6th Ed.) 510, § 202; 3 *Elliott on Railroads* (2d Ed.) 688, § 1281. Such rules or customs may be competent evidence of negligence under proper circumstances. In 45 C. J. 1258, § 827, it is

said in that regard: "Rules adopted by an employer, prescribing the care or precautions to be taken by his employees in the conduct of his business, or evidence of an established custom of conducting his business in a particular manner, whether established by rules promulgated by persons in authority or growing out of the long continued practice of employees, may, it is usually held, be admitted against him to show negligence on the part of an employee, when relevant to the issue, even though the injured person had no knowledge of such rules or custom, except where they require the performance of duties greater than those required by law."

The rules of an employer regarding the conduct of his business, under the circumstances above referred to, are sometimes admitted in evidence on the theory that they are in the nature of admissions of conduct which he deems to be necessary to constitute reasonable care. This reasoning has been severely criticized.

Upon the contrary, there are many authorities which hold that private rules regarding the conduct of business are not competent evidence to establish negligence. This is especially true when the suit is brought in behalf of a stranger to the enterprise who had no knowledge of the existence of such rules and therefore does not rely upon them for protection. These rules are also held to be incompetent as evidence of negligence when they purport to increase the burden of care beyond the standard of reasonable precaution which the law requires. To permit the operator of an industry to establish a standard of care by the adoption of rules, different from the ordinary standard of reasonable care which is required by law, regardless of whether the complainant, who is protected by no special contract of employment, knows of these rules, or relies upon them, would create as many standards of conduct as there are various organizations with different operating rules. The public would then have no fixed standard of care upon which it could rely for protection. Among the best-considered cases which hold these rules to be incompetent under such circumstances is *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166, 169, 70 Am. St. Rep. 341. The Supreme Court reversed the judgment in that case for error in admitting in evidence the private operating rules of a street railway company. The court said: "The court also admitted in evidence, over defendant's objection, its rules intended only for the guidance of its own employees in the operation of its cars. We think this was error. There was no evidence that the plaintiff had any knowledge of the existence of these rules or of any custom, based upon them, as to the manner of operating cars; hence his conduct could not have been in any way affected or influenced by them. * * *

But a person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common. Such rules may require more, or they may require less, than the law requires; and whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party. * * * The fallaciousness and unfairness of any such doctrine [admitting in evidence private rules in proof of negligence against the promulgator thereof] ought to be apparent on a moment's reflection. The effect of it is that, the more cautious and careful a man is in the adoption of rules in the management of his business in order to protect others, the worse he is off, and the higher the degree of care he is bound to exercise. * * * To treat the adoption of such rules as an admission against the party would involve the same principle as treating repairs or improvements made after an accident as an admission of prior defects,—a doctrine long since repudiated by this court, and now repudiated by most of the courts of the country."

The foregoing language was approvingly quoted in the case of *Chicago, B. & Q. R. Co. v. Lampman*, 18 Wyo. 106, 104 P. 533, 25 L. R. A. (N. S.) 217, Ann. Cas. 1912C, 788. Among other cases which for reasons variously expressed have excluded private rules from evidence as proof of negligence under circumstances similar to those of the present case are the following: *Isackson v. Duluth Street Ry. Co.*, 75 Minn. 27, 77 N. W. 433; *Hoffman v. Cedar Rapids & M. C. R. Co.*, 157 Iowa, 655, 139 N. W. 165, 170, Ann. Cas. 1915C, 905; *Carney v. Boston Elevated R. Co.*, 219 Mass. 552, 107 N. E. 411; *Louisville & N. R. Co. v. Stidham's Adm'x*, 187 Ky. 139, 218 S. W. 460; *Louisville & N. R. Co. v. Dyer*, 152 Ky. 264, 153 S. W. 194, 48 L. R. A. (N. S.) 816; *Alabama Great Southern R. Co. v. Clark*, 136 Ala. 450, 34 So. 917, 920; *Brown v. Detroit United Ry.*, 179 Mich. 404, 146 N. W. 278; *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167, 83 S. E. 1072. In the Alabama case above cited it is said: "By rules adopted for the government of its employees in the management of its internal business, the defendant company could not lessen the degree of care which the law requires, and it would be unreasonable to hold the defendant to a higher degree of care than the law imposes, because in its rules, in order to more thoroughly guard against accidents, it exacted an unusual or extraordinary degree of care of its employees."

In a careful examination of the California authorities upon which the respondents rely in support of the ruling admitting in evidence the rules of the company, we are persuaded none of them are in point. These cases are usually between an employee and an

employer. They are based upon rules or custom known to the injured parties and relied upon by them. In one or two instances private rules were introduced without objection. They furnish no authority for the introduction of private rules as proof of negligence in a suit between a common carrier and a stranger to that company when the injured party is ignorant of the existence of such rules and does not rely upon them for his protection. The competency of such evidence has not been heretofore passed upon by the California courts. We believe such evidence is incompetent and prejudicial.

In the present case there is no evidence the railroad company was accustomed to run its passenger trains at ten miles an hour "between Sugar Pine and Winery Spurs" in the city of Madera. There is no evidence the deceased knew of such a rule or relied upon it. Moreover, negligence must become the proximate cause of the accident to create a liability. It does not seem reasonable to hold that, if the passenger train had been running at only ten miles an hour, the accident could have been avoided. Immediately after the freight train passed the crossing, the deceased said, "It's all clear, let's go," and the truck drove across the intervening space of thirteen feet onto the main track, where it was struck. The evidence shows that, when the truck emerged from behind the freight train, the engine was but sixty feet away. With the hearing of the occupants of the truck impaired by the noise of the passing freight train, and their sight of the main track obscured by the line of box cars, great care should have been exercised in driving out upon the main track.

On account of the giving and refusing of erroneous instructions, the admission of proof of the poverty of the family of the deceased, and the admission of the private rules of the railroad company as proof of negligence, it becomes necessary to remand the cause.

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

BRIX v. PEOPLE'S MUT. LIFE INS. CO.*
Civ. 8467.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1933.

Rehearing Granted Feb. 11, 1933.

I. Pleading ⚡403(2).

Insurer setting up, as defense, matter of controversy in construction of indemnity con-

tract sued on, waived objection that no specification of controversy was stated in complaint (Code Civ. Proc. § 1060).

2. Pleading ⚡403(1).

Defect in pleading is cured by subsequent pleading of omitted matter by other party.

3. Courts ⚡118.

Superior court had jurisdiction of action to recover \$400 in unpaid installments on accident policy, and for determination of insured's rights under policy (Code Civ. Proc. § 1060).

4. Insurance ⚡665(3).

Evidence, in action on accident policy, sustained finding insured's stating he was "rigger" by occupation did not constitute misrepresentation regarding occupation, where work did not take him off ground.

Definition of "rigger" includes not only the operation of hoist but putting up, mantling, and dismantling of rigging, that is, steel lines and cables, and the erecting of derricks and hoists.

5. Insurance ⚡665(5).

Evidence sustained finding insured sustaining permanent displacement of shoulder joint was "wholly and continuously disabled" within accident policy terms.

6. Insurance ⚡672.

Court had jurisdiction to render judgment requiring insurer's payment of future installments under accident policy, where only condition to payment was within issues of case, and was determined (Code Civ. Proc. § 1060).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Arthur J. Brix against the People's Mutual Life Insurance Company, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

See, also, 12 P.(2d) 108.

A. B. Weiler, of San Francisco, for appellant.

Samuel M. Samter and J. J. Posner, both of San Francisco, for respondent.

STROTHER, Justice pro tem.

Action upon a policy of indemnity insurance.

The first count in the complaint is for the recovery of the sum of \$400 unpaid installments on an accident insurance policy issued by appellant to respondent, and such installments as might fall due pending trial of the action. The contract is set out and

made part of the complaint. The second count includes by reference all the allegations of the first count, and in addition alleges that a controversy had arisen as to the rights of plaintiff under the contract.

The defendant demurred generally and specifically, among other objections raising the question of the jurisdiction of the court and the failure of plaintiff to specify any particulars of the alleged controversy as to plaintiff's rights. The demurrer was overruled and defendant answered, admitting the execution of the contract, proof of loss, and the payment by it of five monthly installments provided for by the contract; denying the injuries to plaintiff, and denying that any controversy existed as to the rights of the parties. As a special defense, defendant alleged that plaintiff had not been and would not be continuously under the care of a physician, as provided in the policy.

[1-3] Appellant asserts upon this appeal that the superior court of the city and county of San Francisco was without jurisdiction of the action to recover the sum alleged to be due on the contract, actions for that amount being within the exclusive jurisdiction of the municipal court, and that, no specification of controversy having been stated in the second count of the complaint, judgment should have gone in its favor. Assuming, without deciding, that its position was correct in the inception of the action, respondent waived the objection by answering and setting up as a special defense a matter of controversy in the construction of the contract. The common-law rule still obtains that a defect in a pleading is cured by a subsequent pleading of the omitted matter by the other party. The superior court having exclusive jurisdiction of actions brought under section 1060, Code of Civil Procedure, properly retained the action. The court is authorized by the section to determine the rights of the parties and grant "other relief."

The other grounds of error urged by appellant are that the findings and judgment are not supported by the evidence, and that "the judgment itself is not of the character contemplated by the law of this state."

[4] The first objection to the evidence is that plaintiff made a material misrepresentation in answers to questions as to his occupation. He stated that he was a "rigger" by occupation. The answer to the next question was: "The duties of all my occupations are stated in full as operating hoist machine." The definition of "rigger" as given in dictionaries, and testified to by a witness, includes not only the operation of hoist but putting up, mantling, and dismantling of rigging—that is, steel lines and cables—and the erecting of derricks and hoists.

Defendant's attorney testified that there was a classification of nonacceptable occupa-

tions, under a rule of the company, which included work required to be done in the air. It was not, however, shown that this rule was ever brought to the knowledge of plaintiff. The policy itself sets forth that the insurer will not be liable for sickness resulting from certain diseases, or injuries suffered in named occupations, which do not include that in which plaintiff was engaged. The policy contains the further provision that "no reduction shall be made in any indemnity herein provided by reason of change in the occupation of the Insured or by reason of his doing any act or thing pertaining to any other occupation." (Italics ours.) In fact, plaintiff was not, before or at the time of receiving his injuries, engaged in work which took him off the ground. The trial court did not err in finding that there was no misrepresentation.

[5] The defendant by its contract expressly agreed that if the injury should "wholly and continuously disable the Insured from performing any and every kind of duty pertaining to his occupation," that it would pay him the indemnity during his life. The contention of the appellant is that the evidence does not sustain the finding of total disability by the court. The plaintiff suffered displacement of one shoulder joint, with the result that the arm would drop out of the socket even without exertion. Several operations were performed to remedy the condition, but without success. While there was some slight conflict in the expert surgical testimony, the overwhelming weight of it was to the effect that the condition was irremediable. The testimony of an expert in the occupation, that the performance of its duties required great strength, and the ability to use both hands, whether it be considered as that of a "rigger" in the general sense, or limited to the operation of a hoisting machine, was uncontroverted.

The court rendered a present judgment for the amount of the indemnity installments due at the time of the trial, and further requiring the defendant to pay at the same rate during the life of the plaintiff. The finding was in exact conformity with the great weight of the evidence, and the judgment in exact conformity with the agreement of appellant, assuming that respondent's disability will continue for the rest of his life, as found by the court.

[6] Has the court jurisdiction to render judgment requiring the payment of future installments in a case such as this? We can find no ground in reason or precedent against it. In actions for damages for breach of continuing contracts, courts estimate and give judgment for damages that are certain to accrue in the future. In actions for damages for personal injuries, if the injuries are found to be permanent, judgment is given in an amount to cover the loss of the injured party

for his natural life, estimated according to the mortality tables. It is true that courts have refused, where action has been brought for installments due on a contract calling also for future installment payments, to give judgment, when there is no accelerating clause, for the payments in the future. But we are satisfied that the reason and distinction is that in such contracts there are mutual and concurrent covenants or agreements, express or implied by law, failure to comply with which by the plaintiff might, in the future, avoid the contract as to the defendant. But here the only condition as to the payment of the indemnity was within the issues and determined, and there is no reason why the plaintiff should be remitted to another action in case of defendant's failure to pay in the future.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

6. Criminal law §730(11).

Prosecutor's remarks in argument respecting witnesses not testifying *held not prejudicial*, in view of instructions.

Deputy district attorney's argument objected to was, in substance, that, if witnesses had anything to say, he liked to hear them say it from witness stand; that there was one witness who testified for defendant; that he was one of two witnesses who testified to anything that was worth anything; and that he was not there and was out of state, and that prosecutor did not know whether conveniently so or not; and that he would like to ask such witness a few questions, but that his testimony was read. No objection was made at time remarks were made, and in final instructions court instructed jury that conclusions were to be formed from testimony actually introduced, and that inferences were not to be drawn from statements or objections of counsel.

7. Criminal law §726.

Prosecutor's reference to criminal cases in recent history of state in answer to defendant's counsel's reference to other criminal prosecutions *held not prejudicial*.

129 Cal.App. 71

PEOPLE v. WALDEN.

Cr. 2245.

District Court of Appeal, Second District, Division 2, California.

Jan. 20, 1933.

1. Robbery §24(1).

Evidence *held* sufficient to sustain conviction for robbery.

2. Criminal law §1169(1).

Robbery §23(1).

In robbery prosecution, admitting testimony regarding make of car defendant drove and witness' activity regarding repairs on defendant's car *held not erroneous or prejudicial*.

3. Criminal law §730(8).

Where defendant testified regarding alias name, prosecutor's reference to defendant's use of alias name *held not prejudicial*; jury being instructed to disregard it.

4. Criminal law §1170½(2).

Asking of question whether witness had taken defendant to be identified as person who cashed stolen checks *held not prejudicial*, where witness replied no one had so identified defendant.

5. Criminal law §730(1).

Prosecutor's accusing defendant's attorney of shaking head in manner to suggest required answer of witness *held not prejudicial*, where court instructed jury not to draw inferences from statements of counsel.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Clarence B. Walden was convicted of robbery, and he appeals.

Affirmed.

William I. O'Shaughnessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., James S. Howie and John D. Richer, Deputy Attys. Gen., for the People.

STEPHENS, J.

Defendant Walden was convicted of robbery after a trial before a judge and jury. A new trial was denied by the judge and sentence was pronounced. Defendant below appeals from the denial of his motion for a new trial and from the judgment had on the verdict.

Appellant advances seven points upon which he asks a reversal of the case. Points I, II, IV, V, and VI are based upon alleged misconduct of a deputy district attorney during the trial. Point III is based upon an alleged error of the court in the course of trial. Point VII is based upon a claim that the evidence does not support the verdict. We shall hereafter refer to appellant as defendant.

[1] A bank was robbed by several men, and a partial identification was had of defendant as one of the robbers, though it can-

not be said that this partial identification was sufficient, standing alone, to justify a conclusion by the jury that the defendant was one of the robbers. An identification of defendant's automobile was had as the car that drove from the scene of the robbery immediately after its commission with the robbers therein. A substantial part of a quantity of express money orders that had been stolen from the bank at this robbery was found hidden back of the radiants of a gas heater in defendant's home. There were other connecting and circumstantial matters in evidence. On some of these matters of evidence there was conflicting evidence. We think there is no question but that the evidence was sufficient upon which to base the verdict and the action of the judge in denying a new trial, and we so hold. This disposes of point VII.

[2] The error that defendant complains of in point III is that the deputy district attorney asked one of the people's witnesses whether or not defendant had another car, and the witness replied that defendant drove a Chrysler. The witness was also asked about his activity regarding repairs on defendant's car. These questions were objected to as irrelevant and immaterial, and the court permitted them to be answered holding that they would be proper as testing the memory of the witness. We think no error was committed, but, aside from that we fail to discern any prejudice to defendant.

The other points refer to asserted misconduct of the deputy district attorney.

[3] Point I. In answer to a question by the deputy district attorney of a witness, the witness replied that he asked the defendant if he was Peppy Warren, and defendant answered that he was. No objection was made or misconduct assigned. Later the deputy district attorney again referred to the use by defendant of that assumed or alias name. To this the defendant objected and assigned the incident as misconduct. The court made the following remark: "In view of the testimony already in I do not see that it is misconduct. The jury will be instructed to disregard it." We think no prejudice was suffered by the defendant by the incident. *People v. Williams*, 72 Cal. App. 52, 236 P. 355.

[4] Point II. The deputy district attorney asked a witness if he had taken the defendant to several persons and asked if he could be identified by them as the person who had cashed some of the stolen checks or whether such checks had been presented by some one who had been connected with defendant. The reply was to the effect that no one had so identified defendant. No objection was interposed, and no assignment of misconduct was made at the time or during the course of the trial. We think no prejudice was or

could have been suffered by defendant by the incident.

[5] Point IV. The deputy district attorney in open court accused the attorney for defendant of shaking his head in such a manner as to suggest the required answer of a witness. Defendant assigns this remark as error and misconduct. The court promptly instructed the jury that they were not to draw inferences from statements or objections of counsel, and nothing further was done in the premises. No prejudice to the rights of defendant resulted from the incident. *People v. Ong Mon Foo*, 182 Cal. 697, 704, 189 P. 690, and *People v. Beggs*, 178 Cal. 79, 90, 172 P. 152.

[6] Point V. In the course of the final argument the deputy district attorney said: "Well, if witnesses have got anything to say, I like to hear them say it from the witness stand. There was one of the witnesses who testified for the defendant; he is the one, I think, of the two witnesses that testified anything that was worth anything as the facts in the case; and he was not here. That was Mr. Widener. I will talk about that question later on, too. He was out of the state. I don't know whether conveniently so or not. Perhaps he thought he had testified before, and that was enough, and let it go at that. I would like to ask him a few questions. Perhaps things he might have overlooked, or been hazy about when he testified before; but we did the best we could; so his testimony was read, between Mr. O'Shaughnessy and myself."

With commendable candor the Deputy Attorney General states that this statement should not have been made, but thinks that it was not of such seriousness that the case should be reversed because of it. In all of this we agree with the Deputy Attorney General. No objection was made at the time the statement was made, and we are of the opinion that the statement, rambling as it was, meant little more than an expressed regret that all of the witnesses could not have been presented to the jury. In the circumstances, and considering the instructions that had been given during the trial (see point IV), and in the final instructions that the jury's conclusions were to be formed from the testimony actually introduced during the trial, and that inferences were not to be drawn from statements or objections of counsel, we think no prejudice resulted to defendant.

[7] Point VI. In the course of his argument, the deputy district attorney referred to several criminal cases in the recent history of the state. The defendant assigns this as error. But the record discloses that defendant's counsel had referred to other criminal prosecutions in his own argument, seeking to suggest to the jury that perhaps unjust or mistaken prosecutions had taken

place. The deputy district attorney, in reply, referred to cases which he claimed were justly prosecuted. Neither of the attorneys were pursuing a high type of argument to a jury where the liberty of a man was dependent upon testimony then before that jury. However, we think no prejudice was suffered by the defendant therefrom.

Perhaps no criminal case is ever tried where the ideal is maintained unqualifiedly. Naturally in the heat of contest and in the enthusiasm of argument the strict rules of conduct are sometimes overstepped. Were all such cases reversible therefor, the administration of the criminal law would break down completely through niceties of requirements too fine for practical application. The true test is whether or not the defendant has been given a fair trial, the law and the ordinary and common traits of human nature considered. That the defendant who is the appellant here has been given such a fair trial we entertain no doubt.

The denial of the motion for a new trial and the judgment pronounced upon the verdict are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

129 Cal.App. 1

MUZZY v. SUPREME LODGE OF THE FRATERNAL BROTHERHOOD.

Civ. 657.

District Court of Appeal, Fourth District.
California.

Jan. 18, 1933.

1. Insurance $\S$ 819(4).

Evidence sustained finding that death from embolism occasioned by operation for hernia, discovered after insured fell on iron support, resulted solely from "accidental causes."

2. Insurance $\S$ 787.

Words, "without concurrence or will of person injured," in accident policy provision, did not refer to insured's consent to necessary operation.

3. Insurance $\S$ 787.

By-law provision in definition of accident held not to limit meaning of "accidental causes" within benefit certificate.

4. Insurance $\S$ 787.

By-law provision withholding benefits for strain held not to preclude recovery under beneficiary certificate for death traceable to to hernia which resulted from fall.

5. Evidence $\S$ 268.

Insured's statements immediately after falling as to suffering pain and place thereof held competent on issue whether there had been pre-existing hernia.

6. Appeal and error $\S$ 1048(2).

Admission of opinion of physician who performed operation, as to duration of hernia, based partly on personal history given by insured, held not reversible error.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Flora A. Muzzy against the Supreme Lodge of the Fraternal Brotherhood. Judgment for plaintiff, and defendant appeals.

Affirmed.

Michael F. Shannon, Thomas A. Wood, and Robert H. Dunlap, all of Los Angeles, for appellant.

Leland S. Davidson, of Ontario, and Fred A. Wilson, of San Bernardino, for respondent.

BARNARD, P. J.

The plaintiff, as beneficiary, brought this action to recover on a policy of accident insurance issued to her son, Harry Gordon. The record shows that the insured was employed in a packing house; that on August 15, 1930, while assisting another workman in pushing a heavy truck along a track, he slipped and fell, striking an iron support to the track; that shortly thereafter it was discovered he had a hernia; that on October 14, 1930, an operation was performed for the purpose of repairing the hernia; and that on October 21, 1930, the insured died, death having resulted from an embolism occasioned by the operation. After a trial without a jury, in which it was stipulated that the only issue involved was the cause of death, judgment was entered in favor of the plaintiff, from which this appeal has been taken.

The policy contained the following provision: "First: In the event of the death of the member solely from accidental causes and by external violence happening without the concurrence or will of the person injured, the death occurring within ninety days from the date of the accident * * * the Society agrees to pay to Flora Muzzy * * * the sum of Fifteen hundred dollars, upon the required proof of death and upon the surrender of this certificate."

Among other things, the court found as follows: "The court hereby finds that the said Harry E. Gordon died solely from accidental causes, and by external violence happening without the concurrence or will of the said

Harry E. Gordon, within the meaning of and as provided by the beneficiary certificate referred to in said complaint and in said answer."

[1] The main contention here made is that this finding is not supported by the evidence. Appellant first points out the distinction made by our courts between a policy covering accidental death and one covering only death arising from accidental means, contending that this is a case of the latter class, relying on such cases as *Rock v. Travelers' Ins. Co.*, 172 Cal. 462, 156 P. 1029, 1030, 1 L. R. A. 1916E, 1196, *Ogilvie v. Aetna Life Ins. Co.*, 189 Cal. 406, 209 P. 26, 28, 26 A. L. R. 116, and *Harloe v. California State Life Ins. Company*, 206 Cal. 141, 273 P. 560. The general rule is thus quoted in *Ogilvie v. Aetna Life Ins. Co.*: "Where the death is the result of some act, but was not designed, and not anticipated by the deceased, though it be in consequence of some act voluntarily done by him, it is accidental death; but where death is caused by some act of the deceased, not designed by him, or not intentionally done by him, it is death by accidental means."

In *Rock v. Travelers' Ins. Co.*, the following quotation from another case (*United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60) is approved: "That, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means."

Assuming, as contended for by appellant, that the policy here in question covered only death arising from accidental means, we think the slipping and falling which preceded the injury was such an unforeseen, unexpected, and unusual occurrence as would bring the incident within the terms of the policy and constitute an injury resulting through accidental means.

Aside from the question of interpretation and construction of the language used, the appellant contends that this finding is not supported by the evidence in three respects. It is first contended that the evidence is insufficient to show the existence of accidental causes and external violence, in that the only eyewitness did not see exactly what happened. This is based upon the testimony of the workman who was assisting in pushing the truck who, after having testified as to the deceased's slipping and falling and that the side of the body came in contact with an iron projection on the rail, in answer to a question as to whether he had seen that, replied: "Well, I would judge that by his holding his body; his groin, that is what it was." In other por-

tions of his testimony this witness stated that the deceased was pushing very hard on the truck, which operation necessitated his stooping very low; that as he was pushing the car his foot slipped and caused him to fall; that he fell onto the track; that he struck an iron support that extended out from the rail three or four inches; and that immediately afterward he took a leaning position with his hand on his groin with a look of pain on his face and said, "That hurt me." Again, this witness testified that when the deceased fell he struck this iron projection; that he fell against the square corner thereof; that he fell flat "except catching on this side"; and that the lower portion of his body was flat on the floor except for a part being supported on this four-inch high projection. Not only was the trial judge justified in believing any portion thereof, but in its entirety this testimony, especially when taken in connection with other evidence in the case, justified the inference that the deceased, in falling, struck the projecting iron at the point on his body where the external marks and the hernia were later discovered, and is sufficient to sustain the finding so far as proof of the happening of the accident is concerned.

It is next contended that the finding is unsupported because the evidence in fact shows that the deceased was suffering from a pre-existing hernia without which no operation would have been needed. In support of this, appellant relies upon the testimony of a physician testifying in its favor, given in answer to a hypothetical question, to the effect that such a fall could not have caused the hernia in question, and also upon the report of one of the referees of the Industrial Accident Commission, which was introduced in evidence, in which the referee found that the deceased sustained an injury "consisting of an aggravation of a pre-existing hernial condition for which an operation was furnished." If it could be assumed that this report was properly admitted and is to be considered as evidence, the two matters relied on are only a part of the evidence appearing in the record upon this point. There is other evidence to the effect that prior to this accident the deceased was always in good health; that his employment required that he engage in heavy lifting, shoving, and hard manual labor; that he had never taken time off and had never complained of injury or pain; that this injury caused the first interruption of his work; that he was strong and vigorous and stronger than the average man; that, after the injury, his brother, with whom he slept, examined his body and found on his groin a swelling about three inches long and about one inch wide; and that, although he had seen his body many times before, he had never seen such a swelling prior to the accident. The physician to whom he was sent

by his employer and who performed the operation testified that he examined him and found on one groin a swelling which was tender, and that he ascertained that he had a hernia; that this hernia protruded outwardly; that this was a traumatic hernia; that in his opinion it was not a pre-existing hernia; that he advised an operation and operated; and that the patient "died following the repair of a hernia of less than sixty days' duration. Death was due to embolism, which would not have occurred had it not been for his injury." He also testified that this hernia was "a traumatic injury, or blow." He also testified that a number of things connected with his physical examination of the patient convinced him that the hernia was of very recent origin, among which were the facts that there was no thickening of the walls present and no adherent matter; also stating that "a hernia of long standing presents a different picture." He further testified that "I didn't think he ought to return to work," that "he was not in condition to do the work he formerly had done," and that it was "because of this incapacity" that he advised the operation. At best, no more appears than a conflict in the evidence, and the finding is supported in the respect mentioned.

[2] A third ground of insufficiency of the evidence is said to be that it does not appear that the operation was necessary to save the life of the deceased; it being also urged in this connection that the fact that the deceased consented to the operation shows that the death did not occur without the concurrence or will of the person injured. The physician who performed the operation testified that in his opinion the operation was necessary; that such an operation is the only recognized treatment of hernia to effect a cure; that, if the deceased had not consented to the operation, the hernia would have incapacitated him; and that, while an embolism of the character existing in this case is one of the hazards of any operation, it is one that happens very infrequently and one that is not anticipated or expected. In the respect under consideration we think this evidence sufficiently supports the finding complained of. The deceased was a strong, healthy man of 46 years of age, and the words, "without the concurrence or will of the person injured," used in the policy, must be held to refer to the external violence referred to immediately prior thereto, and not to the concurrence of an injured person in consenting to an operation which is reasonably necessary either to save his life or to enable him to earn a subsistence. In all of the respects in which it is attacked, we think the finding is supported by the evidence.

[3] The contention is made that the death here in question did not result from "accidental causes" as that phrase is defined in the by-laws of the defendant society, which by-laws

are made a part of the insurance contract. In this regard we are referred to section 173 of the by-laws, which purports to define an "accident," including a provision that the injured party shall be continuously and wholly disabled from the date of the accident. Since there is evidence that the deceased did some work on a few days after the accident here in question, it is contended that this by-law prevents any recovery on the part of the respondent. While section 173 purports to define an accident, it in no way defines the phrase "accidental causes." The reference therein to continuous and total disability contains no provision as to the length of the same, and that portion of the section is entirely meaningless except as the same is connected up with something else. It is perfectly apparent from the context that this relates to, and in fact it is carried over to and included in, another section of the policy providing for the payment to the member himself of weekly benefits for disabilities which do not result in death. Not only does this fully appear from the context in the by-laws, and from the certificate itself, but the purported definition in section 173 contains the limitation, "unless otherwise defined in the certificate," and the paragraph in the certificate covering the matter of death resulting from "accidental causes" is full and complete, and specifically sets forth the exact requirements and conditions for the payment of such death claim.

[4] The claim is further made that an injury of this sort is specifically exempted under the policy by a part of section 177 of the by-laws reading: "Neither shall any payments of benefits be made to a member for strain, from any cause, or for any disability as a result of overlifting." We are then asked to take judicial notice of the alleged fact that the most common cause of hernia, "in the opinion of laymen," is strain. In any event, we could not assume, under the facts of this case, that this clause controls where such an injury results not from a strain, but from a blow received in a fall, resulting in an actual maladjustment rather than a mere tension or soreness. However, it fully appears from this section that it relates to the payments of disability benefits to members themselves and has no relation to death benefits.

[5, 6] The final contention is that the court erred in admitting certain testimony objected to as being hearsay and self-serving. The workman who was with the deceased at the time of the accident testified that the deceased immediately thereafter said, "That hurt me," and placed his hand on his groin, and also that the deceased complained of suffering a few days later. The brother of the deceased testified that the deceased showed him where "It was hurting him," and the sister-in-law testified that the deceased talked about his pain and suffering. None of these

statements were narratives of past conditions, and they contain no attempt to show what caused the pain or suffering. They were properly admissible and material upon the issue of whether or not there had been a pre-existing hernia. *Lange v. Schoettler*, 115 Cal. 388, 47 P. 139; *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 P. 747; *Bloomberg v. Laventhal*, 179 Cal. 616, 178 P. 496. In any event, they cannot be held sufficiently prejudicial to require a reversal. Objection is also made that the physician who performed the operation based his opinion as to the cause of the injury upon the personal history given by the deceased. This witness, on being asked upon what he based his conclusion that the hernia was of less than sixty days' duration, replied that he based it upon the man's personal history, his statement to him of the accident and how it occurred, together with the physical findings. He then testified in detail as to physical conditions in the patient showing that the hernia had not been of long standing. No reversible error appears in this testimony. *Sherwood v. Thomas* (Cal. App.) 12 P.(2d) 676; *Davis v. Renton*, 113 Cal. App. 561, 298 P. 834.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 480

RILEY v. STACK et al.
Civ. 8798.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1932.

1. Hospitals $\S$ 5.

Act requiring county to pay prorated cost of maintenance of drug addicts committed to state hospital who are bona fide county residents, *held* reasonable exercise of state's police power (St. 1927, p. 153, $\S$ 11, as amended by St. 1931, p. 2192).

2. Judgment $\S$ 707.

Superior Court order that county make payments for support of drug addict in state hospital *held* conclusive on county as to residence of addict, though county was not party to proceeding (St. 1927, p. 149, as amended; Code Civ. Proc. $\S$ 1908).

Such order of the Superior Court was conclusive as to the status of the drug addict, within Code Civ. Proc. $\S$ 1908, since the county of the residence of the drug addict was an essential issue required to be determined before he could be committed to the state hospital, and since

the Superior Court in such proceeding does not sit as a county court but as a court of the state whose determination is final, unless set aside by some proceeding authorized by law, and, until set aside, is not subject to collateral attack by a ministerial officer.

3. Constitutional law $\S$ 252.

Hospitals $\S$ 5.

Act relating to rehabilitation of drug addicts and requiring county to pay prorated cost of their maintenance when bona fide county residents and committed to state hospitals *held* not to deny due process (St. 1927, p. 149, as amended; Const. Cal. art. 1, $\S$ 13; Const. U. S. Amend. 14).

Such act does not offend due process of Const. Cal. art. 1, $\S$ 13, and Const. U. S. Amend. 14, since a "county" is not a "person" within either the federal or state Constitution, but is a mere subdivision of the state and property of individual taxpayer of county not being taken without due process, since, when the legislature fixed the county as a taxing district, it was presumed to have taken such evidence on the question of benefits to local taxpayer as might be necessary and its determination of that matter being conclusive.

[Ed. Note.—For other definitions of "County" and "Person," see Words and Phrases.]

Application for writ of mandate prayed to be directed to respondents as Auditor and Treasurer of San Mateo County to require them to comply with provisions of "Narcotic Rehabilitation Act" (Stats. 1927, p. 149). Writ granted.

Application by Ray L. Riley for writ of mandamus prayed to be directed to Edward M. Stack and another, as Auditor and Treasurer of San Mateo County, to require them to comply with the provisions of the Narcotic Rehabilitation Act.

Writ granted.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for petitioner.

Edmund Scott, Dist. Atty., of Redwood City, for respondent.

NOURSE, P. J.

This is an original proceeding in mandamus to require the respondents to comply with the provisions of the "Narcotic Rehabilitation Act" (Stats. 1927, p. 149, as amended; Deering's Gen. Laws, Act. 5320).

The facts are without dispute. A "patient" within the meaning of the act was duly and regularly committed to the state narcotic

hospital by order of the Superior Court sitting in the city and county of San Francisco. In that proceeding the "patient" was found to be a resident of the county of San Mateo, and the court thereupon entered its order that San Mateo county make payments to the state of California for the support of the inmate of the state hospital pursuant to the act. The respondents defend upon the sole ground that San Mateo county was not a party to the proceeding leading to the commitment, and had no opportunity to contest the issue of the residence of the inmate.

Section 3 of the act (as amended by St. 1931, p. 408) authorizes the arrest and the trial and commitment before "a judge of the superior court" of "any person" found to be a drug addict. Section 4 (as amended by St. 1929, p. 726, § 1) provides that, "at the hearing," the court must inquire into the financial condition of the person committed, and that the court may order the payment of such sums as it may deem just to "the county, or city and county, of which such person is a bona fide resident" during such time as the person committed may remain in the state hospital. Section 11 (as amended by St. 1931, p. 2192) provides that for each person committed "the county of which he is a bona fide resident shall pay the state at the rate of twenty-five dollars per month for the time such person so committed remains an inmate of the institution." Section 12 (St. 1927, p. 153) imposes the duty upon the county auditor to include the amount due under this act in his state settlement report, and requires the county treasurer to pay such amount to the state treasurer.

The respondents admit that they have not performed these duties. They also admit the allegations of the petition that the inmate was duly and regularly committed to the state institution, and that the superior court, in the commitment proceeding, found that the inmate was a bona fide resident of San Mateo county.

[1-3] But respondents argue that the due process of law clauses of the federal and state Constitutions (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14) require that the county, or its taxpayers, should be heard before an obligation to pay is placed upon them. This constitutional guaranty is that no *person* shall be deprived of his property without due process of law. The word "person" has been extended to include private corporations, and, in a limited field, has been extended to public corporations. A county in this state does not come under either class. It is merely a political subdivision of the state over which the Legislature has the inherent right to prescribe the powers, duties, and obligations for the purpose of exercising, on behalf of the state, the governmental functions of such subdivision. The Narcotic Re-

habilitation Act is an exercise of the state's police power designed to care for the narcotic addicts within the state and wherever found. The provision requiring each county to pay a prorated cost of the maintenance of those persons committed, who are bona fide residents of the county is a reasonable provision not unlike those found in the acts relating to the care of the insane, the feeble-minded, the orphans, the juvenile delinquents, and in similar acts. As we said in *Jensen v. McCullough*, 94 Cal. App. 382, 394, 271 P. 568, 574: "The Legislature has the power to determine that each political subdivision should maintain a home for the care of its feeble-minded, or it could provide a state home, or homes, for the purpose, and bear all the burden of maintenance, or it could require each political subdivision to contribute a share of the expense of the maintenance of the individual. In the case at hand the Legislature has provided a home where such patients may be kept, and has fixed a uniform charge upon every county in the state determined by the number of patients committed from each county."

In this exercise of its police power the Legislature has passed a uniform act applicable to all counties in the state and requiring payments upon an uniform basis fixed by the number of inmates received. For the purpose of fixing these charges, it has committed to the Superior Court the duty of determining the issue of residence of the person committed. For this purpose the proceeding is not a contest between two counties to determine which should bear the burden. It is an *ex parte* proceeding in which the state and the patient alone are interested. The Superior Court does not sit as a county court, but it is a court of the state to which the state has delegated the duty of determining the issues before it. When that determination has been made, it becomes final, unless set aside by some proceeding authorized by law. But, until set aside, it may not be subjected to collateral attack by a ministerial officer. Though the respondents are technically county officers, they are, in this instance, agents of the state designated by the state to perform certain functions in the administration of this state-wide act. They do not represent the county or the taxpayers of the county.

But, as agents of the state for this purpose, they cannot be said to be strangers to the proceeding in the San Francisco court. As to them the judgment and order in that proceeding must be deemed conclusive "in respect to the personal, political, or legal condition or relation" of the status of the addict within the meaning of section 1908, Code of Civil Procedure. This is so because the status of the addict—I. e., the county of his residence—was an essential issue which must be determined before he could be com-

mitted to the state institution. *Kelsey v. Miller*, 203 Cal. 61, 91, 263 P. 200.

Our conclusion is that the act does not offend the due process clause in so far as the county is concerned because the county is not a "person" within the meaning of either the federal or the state Constitution, but is a mere subdivision of the state, and, in so far as the individual taxpayer of the county is concerned, his property is not taken without due process because, when the Legislature itself fixes the taxing district (i. e., the county), it is presumed to have taken such evidence upon the question of benefits to the local taxpayer as may be necessary and its determination of that matter is conclusive. *People v. Sacramento Drain. Dist.*, 155 Cal. 373, 386, 103 P. 207; *Brookes v. Oakland*, 160 Cal. 423, 427, 117 P. 433; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 171, 17 S. Ct. 56, 41 L. Ed. 369. The right which the taxpayer then has is not a right to question the public necessity for the tax which he is to pay. *Id.* This right is preserved in the general tax laws, but it is not necessary to make specific references to these provisions because no taxpayer of San Mateo county is proceeding under them.

Let a writ issue as prayed.

We concur: STURTEVANT, J.;
SPENCE, J.

128 Cal.App. 522

**LOS ANGELES COUNTY v. SUPERIOR
COURT IN AND FOR ALAMEDA
COUNTY et al.**

Civ. 8782.

District Court of Appeal, First District, Division 2, California.

Jan. 3, 1933.

Rehearing Denied Feb. 2, 1933.

Hearing Denied by Supreme Court March 2, 1933.

1. Mandamus $\S$ 31.

Mandamus *held* proper remedy to compel Superior Court to assume control over minor child, where court ruled that jurisdiction was in another court; appeal not being adequate or speedy remedy.

2. Constitutional law $\S$ 315.

Order of Superior Court determining that minor was ward of court and finding that she was resident of another county *held* not to deny due process to county, though it was not a party to proceeding (*Deering's Gen. Laws 1931, Act 3966, §§ 3, 13; Code Civ. Proc. § 1908; Const. Cal. art. 1, § 13; Const. U. S. Amend. 14*).

Such order did not deny county due process as against contention that county, if charged with expense, would be charged without having its day in court, since in such proceeding county is not a "person" within Const. Cal. art. 1, § 13, and Const. U. S. Amend. 14; the state being party which assumes the burden of the care of the minor and the apportionment of a part of the expense of that care to the various counties being merely an incident to the exercise of the state's police power over its political subdivisions.

[Ed. Note.—For other definitions of "Person," see Words and Phrases.]

3. Infants $\S$ 16.

Order of Superior Court having jurisdiction of subject-matter and parties and determining that residence of neglected minor was in another county *held* not subject to collateral attack (*Deering's Gen. Laws 1931, Act 3966, §§ 3, 13*).

4. Domicile $\S$ 5.

Residence of illegitimate unmarried minor follows that of mother and cannot be changed by act of minor or guardian (*Pol. Code, § 52, subd. 6*).

5. Infants $\S$ 16.

Juvenile court law must be interpreted in light of what Legislature intended to accomplish by it (*Deering's Gen. Laws 1931, Act 3966*).

6. Domicile $\S$ 5.

Residence of illegitimate unmarried minor abandoned by its mother, and for whom no guardian was appointed, is county wherein mother resides, and continues to be such until another residence is gained by legal means (*Deering's Gen. Laws 1931, Act 3966, § 13; Civ. Code, § 246; Pol. Code, § 52*).

Application for writ of mandate by Los Angeles County, a body politic and corporate, and a political subdivision of the State of California, prayed to be directed to the Superior Court in and for Alameda County, and Hon. Lincoln S. Church, Judge thereof, and another.

Peremptory writ issued as to the Superior Court.

Everett W. Mattoon, Co. Counsel, and L. K. Vobayda, Deputy Co. Counsel, both of Los Angeles, for petitioner.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondents.

NOURSE, P. J.

This is an original proceeding in mandamus to require the respondent Superior Court

to assume jurisdiction over a minor child found to be a resident of Alameda county. The respondent county is joined as a party, but, as no cause of action is stated against it, the demurrer of the county is sustained.

From the stipulation of facts it appears that Margarita Altamirano was born December 13, 1917, in Alameda county, the illegitimate child of Anna Castro; that the father of said child is unknown; that Anna Castro has at all times resided in Alameda county; that, shortly after the birth of the child, the mother delivered her to Conception Mendez with an oral agreement that she might adopt the child; that the child lived with Conception Mendez for a period of years in Alameda county, was taken by Conception Mendez to the city and county of San Francisco and later to Los Angeles county; that Conception Mendez received no compensation for the care of said child from any person; and that the child was not adopted by her or by any other person. It is further stipulated that no guardian has ever been appointed for the child, and that no person, other than said mother, is liable for its support.

On October 9, 1931, the juvenile court sitting in Los Angeles county, in proceedings regularly had before it, duly and regularly adjudged said child to be a ward of the court, duly found that she was a resident of the county of Alameda, and duly ordered her case transferred to the juvenile court of the latter county under the provisions of section 13 of the Juvenile Court Law (Deering's Gen. Laws, Act 3966). The order and judgment of the court sitting in Los Angeles county recited, as required by the act, all the findings and orders of that court with a summary of the facts and evidence in the possession of the court or probation officer as required by said section. Included therein was the finding that the child was a resident of Alameda county. The respondent court, assuming that none of these matters had been adjudicated, "after a full and fair examination into all the facts pertaining to the matter," and after it "had deliberated carefully and fully upon the evidence so taken and received and after a careful review of the law in the premises," found that the residence of the child was in Los Angeles county, and ordered the child transferred back to that county. It is further stipulated that all the facts affecting the residence of the child and of its mother have existed without change as heretofore set forth, and do now still so exist; that said child is wholly without means, and is being fully and entirely supported by petitioner. It is also stipulated that the respondent court has refused, and will continue to refuse, to assume or exercise jurisdiction of said case with respect to inquiring into the financial condition of said child and of its mother, or other person charged with its support, or to assume or exercise any jurisdiction in re-

spect to the care and maintenance of the ward under the provisions of the Juvenile Court Law.

[1] Respondent argues that mandamus is not the proper remedy, because the Alameda court did take jurisdiction, and because an appeal might have been taken from its order. But the court assumed jurisdiction to determine a matter which was beyond its jurisdiction to determine, and refused to exercise jurisdiction over the matters which the statute requires it to adjudicate. By the stipulation of facts it appears that respondent will continue to refuse to act because it has decided, as matter of law, that the jurisdiction is in the Los Angeles court, and hence mandamus is the proper remedy. *Hennessy v. Superior Court*, 194 Cal. 368, 374, 228 P. 862. Whether or not an appeal lies from the order need not be determined. It is sufficient to say that, under the circumstances, an appeal would not be an adequate nor a speedy remedy.

[2] The respondent argues that there is a want of due process as to the county of Alameda because, if respondent assumes jurisdiction over the child, and if it is found that the mother is unable to support it, and if it is found that the child is destitute and has no means of support, and if the court should direct that the expense of the support and maintenance of the child be paid by Alameda county, then the county would be charged without having had its day in court. In matters of this kind the county is not a "person" within the meaning of either the federal or the state Constitution (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14), and is not protected by the due process clause of either. *Riley v. Stack* (Cal. App.) 18 P.(2d) 110.

The "parties" to the proceedings had under section 3 of the Juvenile Court Law are the state and the minor; the state appearing "in loco parentis." The state is the "party" which assumes the burden of the care of the destitute minor, and the apportionment of a part of the expense of that care to the various counties is merely an incident of the exercise of the state's police power over its political agencies and subdivisions.

[3] The writ must issue because the question of residence is "res adjudicata"—determined in a proceeding before the Superior Court sitting in Los Angeles county; a court having jurisdiction of both the subject-matter and of the parties. The question of residence was one of those jurisdictional facts which the Superior Court was bound to determine from the evidence produced before it. That fact having been determined in a court of competent jurisdiction, the determination is not open to collateral attack. A similar situation arises in probate proceedings where the question of the residence of the deceased must be determined by the pro-

bate court before proceeding with the administration of an estate. That this determination is final and not open to collateral attack has been the rule of the decisions from *Estate of Griffith*, 84 Cal. 107, 110, 23 P. 528, 24 P. 381, to *Holabird v. Superior Court*, 101 Cal. App. 49, 52, 281 P. 108, where cases are cited. In all the cases cited the probate court assumed jurisdiction upon a finding that deceased was a resident of that county. But upon the principle invoked it would seem to follow that, if the probate court upon a hearing for letters should hold that the deceased was a resident of some other county, and should therefore decline to assume jurisdiction, such finding would likewise be conclusive and binding against collateral attack in the probate court sitting in every other county.

Though the "res adjudicata" doctrine was not expressly invoked in these cases, it is the underlying principle controlling the question presented here. The reasons for this doctrine are well expressed in 15 R. C. L. p. 954, where it is said: "Public policy and the interest of litigants alike require that there be an end to litigation, and the peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject-matter shall not be retried between the same parties in any subsequent suit in any court. The doctrine of res adjudicata not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings which otherwise would be endless."

Conformably with this principle, the Legislature, having first conferred upon the juvenile court of each county special jurisdiction over delinquent minors found "within the county, or residing therein" (*Juvenile Court Law*, Deering's Gen. Laws, Act No. 3966, § 3), provided (section 13) that: "Whenever a petition has been filed in the juvenile court of a county other than that of the residence of a person coming within any of the provisions of this act, or whenever, subsequent to the filing of a petition in the juvenile court of the county where said person resides, the residence of said person is changed to another county, the entire case may be transferred at any time to the juvenile court of the county wherein said person then resides, and such court must take jurisdiction of the case upon the filing with it of such order."

As the underlying purpose of the "Juvenile Court Law" is to enable the state to care for the minor through judicial and administrative control over the parent and guardian, and as the residence of the minor must follow the residence of the parent or guardian, the clear intent of the provisions of section 13 is that the control of each minor should be vested in the juvenile court of the county where its parent or guardian resided, because the court of that county is better able

to enforce the provisions of the act relative to the parent or guardian. For the purpose of effecting the transfer, section 13 provides that "the order of transfer shall recite (a) each and all the findings, orders * * * and (b) that said person resides in or has removed to the county to which said matter has been transferred. * * *" The Legislature might have added that these findings were final and not open to collateral attack, but this would have been but surplus language, because such is the general rule declared in section 1908, Code of Civil Procedure. If, after a cause has been transferred within the terms of the act, new facts and conditions should arise which would warrant a new trial of the issue of residence we would not hold that the former adjudication barred a retrial, but such a case has not arisen here. The juvenile court sitting in Los Angeles, having jurisdiction of the person and of the subject-matter, determined the jurisdictional fact of residence, and it thereupon became the duty of the respondent to assume jurisdiction of the case with the issue of residence adjudicated. In this respect we can see no distinction between a matter of this kind and one arising under section 397 et seq., Code of Civil Procedure, providing for the change of the place of trial of civil actions. Manifestly, if a change is ordered on the ground of defendant's residence, the court to which the cause is transferred must take jurisdiction and may not retry the issue of residence. There could scarcely be a better illustration of a case where "public policy * * * and the peace and order of society demand that matters distinctly * * * determined * * * shall not be retried" than the case of this helpless minor abandoned by both parents and thrown about from one county to another like a shuttle-cock because of a difference in legal conclusions.

[4] When the cause was transferred to the respondent court, it became the duty of respondent to take jurisdiction of the case and to make the appropriate orders for the support and maintenance of the child as required by the *Juvenile Court Law*. It had no jurisdiction to transfer the cause to another county, unless the residence of the child "is changed to another county." Section 13. It is stipulated that there was no "change" in the residence of either mother or child, and that the residence of the mother was at all times in Alameda county. If, as now argued, the respondent court held that the minor had obtained a legal residence independent of her mother, and if, for that reason, the respondent refused to proceed under the act, this was not merely an erroneous decision on a matter of law, but a refusal to perform a duty specially enjoined by law. *Temple v. Superior Court*, 70 Cal. 211, 212, 11 P. 699; *Cahill v. Superior Court*, 145 Cal. 42, 46, 78 P. 467; *Hennessy v. Superior Court*, 194 Cal.

363, 373, 374, 228 P. 862. On the point of law involved there can be no controversy. The residence of an illegitimate unmarried minor follows that of the mother. *Blythe v. Ayres*, 96 Cal. 532, 560, 31 P. 915, 19 L. R. A. 40; 9 Cal. Jur., p. 839. Such residence cannot be changed by the act of the minor or that of his guardian. Pol. Code, § 52, subd. 6. Abandonment on the part of the parent forfeits the right of guardianship. Civ. Code, § 246, subd. 4; *Guardianship of Vance*, 92 Cal. 195, 198, 28 P. 229; *In re Hawkins*, 183 Cal. 568, 576, 192 P. 30. The two cases last cited were guardianship proceedings brought under section 1747, Code of Civil Procedure (now Probate Code, § 1440 et seq.) which authorizes the Superior Court of each county to appoint guardians of minors "who are inhabitants or residents of the county." In each case the rule of the decision was based upon section 246, Civil Code (now Probate Code, § 1407 et seq.), and the parent was held to have forfeited his right to guardianship because of his abandonment of the child. In each case the child was admittedly an "inhabitant" of the county where the proceeding was commenced. In both cases the court, by way of dicta, added that the "residence" of the child followed that of those who intended to give it a permanent home. *People v. Dewey*, 23 Misc. 267, 50 N. Y. S. 1013, and *Cannon's Estate*, 15 Pa. Co. Ct. R. 312, were cited as authority. But section 52 of our Political Code was not considered in either the *Vance* or the *Hawkins* Case, and we do not find a similar provision in the laws of New York or Pennsylvania.

It is settled law in this state that there can be but one residence, and that that can be changed only by the union of act and intent. Section 52, Pol. Code. It is equally well settled that a residence cannot be lost until another is gained. *Id.* In this case the residence of the minor was the residence of the mother and that residence was not lost until another was gained. By her abandonment of the daughter the mother forfeited her right of guardianship. Section 246, Civ. Code, now found in section 1409, Probate Code. But this did not relieve her of her obligation to support the child. Section 196a, Civ. Code. In respect to destitute children the main purpose of the Juvenile Court Law is to enforce this obligation upon the parent. To facilitate this enforcement the juvenile court is directed to "inquire into the * * * ability of the parent * * * or other person liable for the support and maintenance of said ward * * * to pay for the expense of support and maintenance. * * *" Section 11. The same section then authorizes the court to order the parent "or other person liable for the support" of the ward to pay such sums as the court shall deem proper.

[5, 6] Manifestly these portions of the act can be better administered in the county where the parent resides, and it would seem to be the clear intention of the act to treat the residence of the parent as the residence of the abandoned child in the provisions of section 13 relating to a transfer. If this were not so, there would be no purpose in providing for a transfer. The statute must be interpreted in the light of what the Legislature intended to accomplish by it. Taking the act as a whole, the only reasonable interpretation is that the Legislature referred to the residence of the minor in section 13 in contemplation of the rules determining residence found in section 52 of the Political Code. Such an interpretation brings us to the conclusion that the residence of an illegitimate unmarried minor is the residence of the mother; that this residence cannot be changed by simple abandonment; and that such a minor so abandoned, and for whom no guardian has been appointed, is a resident of the county wherein the mother resides and continues to be such until another residence is gained by some legal means beyond the mere abandonment on the part of the mother.

Let a peremptory writ issue.

We concur: STURTEVANT, J.; SPENCE, J.

129 Cal.App. 68

A. HAMBURGER & SONS, Inc., v. KICE
et al.

Civ. 7511.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1933.

1. Courts — 168.

Plaintiff having good cause of action in municipal court could not have superior court take jurisdiction by seeking declaratory relief in addition (Code Civ. Proc. § 1060).

First count of amended complaint alleged action against three defendants whose individual stockholder's liability was less than \$2,000 each, so that causes of action were within municipal court's but not within superior court's jurisdiction; and the second count of amended complaint, seeking declaratory relief, under Code Civ. Proc. § 1060, related to item of evidence not relevant to fact of defendants' liability as stockholders, but was controversy touching solely upon amount for which they were liable.

2. Action $\Leftrightarrow$ 6.

Where plaintiff failed to state cause of action within jurisdiction of superior court because amount involved was below \$2,000, superior court had discretion to decline jurisdiction because of prayer for declaratory relief (Code Civ. Proc. § 1061).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by A. Hamburger & Sons, Incorporated, against Hugh Kice and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Mitchell, Silberberg & Davis and Peery Price, all of Los Angeles, for appellant.

McGee & Robnett, of Los Angeles, and P. H. Burke, of Beverly Hills, for respondents Kice and Pulliam.

YORK, J.

The judgments herein appealed from were entered after demurrers to the amended complaint of plaintiff and appellant had been sustained. The amended complaint was in two counts, the first being an action upon stockholders' liability growing out of a promissory note. No question is raised by appellant as to the propriety of the order sustaining demurrers to the first count of the complaint. After leave of the court had been had and obtained, appellant filed this amended complaint which amended complaint for the first time set up a second count in addition to a reiteration of the first count contained in the original complaint, said second count seeking declaratory relief under section 1060 of the Code of Civil Procedure. The demurrers were sustained by the court solely on the ground of lack of jurisdiction; therefore, the sole question presented upon this appeal, as stated by appellant, is whether or not the court had jurisdiction over plaintiff's second cause of action. An examination of the amended complaint discloses that, if the facts stated were true, plaintiff had a good cause of action against the defendants, if brought in the municipal court, and that the superior court had no jurisdiction over the first cause

of action. This being so, the plaintiff had no right by way of its amended complaint to request the court to take cognizance of the matter under section 1060 of the Code of Civil Procedure, as it had a plain, speedy, and adequate remedy at law to enforce its rights, if any, as set forth in the first cause of action of said amended complaint by a suit in the proper forum.

The judgments appealed from are affirmed.

CONREY, P. J.

I concur in the judgment.

[1, 2] The respondents, as to whom the action was dismissed, were three defendants whose individual stockholder's liability, as to each respondent, was less than \$2,000. These causes of action, therefore, were not within the jurisdiction of the superior court. These facts are shown by appellant's complaint.

The alleged controversy, stated in the second count of the complaint, related only to an item of evidence not relevant to the fact of respondents' liability as stockholders. It was a controversy touching solely upon the amount for which they were liable. That issue could be determined in an action to recover judgment in the court having jurisdiction of such action against respondents, just as well as in the superior court.

And if it be contended that the dismissal for want of jurisdiction was erroneous because the court did have jurisdiction for the purposes of a declaratory judgment, I think that (without answering that question) there is, at all events, one sufficient answer to that contention. The order sustaining the demurrer of respondents "as to jurisdiction" rested primarily upon the fact that plaintiff had not stated, against respondents, a claim amounting to a sum within the jurisdiction of the court. Having so determined, the court had at least a discretionary authority to decline to exercise against respondents the power given by statute concerning declaratory judgments. This discretion is vested in the court by the direct terms of the statute. Code Civ. Proc. § 1061.

I concur: HOUSER, J.

PEOPLE v. SMITH.

Cr. 3610.

Supreme Court of California.

Jan. 20, 1933.

Rehearing Denied Feb. 17, 1933.

1. Grand jury $\Rightarrow$ 8.

That jury commissioner prepared grand jury list before court met to select grand jurors *held* not to debar judges from accepting such list without change (Code Civ. Proc. §§ 204, 204d).

2. Criminal law $\Rightarrow$ 1167(3).

Denying defendant right to interrogate each member of superior court regarding grand jury list *held* not error where, though interrogation were granted, result would not be changed.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

George Smith was convicted of first-degree murder, and he appeals from orders denying motion to strike indictment from files and to vacate judgment of conviction, which motion was made after judgment of conviction had become final.

Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SEAWELL, J.

The defendant, George Smith, together with one Charles Rossi, true name John Kazarin, was jointly accused by the grand jury of the county of Alameda of having murdered one Reinhold A. Frey on or about December 20, 1930. They were subsequently placed on trial, and were both convicted of murder of the first degree, with the penalty fixed at death. Pending the appeal Kazarin committed suicide. The conviction of George Smith was affirmed by this court on June 30, 1932 [12 P.(2d) 945], and the judgment became final thirty days thereafter.

Appellant comes to this court on a purported appeal from an order made by the superior court of the county of Alameda in a proceeding taken after the judgment of conviction had become final, which order herein appealed from denied appellant's belated motion for an order striking the indictment in which appellant was charged with murder from the files of said superior court, and for an order vacating, annulling, and setting aside the judgment of conviction. The notice was filed on August 29, 1932, and proceedings pursuant thereto were immediately commenced and prosecuted

to a final determination. The contention of appellant, as well as we are enabled to understand his position, is based upon alleged irregularities, in that the grand jury which returned and presented the indictment was an illegal body for the reason that the veniremen from which the grand jury of nineteen members was impaneled were not selected by a majority of the judges of the superior court of Alameda county, as provided by sections 204 and 204d of the Code of Civil Procedure. His point seems to be that there was no written order on file in the county clerk's office of Alameda county, signed by a majority of the judges, fixing the number and ordering the listing and selection of the grand jurors to be listed for grand jury service prior to the day the jury commissioner presented said list to the court. It appears from the record of said proceedings that the jury commissioner, on or about the middle of December, 1929, prepared a list of persons to be summoned for grand jury duty, consisting of sixty, and that on the 27th day of January, 1930, this list of proposed grand jurors was presented to the superior court of Alameda county in bank, at which time all members of the court were present, and by their signatures designated said persons as presented grand jurors for the ensuing year, and from this list the grand jury which indicted the appellant was drawn. It also appears from the testimony in the case that the order designating the number of grand jurors and which also designated the persons to serve as grand jurors was performed as one act on January 27, 1930. It further appears that said list, prior to January 27, 1930, had at least come to the attention of one or more members of the superior court of Alameda county, and from this circumstance and from the further fact that all of the judges of said court signed said order, it must be presumed that they had knowledge of the nature and importance of the act which they were performing.

[1, 2] It seems to be the contention of the appellant that the tentative preparation of the list by the jury commissioner made prior to the day upon which the order was signed by the judges was made without authority of law, and that said superior court was without power to adopt the list of persons so presented by the commissioner for grand jury service because the list, as he terms it, was prematurely prepared by said jury commissioner. We are unable to follow appellant in his contention. The fact that the jury commissioner, whose duty it was to prepare a list of qualified persons to serve as grand jurors, in fact made up a list a week or two before the court met for the purpose of listing or selecting grand jurors, could not debar or disqualify the judges from accepting the list as prepared by the jury commissioner without changes if the judges so determined. The

fact that the judges indorsed the list, as shown by the evidence adduced upon the hearing, and further that they actually appended their names thereto, is conclusive on this subject. Counsel complains that the presiding judge at the hearing refused to permit him to call each member of the superior court of Alameda county and interrogate him as to his knowledge of the qualifications of the men who constituted the list, and the manner in which they had been selected. It is very clear from the testimony of the presiding judge, who was examined by appellant, and from the examinations of the custodians of the records in the proceeding, that there was nothing that appellant could have elicited from any of said judges which was not before the court, and, indeed, about which there was any serious dispute. Every fact and circumstance essential to rendering a decision upon the matter was before the court time and again, and the facts of the case for the purpose of this decision may be accepted in accordance with the theory of appellant, and yet he would not be entitled to prevail upon any of the issues tendered by him.

As a matter of law the court would have been entirely justified in dismissing the proceeding. We have here the spectacle of appellant attempting to reopen a case which had become final approximately one month prior to the inauguration of this unusual proceeding. Appellant cites cases holding that grand juries summoned by an elisor, a person not entitled to summon a grand jury except in case where there is a disqualification of the sheriff, are illegal bodies. The proceedings had in the cases cited by him were commenced before the trial and conviction of the petitioner. In at least one of those cases this court granted a writ of prohibition, holding that the trial court was without jurisdiction to try the cause and that defendant had no plain, speedy, or adequate remedy at law. *Bruner v. Superior Court*, 92 Cal. 239, 28 P. 341. The most that could be said of the proceedings herein complained against, conceding the facts to be as contended for by appellant, would be an irregularity which would not go to the jurisdiction of the cause.

It will be recalled that this court very fully considered the law and facts of this case when presented for our decision upon its merits. *People v. Smith & Rossi* (Cal. Sup.) 12 P.(2d) 945. All of the questions of law raised by the appellant are there considered and disposed of. A motion was made by appellant to set aside the indictment on the ground that it did not conform with sections 241, 242, and 243 of the Code of Civil Procedure, in that the court ordered the names of thirty grand jurors drawn, and although said names were drawn, only twenty-eight were served or summoned. This was appellant's only ground of motion to set aside the indictment.

We discussed this alleged error in said cause, and held that it was entirely without merit. Again, on motion for new trial, the appellant moved in arrest of judgment that the indictment did not conform to the requirements of sections 950, 951, and 952 of the Penal Code, and, further, that said grand jury was not impaneled in compliance with sections 241, 242, and 243 of the Code of Civil Procedure, in that thirty names were drawn from the grand jury box and two of said number were not served—a question heretofore disposed of. No other contention was made as to the illegality of the grand jury or the irregularity of the proceeding in any respect. The proceeding taken one month after said judgment became final is based upon other sections of the code than those raised by motion to set aside the indictment or in arrest of judgment, and said sections were not presented or urged on a motion for new trial. We have examined the proceedings and say unhesitatingly that there is not a scintilla of merit in the showing made on the delayed motion to set aside the indictment or annul the judgment. We would be justified in dismissing the proceedings, but have concluded that in the circumstances of the case we should affirm the order.

The judgments and orders made in said proceeding are therefore affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; THOMPSON, J.

217 Cal. 236

**METZLER & CO. OF CALIFORNIA v.
STEVENSON et al.**

L. A. 12805.

Supreme Court of California.

Jan. 17, 1933.

1. Mines and minerals ☞78(3, 7).

To be valid, notice of forfeiture for breach of covenant of community oil and gas lease granting to purchasers of lots in each parcel the benefits inuring to lessors, and action to declare forfeiture, must be by joint action of all lessors or assigns (Civ. Code, § 1431).

2. Mines and minerals ☞78(7).

Evidence sustained finding that lessees waived presentation of certificate of title to land under oil and gas lease not requiring them to drill unless lessors produced certificate.

3. Mines and minerals §78(7).

Evidence held insufficient to sustain finding that lessees abandoned rights under oil and gas lease.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Metzler & Company of California against M. S. Stevenson and others. From a judgment in favor of plaintiff, Charles P. Reiniger and others appeal.

Reversed.

Clyde C. Shoemaker, of Los Angeles, for appellants.

Glen Behymer and B. L. Hoyt, both of Los Angeles, for respondent.

PRESTON, J.

Appeal from judgment quieting title of plaintiff to a portion of subdivided tract of land located in Los Angeles county and hereinafter referred to as "Parcel C." Some of the defendants failed to appear and their default was regularly entered. Appellants, however, are insistent in their demands based upon the provisions of a certain oil and gas lease held by them.

Said lease was executed on April 15, 1924, by defendants Stevenson and Morgan, as owners of a portion of the above-mentioned tract of land described as parcel A and as purchasers under contracts of the remaining portions thereof, described as parcel B and parcel C, to defendant Pomeroy, covering said parcels A, B, and C and giving him the sole and exclusive right to prospect, drill for, and remove oil, gas, and other hydrocarbon substances therefrom and to do other things incidental thereto, for a term of twenty years, and during production thereafter, unless the lease should be otherwise surrendered or forfeited by the lessee. The lessors reserved the right to subdivide the land into lots to be sold for residence and business purposes or to use it for agriculture or grazing, so long as said operations should not interfere with the rights or operations of the lessee. The lease then provided that immediately upon its execution by the lessors the lessee "will cause to be erected and constructed on 'Parcel A' an oil well derrick * * *." And: "The Lessee hereby promises and agrees to commence actual drilling of a well upon some portion of the premises hereby leased within five months from and after date of delivery of certificates of title upon said lands showing title in lessors * * *." Actual drilling of a well * * * is * * * understood to be the actual spudding in of said well followed by diligent prosecution of drilling of said well to completion, or abandonment. * * * It is understood * * * that the erection and construction of the oil derrick in this

lease above required to be immediately erected * * * does not in any wise constitute compliance with the provisions of this paragraph requiring the commencement of actual drilling of a well * * * within the time * * * provided * * *." The lease further provided that upon completion or abandonment of the first well, the lessee would within sixty days thereafter commence the drilling of a second well. Following various provisions covering the drilling of further wells and payment of royalties, etc., the lease provided: "Lessee accepts this lease upon the express understanding and with the knowledge of the fact that as to parcels B and C the legal title to said lands is not as yet vested in the Lessors, but that the Lessors are the purchasers of parcels B and C and will in due course of time procure title to same and that it is the intent of the parties hereto that upon the lessor acquiring the legal title to parcels B and C the lease herein created shall be of the same force and effect as if the said Lessors at the date of execution of this lease had the legal title thereof." It was further provided that upon failure of the lessee to commence the drilling of said first well within the time specified the lease should ipso facto, and without notice, cease and terminate. The lease was recorded April 24, 1924.

On February 12, 1925, Southwestern Realty Board, a corporation, from which defendants Stevenson and Morgan were purchasing parcels B and C, deeded said parcels to defendant Morgan and his wife and immediately thereafter, on the same day, said defendant and wife and defendant Stevenson and wife deeded said parcels back to said Southwestern Realty Board; the latter conveyance being made subject to the terms of the oil and gas lease. The court found that the lessee and his assignees had knowledge of the execution and delivery of these various deeds. On November 24, 1926, lessee Pomeroy assigned said lease to defendant Grace M. Reiniger, who thereafter assigned a fractional interest therein to defendant Spencer; on the same day an instrument was executed by Grace M. Reiniger, Charles P. Reiniger, her husband, and Charles H. Spencer, as first parties, and said lessors Morgan and Stevenson, as second parties, whereby the first parties agreed to deliver to the second parties a portion of all oil and gas recovered from said lease or of the net proceeds thereof, and the second parties recited that they had entered into an agreement with defendant Theriot to furnish certain money and to drill a well upon a portion of the leased premises. Thereafter, and on January 3, 1927, Southwestern Realty Board deeded parcel C to Coast Properties, Inc., and about November 23, 1928, the latter company deeded said parcel to this plaintiff, Metzler & Co., still subject to the terms of said oil and gas lease.

Metzler & Co. thereupon instituted this ac-

tion to quiet its title to said parcel C, naming as defendants the various above-mentioned parties. The court made findings in its favor, followed by a decree quieting title as prayed. From said judgment said defendants Charles P. Reiniger and wife and Charles H. Spencer have alone appealed, claiming that the evidence fails to show the alleged forfeiture of the lease and fails to support the finding to the effect that the furnishing of certificate of title was waived by defendants. Appellants also claim that the court erred in permitting a material witness to use a verified complaint in another action to refresh his memory and that the lease has not been abandoned.

The findings of the court show the facts, in addition to those above set forth, to be substantially as follows: That prior to January 5, 1925, a derrick was erected on parcel A and a well was partially drilled but never completed or carried to production; that on said date the work of drilling and prospecting which had been carried on for some four or five months, was abandoned and all machinery was removed from the premises except the derrick itself; that the work of drilling and prospecting was never resumed nor was any further well commenced within sixty days or any other period; also that certificates of title were never furnished the lessees and that the furnishing thereof was waived by the defendants and each of them; that on March 13, 1927, Coast Properties, Inc., the then owners of the property, served upon the lessee and his successors in interest, including appellants, a notice of default under the terms of the lease; from these facts the court concluded that the lessees had abandoned any rights which they may have had under the said lease and had forfeited any right, title, or interest in and to the said parcel C.

[1] It will be observed that the notice of forfeiture was not given by plaintiffs themselves but by their predecessors in ownership, nor was the notice a joint act of the original lessors nor was it joined in by any of the present owners of other portions of the three tracts involved. Appellants assert that under the terms of the lease as drawn all parties that are properly described as lessors or their assigns must by joint action give notice of forfeiture before same is valid and this must be followed by an action to which all said persons are made parties by plaintiff. We feel compelled to sustain this contention.

The lease in question covers a very large number of city lots and contemplates a sale of these properties during the period of the lease in small subdivisions; this may cause some difficulties, but these are not sufficient to work the overthrow of a rule of property. It is clear that under the terms of the instrument it is what is known as a community lease, that is, as the lots in each of said parcels are sold by the lessors to purchasers, the purchasers are to participate in the ben-

efits inuring to the lessors "In the ratio that the areas of said lot or lots of said respective purchaser or purchasers shall bear to the total area of the hereinabove described lands covered by this lease."

Under section 1431 of the Civil Code, an "obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several. * * * " Moreover, we are unable to distinguish this situation from that found in the case of *Jameson v. Chanslor-Canfield, etc., Co.*, 176 Cal. 1, 167 P. 369, 370, and the very recent case of *Jones v. Pier et al.* (Cal. App.) 12 P.(2d) 646, 647. In the first-mentioned case the language of the lease was as follows: "It is especially agreed by said parties of the second part that failure upon their part to perform any of the conditions embodied herein for a period of thirty days after notification by the parties of the first part to perform such conditions shall render this agreement null and void if said first parties shall so elect." The language of the lease in the second case was: "If the lessee shall fail for a period of ten (10) days after written notice given to it, * * * by the lessors to comply with provisions of this lease, the lessors may at their option terminate this lease." In each of these cases it was held that the notice of forfeiture as well as the action to declare the same must be the joint act of all the lessors. The language of the lease in the case at bar is: "Upon the failure of the Lessee to comply with any other covenant in this lease the Lessors may cancel and determine this lease upon thirty (30) days written notice, specifying the covenant or covenants which the Lessee has failed to perform and if the Lessee fails to perform such covenant or covenants so specified in said notice within said thirty days this lease shall terminate."

It is true that in the first case cited the lessors were tenants in common, but such is not the situation in the other case; therefore, unless language can be found in this lease to render said holdings inapplicable, appellants' claim must be upheld. We have carefully examined the lease and find no provisions making any such distinction.

[2, 3] All other points made by appellants are rendered immaterial by the above holding with the exception of the contention that the lessees were not required to drill unless and until a certificate of title was produced by the lessors showing the right in them to execute the lease in question. But the evidence is sufficient to show that the lessees within the time provided erected a derrick and also caused a well to be drilled, the operation occupying some four or five months and ending by a cessation of operations on or about January 5, 1925. This evidence seems sufficient to sustain the finding of the court that the presentation of a certificate of title was waived by the lessees. In the conclusions

of law is the statement that defendants as lessees had abandoned any rights which they had under said oil and gas lease. Conceding said statement to be a finding, it has no sufficient evidence in the record to sustain it. Throughout the proceedings the lessees have contended that the lease was in full effect and that as a condition precedent to action on their part a certificate of title should be furnished.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; TYLER, Justice pro tem.

217 Cal. 262

TAYLOR et ux. v. BUDD et al.
S. F. 13763.

Supreme Court of California.
Jan. 20, 1933.

Rehearing Denied Feb. 17, 1933.

1. Usury § 42.

Loan requiring maximum interest of 12 per cent. monthly in advance, and whereunder borrower received \$10,890 and paid interest at 12 per cent. on \$11,000, *held* usurious.

2. Usury § 45.

Note must be tested for usury with reference to actual sum given by lender to borrower and not by face of note.

Where the first month's interest has been collected in advance, the principal sum loaned will be held to be the amount of the loan, less the interest or commission deducted in advance.

3. Usury § 66.

Renewal note containing usurious provision of original note, requiring borrower receiving only \$10,890 to pay maximum interest of 12 per cent. on \$11,000 *held* usurious.

4. Usury § 104.

Borrower's act of initialing change made in renewal note by lender's trustee by striking out words "in advance" from interest provision *held* not compromise or waiver of claim for past usurious payments (Usury Law, § 3 [Gen. Laws 1931, Act 3757, § 3]).

Such act was not a compromise or waiver of past usurious interest payments since the act was induced by the lender's trustee and was not relied on by him, and as a compromise and release it was totally lacking in consideration, since the lender merely relinquished, for the future, all claims for illegal interest, and because as a waiver it lacked any indication of an

intent of the borrower to give up any rights; there being no express reference to claims for past usury; "waiver" being defined as an intentional relinquishment of a known right.

[Ed. Note.—For other definitions of "Waiver," see Words and Phrases.]

5. Usury § 138.

Borrowers *held* entitled to recover treble amount of interest paid under usurious note during year preceding action, and actual usurious interest paid prior to year preceding action and within two years of suit (Usury Law, § 3 [Gen. Laws 1931, Act 3757, § 3]).

6. Usury § 102(2).

Payments of usury are not considered voluntary, but deemed to be made under restraint.

7. Usury § 95.

Borrower's tender of amount due under usurious note *held* unnecessary, where amount to be paid depended on accounting, and action to declare note usurious was in equity, willingness to pay amount due being sufficient (Usury Law, § 3 [Gen. Laws 1931, Act 3757, § 3]).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Felton Taylor and wife against C. A. Budd and another. From a judgment for defendants, plaintiffs appeal.

Reversed.

Prior opinion, see 10 P.(2d) 135.

J. L. Smith, of San Francisco, for appellants.

Knight, Boland & Christin, Charles A. Christin, and Arthur Dunn, Jr., all of San Francisco, for respondents.

LANGDON, J.

This is an action for an accounting and other relief based upon a claim of usury in a loan from defendant Noble to plaintiffs. On May 2, 1925, plaintiffs, husband and wife, borrowed money from said defendant, executing a promissory note for one year in her favor in the amount of \$11,000, secured by a deed of trust on real estate, with defendant Budd as trustee. The note contained provision for interest at 12 per cent. per annum, payable monthly in advance. At the time of making the loan, \$220 was deducted and paid to a real estate firm and an attorney for brokerage and legal services. At such time, also, the first month's interest on \$11,000 was deducted by the lender. Hence plaintiffs received a total of \$10,670, for which they agreed to pay, and did pay, interest at the

rate of 12 per cent. on \$11,000, monthly in advance.

After the note became due, interest payments were continued, and on November 2, 1926, at the demand of defendants, the loan was renewed, and plaintiffs paid to the same attorney the sum of \$165 for legal services in negotiating the said renewal. The new note was for the same amount as the old, with the same interest provision, and plaintiffs continued their payments of interest in advance.

On September 2, 1927, after the decision of this court in *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725, defendant Budd sent for plaintiff Felton Taylor, and, after informing him of the holding of that case, struck out the words "in advance" from the interest provision of the renewal note, telling him that he need not pay interest monthly in advance in the future. Taylor initialed the change, and paid no further interest in advance.

Some time thereafter, in March, 1928, the plaintiffs defaulted. On June 23, 1928, the trustee instituted proceedings to sell the property under the deed of trust. On October 2, 1928, plaintiffs brought this action to declare the loan usurious and the interest provisions void; to determine the amount due from plaintiffs after credit for usurious interest paid and treble damages for usurious interest paid during the year prior to the filing of the action; and to enjoin the sale save for such sum as might be properly due. Plaintiffs offered to pay whatever sum was found by the court to be proper.

Pending the trial, a temporary injunction was granted. Thereafter judgment was rendered in favor of defendants, and the injunction was dissolved. The trial court proceeded upon the theory that, while the original note was usurious, the initialing of the change in the same eliminated this defect, and also constituted a compromise and settlement of any claim for prior usurious payments. This theory is, in our opinion, incorrect.

[1-3] The original loan was usurious for two reasons: First, as admitted by all parties, the requirement of the maximum interest (12 per cent.) monthly in advance was a violation of the statute, regardless of whether there was any criminal intent. *Haines v. Commercial Mortgage Co.*, supra; *Martin v. Kuchler*, 212 Cal. 536, 290 P. 52. Second, a note must be tested for usury with reference to the actual sum given by the lender to the borrower, and not by the mere face of the note; and where, as here, the first month's interest has been collected in advance, "the principal sum loaned will be held to be the amount of the loan less the interest or commission deducted in advance." *Haines v. Commercial Mortgage Co.*, supra, page 625 of 200 Cal., 254 P. 956, 255 P. 805. See, also,

Babcock v. Olhasso, 109 Cal. App. 534, 293 P. 141. Plaintiffs here received from the lender at the time of the loan \$11,000, less \$110, the first month's interest, or \$10,890, upon which they continually paid interest at the rate of 12 per cent. on \$11,000, which was plainly usurious. This feature was of course present in the renewal note and in the note after it was initialed, so that during the entire period of the loan usury was present. See *Westman v. Dye*, 214 Cal. 28, 4 P.(2d) 134.

The payment of the commission of \$220 for the making of the original loan, and the fee of \$165 exacted by the attorney for renewing the loan, were found by the trial court to be proper charges for services rendered, and the court also found that said sums were not retained by the lender. We find no showing in the record sufficient to disturb this finding.

[4] No compromise or waiver of any claim for past usurious payments resulted from plaintiff Felton Taylor's act in initialing the change in the note. As a compromise and release, it was totally lacking in consideration, since the lender merely relinquished for the future all claims for illegal interest. The borrower was not, at that time, in default. As a waiver, it lacked any indication of an intent on the part of plaintiffs to give up any rights. There was no evidence that Taylor was fully aware of his right to recover unlawful interest paid, and there was no express reference to claims for past usury. Waiver is an intentional relinquishment of a known right. *Wienke v. Smith*, 179 Cal. 220, 176 P. 42; *Alden v. Mayfield*, 164 Cal. 6, 127 P. 45; *First Nat. Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64. Nor was there any estoppel, for the act was induced by defendant Budd, and there was no reliance or change of position by said defendant as a result of any act of plaintiffs.

[5, 6] The next question is as to the remedies available to plaintiffs. They are clearly entitled to recover treble the amount of interest paid under the note during the year preceding the action. Usury Law, § 3, 2 Deering's Gen. Laws, 1931, Act 3757, p. 1908. They are also entitled to recover the actual usurious interest paid prior to the year preceding the action, and within two years of the suit. The penalty of treble interest specified in the act has been held in this state to be cumulative, and not to abrogate the common-law remedy to recover money paid under illegal provisions of a contract. Payments of usury are not considered voluntary, but are deemed to be made under restraint. *Babcock v. Olhasso*, 109 Cal. App. 534, 293 P. 141; *Curtis v. Thaxter*, 204 Cal. 439, 268 P. 630. See, also, *Westman v. Dye*, supra. The view expressed by the appellate department of the Superior Court in *Douglas v. Klopfer*, 107 Cal. App. (Supp.) 765, 288 P. 36, that only the excess over the legal rate of 7 per cent.

may be recovered, is in conflict with the above-mentioned holdings, and must be disapproved.

[7] The final contention of defendants that plaintiffs are not entitled to maintain this action because they failed to make a tender of the amount due under the note may be simply answered. The complaint alleged ability and willingness on the part of plaintiffs to pay the entire principal, less any credits that might be due; plaintiffs testified to such effect; and the court so found. Inasmuch as the action was in equity and the amount to be paid was dependent upon an accounting and a determination of what constituted the actual usurious payments, it was neither possible nor necessary for plaintiffs to make a formal tender of any definite sum. The offer to do equity was sufficient.

For the reasons given, it is apparent that the court erred in denying relief to plaintiffs and in dissolving the temporary injunction. The judgment must therefore be, and it is hereby, reversed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

217 Cal. 252

CITY OF SALINAS v. LUKE KOW LEE.
S. F. 14620.

Supreme Court of California.
Jan. 20, 1933.

1. Judgment $\S$ 346.

Judgment void on its face may be set aside by court entering it at any time.

2. Judgment $\S$ 311.

Court entering default judgment in action to foreclose street assessment lien had power some four years thereafter to permit filing of amended affidavit of publication showing compliance with law (Code Civ. Proc. $\S$ 413, 670).

Court had such power because it is the fact of service and not the proof of service that determines the validity of judgment.

3. Judgment $\S$ 518.

Motion to vacate default judgment in action to foreclose street assessment lien made after statutory period is collateral attack determinable on judgment roll alone (Code Civ. Proc. $\S$ 413, 670).

4. Judgment $\S$ 470.

Against collateral attack, every presumption is made in favor of judgment, and any

facts consistent with its validity will be presumed rather than one which will defeat it.

5. Judgment $\S$ 491.

Where judgment recites defendant's default was duly and regularly entered, that affidavit of service showed insufficient publication of notice would not render judgment void on its face and subject to collateral attack (Code Civ. Proc. $\S$ 413, 670).

Such fact would not render judgment void on its face because recital that default was duly and regularly entered was part of judgment roll, and it would be presumed that court had adequate proof of sufficient publication, since there was nothing to show that recital was based on the particular affidavit.

6. Municipal corporations $\S$ 566.

Where property owner resided outside of state, affidavit for publication of summons in action to foreclose street assessment lien need not state that certificate of residence had been filed (Code Civ. Proc. $\S$ 412).

7. Appeal and error $\S$ 241.

Where, in motion to vacate default judgment, sufficiency of complaint to state cause of action was not challenged, point cannot be urged on appeal.

In Bank.

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Action by City of Salinas against Luke Kow Lee, wherein default judgment was entered against defendant. From an order denying defendant's motion to vacate such judgment, defendant appeals.

Affirmed.

L. C. Pistolesi and Franklin B. Worley, both of San Francisco, and F. P. Feliz, of Monterey, for appellant.

Russell Scott and Stanley K. Lawson, both of Salinas, for respondent.

WASTE, C. J.

This action was brought to foreclose a street assessment lien. The service of summons was by publication, and judgment against the defendant was entered by default January 24, 1927. Motion to set aside the judgment was made September 28, 1931, more than four years after its entry. Stated generally, the motion was grounded on an asserted want of jurisdiction in the trial court over the person of the defendant. The motion to vacate was denied, and, from the order denying the same, the defendant prosecutes this appeal.

[1, 2] It is, of course, settled that a judgment void on its face may be set aside at any time by the court entering the same, either

upon its own motion or at the request of the parties thereto. *Baird v. Smith* (Cal. Sup.) 14 P.(2d) 749; *Lake v. Bonynge*, 161 Cal. 120, 126, 118 P. 535. At the time of the entry of appellant's default, and up to and including the time of the making of the motion to vacate, the affidavit of publication, which, of course, constitutes a part of the judgment roll, indicated that the summons had been published for "one month." Under section 413 of the Code of Civil Procedure and under the order of the court below directing publication of summons, which order also forms a part of the judgment roll (section 670, Code Civ. Proc.), it was essential in order to acquire jurisdiction of the person of the appellant, he being then out of the state, that summons be published for "two months." Upon the making of the motion to vacate, it thus appeared on the face of the judgment roll that publication of summons had been for an insufficient period. To overcome this apparent deficiency and to cause the record to speak the truth, the court below, in response to a cross-motion of the respondent, permitted the filing of an amended affidavit of publication wherein it was made to appear that summons had, in fact, been published for a period of two months as required by law and the order directing such publication. It was well within the province of the court below to permit the filing of such amended affidavit of publication, even though several years had then elapsed since the entry of the judgment, for it is now well settled that it is the fact of service and not the proof of service which determines the validity or invalidity of a judgment. *Herman v. Santee*, 103 Cal. 519, 523-525, 37 P. 509, 42 Am. St. Rep. 145; *Estate of Newman*, 75 Cal. 213, 220, 16 P. 887, 7 Am. St. Rep. 146; *Allison v. Thomas*, 72 Cal. 562, 564, 14 P. 309, 1 Am. St. Rep. 89; *Spaulding & Co. v. Chapin*, 37 Cal. App. 573, 577, 174 P. 334.

The rule is well stated in *Freeman on Judgments* (5th Ed.) p. 370, § 193, wherein the following appears: "As a general rule, an officer who has made a return of process will be permitted to amend such return at any time. If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of the service of process does not consist of the return of an officer, the like rule prevails. Thus if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to

be filed showing the facts, and when so filed it will support the judgment as if filed before its entry."

In the case of *Herman v. Santee*, supra, the filing of the amended affidavit of service of summons was permitted approximately one year after the entry of judgment. Such proof is permitted, not for the purpose of authorizing the court to enter a new judgment, but to show that the judgment previously entered was not without jurisdiction, and never was void.

[3-5] However, even in the absence of the amended affidavit showing proper service, we would be disinclined to agree with appellant's contention that the judgment is void on its face and therefore amenable to a motion to vacate made more than four years after its entry. Having been made long after the expiration of the period prescribed in section 473 of the Code of Civil Procedure, such motion is governed by the rules applicable to collateral attack, and must therefore be presented and determined upon the judgment roll alone. In *re Morehouse*, 178 Cal. 634, 636, 169 P. 365; *Lake v. Bonynge*, supra; *Canadian, etc., Co. v. Clarita, etc., Co.*, 140 Cal. 672, 674, 74 P. 301; 15 Cal. Jur. 47, § 139. This being so, every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it. *Canadian, etc., Co. v. Clarita, etc., Co.*, supra; In *re Eichhoff's Estate*, 101 Cal. 600, 605, 36 P. 11. The judgment here assailed declares that "the default of the defendant herein has been duly and regularly entered in this cause in accordance with law and the order of this court." This jurisdictional recital in the judgment constitutes a part of the judgment roll. It does not appear that said recital was at all based upon the original and deficient affidavit of publication. It may well be that prior to or at the time of the entry of judgment it was made to appear to the trial court by other means that due publication of summons had been had. It will therefore be presumed in support of the judgment, and in conformity with the above-cited cases, that proof other than the original affidavit was introduced satisfying the court below of the fact of due and proper service of the defendant and of the regularity of the default. In discussing a somewhat similar situation it was said in *Hahn v. Kelly*, 34 Cal. 391, 408, 94 Am. Dec. 742: "So in the case of a service by publication—if the affidavit of the printer states that the summons was published one month, and yet the Court in its judgment states that it was published three, or that service has been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it." In this regard, see, also,

Sacramento Bank v. Montgomery, 146 Cal. 745, 750-754, 81 P. 138; Musser v. Fitting, 26 Cal. App. 746, 751, 148 P. 536.

[6] Appellant next contends that the judgment is invalid because of the asserted insufficiency of the affidavit for publication of summons. Citing section 412 of the Code of Civil Procedure, appellant urges that the affidavit fails to state "either that no certificate designating the place where the summons might be served on the defendant had been filed or that if filed the defendant could not be found by the sheriff at the place designated." The point is without merit. As already indicated, service of summons by publication was had in this case on the ground that appellant at the time resided out of the state. In such a situation it is not necessary for the affidavit to state that a certificate of residence had not been filed. *Davis-Heller-Pearce Co. v. Ramont*, 66 Cal. App. 778, 781, 226 P. 972, 973. The case of *McPhail v. Nunes*, 38 Cal. App. 557, 177 P. 193, relied on by appellant, is readily distinguishable from the present case, for there the affidavit for publication was made on the ground that the defendant, after due diligence, could not be found within the state. In such a case, it is essential that the affidavit aver the existence or nonexistence of a certificate of residence. The matter is discussed in *Davis-Heller-Pearce Co. v. Ramont*, supra, wherein it is said: "The affidavit does not show that [defendant] had not filed the certificate of residence provided for by section 1163 of the Civil Code. The statute, however, requires such showing only where service is sought to be made upon a person by publication upon the ground that he cannot, after due diligence, be found within the state. The order for publication of summons is based upon the ground, as stated therein, 'that the said defendant resides out of the state, and is now a resident of Tucson, Ariz.' It was not necessary, therefore, for the affidavit to state that no certificate of residence had been filed."

[7] Appellant next urges that the verified complaint fails to state a cause of action, and will not, therefore, support an order for publication of summons. Respondent replies, and inspection of the record satisfies us as to the correctness of its position, that this point was not urged in the court below in support of the motion to vacate, but is advanced for the first time on appeal, and, under well-settled principles, is not entitled to consideration. With this conclusion we are in accord. However, a consideration of the point on its merits would not require a reversal of the order refusing to vacate. We are satisfied that the complaint states a cause of action under the Improvement Bond Act of 1915 (St. 1915, p. 1441), as amended in 1923. (St. 1923, pp. 415, 416.) Appellant's contention is based on the

misapprehension that the complaint herein was drawn under the Street Improvement Act of 1911 (St. 1911, p. 730), as amended in 1915. St. 1915, p. 1464. Such is not the case.

The order is affirmed.

We concur: LANGDON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

217 Cal. 276

PEOPLE v. HARRISON.

Cr. 3561.

Supreme Court of California.

Jan. 24, 1933.

Homicide ☞250.

Evidence held sufficient to sustain conviction for murder.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Alfred Harrison was convicted of murder, and he appeals.

Affirmed.

J. Harvey Hearn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for respondent.

IRA F. THOMPSON, J.

The defendant was charged with the crime of murder committed in Los Angeles county. He was tried, found guilty, and sentenced to suffer the penalty of death. This appeal is from the judgment and from an order denying his motion for a new trial.

The case was on the calendar and called for oral argument on June 7, 1932, at which time counsel waived oral argument, and was granted thirty days within which to file appellant's opening brief. No brief has been filed.

Section 1253 of the Penal Code reads as follows: "The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear." In spite of the section and the failure of appellant to throw any light upon his claims of error, and on account of our solicitude for one condemned to pay the extreme penalty, we have read the record in its entirety. It appears therefrom that Clarence Edward Harrison, who was no kin of the appellant, was found dead with a bullet hole in his head at the gasoline service station in Los Angeles where he was employed, on the morning of September 25, 1931, shortly after he had visited a lunchroom

across the street. There is also in evidence the fact that shortly before the deceased was killed the appellant and another man, the latter being in possession of an automatic pistol, were out on the street in an automobile. Shortly after, the appellant, in a greatly excited frame of mind, appeared at a friend's room in possession of the pistol and stated that he had "just bumped off a fellow." The bullet was removed from the brain during the post mortem examination and examined by a ballistic expert, who testified that it was fired by the pistol formerly seen in appellant's hands, which was identified, and of which the police had secured possession. The appellant fled the jurisdiction. Subsequently he was apprehended and made a free and voluntary confession which, without any doubt whatever, establishes that he was guilty of the crime charged. It will thus be seen that the evidence amply justifies the verdict of the jury.

Judgment and order affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

217 Cal. 280

KECK v. KECK.

S. F. 14747.

Supreme Court of California.

Jan. 24, 1933.

1. Appeal and error ⇨657(1).

Appellate court having jurisdiction of regularly filed record may authorize withdrawal for amendment in conformity with order.

2. Appeal and error ⇨657(1).

Where clerk of trial court refused to present transcript for certification, but over appellant's objection filed it in appellate court, permission to withdraw, with direction to trial judge to authenticate, will be granted (Code Civ. Proc. § 953a).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action for divorce by Lizzie B. Keck against Arthur W. Keck. From order reducing alimony made subsequent to granting of interlocutory decree of divorce, Lizzie B. Keck appeals. On respondent's motion to dismiss or affirm.

Motion denied, and appellant granted leave to withdraw transcript for authentication.

Waldo F. Postel, of San Francisco, for appellant.

William P. Hubbard, of San Francisco, for respondent.

WASTE, C. J.

[1, 2] This is an appeal from an order entered subsequent to the granting of an interlocutory decree of divorce to the appellant upon her cross-complaint and purporting to alter and reduce the alimony or support payments necessary to be made by the respondent to the appellant. Respondent moves the dismissal of the appeal or the affirmance of the order on the ground that no properly authenticated record has been presented or filed herein. On its face the motion has merit, for the transcript is certified to by the clerk alone, though it contains many matters which can only be properly authenticated by the court. However, it appears from the record now before us that appellant seasonably pursued the steps essential to the production of a proper record on appeal. The notice to the clerk for preparation of transcript, filed under section 953a of the Code of Civil Procedure, was sufficiently broad to warrant the making up of a reporter's transcript. When informed by the clerk of the court below that the transcript had been prepared, as requested, counsel for appellant asserts that he demanded that the same be presented to the judge for certification but that said clerk refused so to do and over counsel's objection filed the same in this court with the clerk's certificate alone appended thereto. Counsel for appellant also points out that he thereafter requested the judge of the court below to certify to the transcript but that such request was refused for an asserted want of jurisdiction. In addition to the foregoing, appellant has presented to this court a cross-motion asking leave to withdraw the transcript for proper certification by the court below. That an appellate court, having jurisdiction of a record regularly on file may properly authorize the temporary withdrawal thereof at any time during the pendency of the appeal, so that the same might be corrected or amended in conformity to the direction of the appellate court, is now settled. *McMahon v. Hamilton*, 202 Cal. 319, 323-325, 260 P. 793; *Tasker v. Warmer*, 202 Cal. 445, 447-449, 261 P. 474. In the latter case, in response to a motion therefor, we permitted the withdrawal of the transcript in order that certain matters improperly included in the clerk's transcript might be removed therefrom and inserted in the reporter's transcript, with a direction to the trial court to thereupon certify to the same. The circumstances of the present case warrant the granting of similar relief to the appellant herein, with the result that there will then be presented to this court a properly authenticated rec-

ord upon which we can hereafter dispose of the cause on its merits, which result is always to be favored.

The motion to dismiss or affirm is therefore denied. The appellant is hereby authorized to withdraw the transcript for purposes of certification and the trial court is directed upon receipt of the same to proceed with the authentication thereof within the time specified in and pursuant to the provisions of section 953a of the Code of Civil Procedure.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

217 Cal. 277

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. J. D. MILLAR REALTY CO et al.

L. A. 13552.

Supreme Court of California.

Jan. 24, 1933.

Mortgages ☞ 568.

In foreclosure suit, right to ask equity court for instructions regarding distribution of proceeds exists independent of statute respecting declaratory relief (Code Civ. Proc. § 1060).

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Suit by the Security-First National Bank of Los Angeles against the J. D. Millar Realty Company and others. From a decree for plaintiff, defendant W. R. Steele appeals.

Affirmed.

N. B. Nelson, of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

PRESTON, J.

Defendant J. D. Millar Realty Company, a corporation, was indebted to plaintiff bank in the sum of about \$60,000, which indebtedness was secured by an express trust to sell certain real property, designated in the record as trust No. 6280 and also by a similar trust designated in the record as trust No. 5155. Defendant and appellant Steele is a junior lien claimant on the real property affected by trust No. 6280. Plaintiff brought this action to foreclose said trusts as equitable mortgages and in addition prayed for the direction of a court of equity as to the marshaling of the moneys resulting from a sale of said real

property. Said realty company, said W. R. Steele, and several others were made defendants, and all of them, including said Steele, defaulted or else disclaimed interest. A decree of foreclosure and sale and marshaling of assets followed as prayed. Said defendant W. R. Steele alone appealed.

Appellant has filed a perfunctory brief which does not comply with the provisions of rule V, subdivision 3, regarding a statement of the legal questions involved. Appellant, however, does concede that said decree of foreclosure and order of sale thereunder were properly entered. He makes no offer to discharge the prior lien or to otherwise do equity in the premises. His sole ground of complaint is that the provisions of the decree giving so-called declaratory relief are in excess of the prayer of the complaint. This contention is plainly without a semblance of merit.

The complaint, in this connection, contained the following allegations: "Furthermore, that said plaintiff is unable to determine, without a declaratory court decree, the chronological order in which the plaintiff may sell and apply the proceeds from trusts 6280 and 5155, respectively, in satisfaction of the said \$65,000 note referred to in trust 6280, on which there remains an unpaid balance of \$55,066.54, inasmuch as the defendant W. R. Steele appears to have a junior lien against J. D. Millar Realty Company under trust 6280, but has no interest under trust 5155. That the plaintiff cannot safely proceed with the foreclosure of the defendants' interest in and to the trusts 6280 and 5155 and interests in the real estate therein described, if any, until the court by a proper decree construes and determines the respective rights of the plaintiffs and the defendants in said trusts."

The prayer of the complaint, so far as here material, is in substance as follows: "6. That the court instruct and order said plaintiff to foreclose trusts #6280 and #5155 and to apply the proceeds therefrom in whatever manner the court believes the equities of the various parties demand, without in anywise depriving said plaintiff of any of its securities for said note. * * * 8. Judgment against the defendants for its costs of suit and that such sum, together with the sum of \$55,066.54 and interest * * * with reasonable attorneys' fees, be adjudged to be a lien upon the property and the interests of the defendants under said trusts * * * and the property therein described, and that the interests of said * * * Realty Company and the other defendants in and to said trusts * * * and the property therein described, be ordered sold, pursuant to law, and the custom of this court, and that said amount due plaintiff * * * be paid from the proceeds of said sale; or in the event that the proceeds * * * are insufficient, that the plaintiff have judgment against the said * * *

Realty Company for any deficiency which may remain; that the lien therein decreed and the title conveyed by said sale be adjudged superior to any right, title or interest which said defendants may have, and for such other and further relief as to the court may seem meet and proper. * * * 10. That the court construe said trusts #6280 and #5155 and give said plaintiff such declaratory relief as the court deems just in the premises. * * *

The decree in this respect merely provided for such a marshaling of the assets of the trust that the proceeds of trust 5155, in which appellant had no interest, should be first applied to the discharge of said indebtedness and in the event of its insufficiency for that purpose that the proceeds of trust 6280 be used for the same purpose. In other words, the decree protected appellant's rights and each provision thereof is in his favor and not against him.

The right to ask a court of equity for instructions under such circumstances as appear here exists independent of section 1060 of the Code of Civil Procedure, giving the right of action for declaratory relief.

Further discussion is unnecessary.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

217 Cal. 249

CUNHA v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

S. F. 14735.

Supreme Court of California.

Jan. 19, 1933.

1. Contempt ☞67.

Where District Court of Appeal annulled contempt judgment on proceedings by habeas corpus and by writ of review and habeas corpus proceeding was not reviewable, certiorari to review order entered in review proceeding held dismissible since presenting moot question (Pen. Code, § 1506, as added by St. 1927, p. 1061).

2. Contempt ☞67.

Habeas corpus ☞112.

Proceeding by habeas corpus and by certiorari to annul contempt judgment could not be considered as one proceeding so as to authorize Supreme Court to consider order on habeas corpus as one in certiorari (Pen. Code, § 1506, as added by St. 1927, p. 1061).

3. Certiorari ☞64(1).

Supreme Court may not be called upon to determine questions purely moot.

In Bank.

Proceeding by Edward A. Cunha for a writ of certiorari to review an order of the Superior Court in and for Alameda County, Stanley Murray, Acting Judge, adjudging petitioner guilty of contempt. To review an order annulling the contempt order, respondent brings certiorari.

Proceeding dismissed.

For prior opinion, see 11 P.(2d) 907.

Edward A. Cunha, in pro. per., and Harry I. Stafford, both of San Francisco, for petitioner.

Earl Warren, Dist. Atty., J. Frank Coakley, Asst. Dist. Atty., and George C. Perkins, Deputy Dist. Atty., all of Oakland, for respondent.

PER CURIAM.

Review to annul an order of the respondent court adjudging the petitioner guilty of contempt and imposing upon him a sentence of five days in jail and a fine of \$500, with the alternative of imprisonment if the fine be not paid.

The petitioner was chief counsel for the defendant in the case of *People v. James R. Kelly*, commenced and tried in the respondent court. After the conclusion of the trial the petitioner was cited to appear and show cause why he should not be punished for contempt. After an extended hearing he was found guilty and committed to the custody of the sheriff of Alameda county. He thereupon filed an application for a writ of habeas corpus in the District Court of Appeal, First District, Division 1. The writ was granted and he was released from custody upon bail approved by a judge of that court pending a determination of the matter.

Five days after the habeas corpus proceeding was instituted the petitioner filed with said District Court of Appeal his petition for a writ of review to annul said judgment of contempt. The writ was granted. The sheriff filed his return to the writ of habeas corpus and three days later the respondent court filed a return to the writ of review. Both matters came on for hearing before the District Court of Appeal. An opinion was written and filed by that court in the habeas corpus matter wherein it was determined that the judgment was void. The order of contempt was accordingly "annulled, and the petitioner released from custody." Ex parte Cunha (Cal. App.) 11 P.(2d) 902, 906. On the same day the District Court of Appeal also entered an order in the present proceeding annulling the order of contempt on the authority of the prior opin-

lon and order in the habeas corpus matter. Petitions for hearing in this court were filed in both matters. The petition for hearing in the habeas corpus matter was denied by this court "on the ground that the court has not jurisdiction to entertain the application." Minutes of the court, June 20, 1932. This for the reason that there is no provision of law empowering this court to review the order of the District Court of Appeal in a habeas corpus proceeding except in the cases provided for in section 1506 of the Penal Code, added in 1927 (St. 1927, p. 1061), of which said proceeding was not one. Ex parte Zany, 164 Cal. 724, 130 P. 710; Ex parte Page, 214 Cal. 350, 5 P.(2d) 605; In re Palmer, 214 Cal. 792, 5 P.(2d) 608; In re Mefferd (Cal. Sup.) 6 P.(2d) 71.

[1] The petition for a hearing in the present matter was granted for the reason that we were in doubt as to the correctness of the reasoning and conclusions which by reference were made the basis of the order herein by the District Court of Appeal. We were impressed with the showing on the part of the respondent as to the improper conduct of the petitioner and as to the validity of the order of contempt; but on the further consideration of the cause before us on the merits we are met with the contention of the petitioner that the present matter presents a question which is entirely moot. In this connection it appears that the order of contempt has been annulled and the alleged contemnor discharged from custody by a judgment of a court having jurisdiction in the premises, which judgment has become final and is not subject to review by any court in the land. To pass upon the merits of the present proceeding would be an idle act. If the order of contempt were affirmed and the petitioner were again taken into custody for the same offense, the effect and finality of the judgment of the District Court of Appeal on the habeas corpus proceeding would entitle him to his immediate discharge.

[2, 3] The respondent contends that although the petitioner proceeded by two distinct methods, namely, by habeas corpus and by certiorari, nevertheless the same amounted in effect to one proceeding wherein this court may consider the order on habeas corpus as one in certiorari. While the result of either proceeding might be the same in that the order of contempt might be set aside in either, the two proceedings are so separate and distinct in law that we find no justification for treating them as one and the same. The fact that the judgment of the District Court of Appeal in the habeas corpus proceeding is final and not subject to review, whereas the order of that court in the review proceeding was subject to transfer to this court, does not present a judicial question. It is so because

the law so provides. As the court may not be called upon to determine questions which have become purely academic and moot (Wright v. Board of Public Works, 163 Cal. 328, 125 P. 353; 2 Cal. Jur. p. 123), there is no alternative but to discharge the writ of review and dismiss the proceeding.

It is so ordered.

217 Cal. 244

**EAGLE INDEMNITY CO. v. INDUSTRIAL
ACCIDENT COMMISSION OF CALI-
FORNIA et al.**

L. A. 13600.

Supreme Court of California.

Jan. 19, 1933.

1. Constitutional law ⇨70(3).

Legislature may prescribe qualifications for admission to bar and define practice of law, subject to judicial inquiry as to propriety and reasonableness of its regulations.

2. Master and servant ⇨420.

Industrial Accident Commission may declare lien for amount directed to be paid lay representative of compensation claimant as "attorney's fees for legal services" (St. 1917, p. 848, § 19 (a), and § 24 (a, b, d), as amended by St. 1929, p. 323; Code Civ. Proc. § 842).

The services of one representing party litigant before Industrial Accident Commission are those of "attorney," primary meaning of which is "representative."

[Ed. Note.—For other definitions of "Attorney," see Words and Phrases.]

3. Master and servant ⇨420.

Amount of compensation allowed, and proper conduct of, representative of litigant before Industrial Accident Commission is peculiarly within latter's control (St. 1917, p. 848, § 24 (b, d), as amended by St. 1929, p. 323).

4. Master and servant ⇨420.

Court held not warranted in setting aside, as against public policy, Industrial Accident Commission's order declaring lien for amount directed to be paid compensation claimant's lay representative as attorney's fees (St. 1917, p. 848, § 19 (a), and section 24 (b), as amended by St. 1929, p. 323).

In Bank.

Proceeding by Lorenza Z. Hernandez and others, minors, by their guardian ad litem, Lorenza Z. Hernandez, to recover compensation under the Workmen's Compensation and Safety Act for the death of Gavino Hernandez, employee, opposed by the employer, and the Eagle Indemnity Company, insurance

carrier. Compensation was awarded by the Industrial Accident Commission, and the insurance carrier applies for certiorari to review and annul the award.

Award affirmed.

F. Britton McConnell and E. Herbert Herlihy, both of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

Paul Shapiro, E. G. Hewitt, and Willis S. Mitchell, all of Los Angeles, amici curiæ for respondent Alex Mestas.

California Lawyers' Association, Barry Sullivan, James M. Carter, G. M. Grant, Allan F. Daily, J. M. Sinclair, and Eldred E. Wolford, all of Los Angeles, amici curiæ for petitioner.

SHENK, J.

Petition to review and annul an award of the Industrial Accident Commission.

On September 15, 1931, Gavino Hernandez, an employee, sustained injuries arising out of and in the course of his employment, as a result of which he died. The petitioner herein is the insurance carrier of the employer. On application of the widow and minor children of the decedent, the respondent commission awarded a death benefit computed in accordance with the statute. The commission found, among other things, that "the applicants' representative, Alex Mestas, is entitled to a lien against compensation for the reasonable value of his services in the sum of \$100," and in its award made the compensation payable to the widow, "less \$100 thereof payable to Alex Mestas, as attorney's fees."

It is the award of the reasonable value of his services to Alex Mestas as the applicants' representative, and the making of the amount thereof "as attorney's fees" a lien on the award, that is attacked as beyond the jurisdiction of the commission, since it appeared beyond dispute that Mestas is not and never has been admitted to practice law in the courts of this state.

The respondent seeks to justify its action under the terms of the Workmen's Compensation and Safety Act and particularly section 19(a) (St. 1917, p. 848) and section 24 (St. 1923, p. 772) thereof. Section 19(a) provides, in part: "Either party shall have the right to be present at any hearing, in person or by attorney or by any other agent, and to present such testimony as shall be pertinent under the pleadings." Section 24(a) provides, in part, that "No compensation, whether awarded or voluntarily paid, shall be paid to any attorney at law or in fact or other agent, but shall be paid directly to the claimant entitled to the same, unless otherwise ordered by the commission"; and 24(b): "The commission may fix and determine and allow as a lien

against any amount to be paid as compensation: (1) A reasonable attorney's fee for legal services pertaining to any claim for compensation either before the commission or before any of the appellate courts." Section 24(d) provides that it shall be competent for the commission to determine what shall be a reasonable charge for legal services, and that no charge, claim, or agreement for such services in excess of the amount so determined "shall be enforceable, valid or binding in any respect." This section also provides: "The privilege of any person, including attorneys admitted to practice in the supreme court of the State of California, to appear in any proceeding as a representative of any party before the commission, or any of its referees, may be removed, denied, prohibited or suspended by the commission for a violation of the foregoing provisions of this section or for other good cause, after hearing had."

It is assumed by the respondent commission and is conceded by Mr. Mestas, appearing on his own behalf, that the services performed by him in the prosecution of the claim before the commission were legal services. It is further conceded by him that the legal services so rendered by him would constitute "unlawful practice of the law," unless the Workmen's Compensation Act authorizes one not an attorney at law to perform such services.

The question presented is this: Do the pertinent provisions of the Workmen's Compensation Act evidence an intention on the part of the Legislature to permit a person not admitted to practice law to represent a litigant before the Industrial Accident Commission and to receive compensation for legal services, the amount thereof to be fixed and charged as a lien by the commission, and, if so, is it within the power of the Legislature to so provide?

[1] The question is one of both legislative and judicial concern. The Legislature may, in the first instance, prescribe the qualifications for admission to the bar and define what shall constitute the practice of the law, but regulations to that end must stand the test of judicial inquiry as to their propriety and reasonableness. *State Bar of California v. Superior Court*, 207 Cal. 323, 278 P. 432. In the exercise of its power, the Legislature has properly provided, or has provided for, such regulations under which, as a general rule, no one may practice law without a license, and to obtain a license he must be admitted to the bar. Exceptions to this general rule have been established and long recognized. A well-known exception is provided by section 842 of the Code of Civil Procedure, as follows: "Parties in justices' courts may appear and act in person or by attorney; and any person, except the constable by

whom the summons or jury process was served, may act as attorney." This section has been in effect in substance since the adoption of the Practice Act, and in it we have the long-approved authorization for a layman to practice law as an attorney, in a judicial tribunal. This exception to the general rule is recognized also by section 281 of the Code of Civil Procedure; and with limitations by section 96 of the same Code. We find nothing in the State Bar Act, or other statute of this state, establishing the general rules regulating the admission to or the practice of the law which has disturbed the special rule as to the practice of the law by laymen as attorneys in justices' courts.

[2] An examination of the Workmen's Compensation Act, and particularly the provisions thereof above quoted, has convinced us that the Legislature has provided a further exception to the general rule, as to practice before the Industrial Accident Commission. The statute specially provides that a party litigant before the commission may be represented by one not admitted to practice law. When so acting he performs legal services, and such services are the services of an "attorney," as that term is used in section 842 of the Code of Civil Procedure. When so understood, it is in accord with the primary meaning of the word "attorney" as a "representative." (Standard Dictionary.) When he has performed such services the act provides that the commission may fix the amount to be paid therefor. When so fixed no violence is done to the terms of the act to have a lien declared therefor as "attorney's fees for legal services." If he were not permitted under the act to perform such legal services without a license to practice law the result would be different.

[3] The foregoing meaning of the language of the act is reinforced by the practical construction placed thereon by the commission since 1917. During this period of over fifteen years the commission has permitted claimants to be represented by representatives, or attorneys not admitted to practice law, and this proceeding is the first instance in which the point has been raised. No abuse of the practice so long obtaining has been suggested, and none may well arise because of the fact that the whole matter of the amount of the compensation, if any, to be allowed and the proper conduct of representatives of litigants before it, is peculiarly within the control of the commission. For good cause shown and after hearing, the privilege of representing litigants before it may be "removed, denied, prohibited or suspended," and this power applies as well to "attorneys admitted to practice" as to lay representatives. Section 24(d). Furthermore, no charge for legal services by a representative of a claimant nor any agree-

ment therefor is binding, and any such charge or agreement is declared invalid under the section just referred to.

[4] Nor do we find in this proceeding such a question of public policy as would justify the overturning of the order of the commission. The question of public policy is argued on both sides by *amici curiæ*, all members of the state bar. On the one hand it is urged that the order should be affirmed on the ground that numerous claimants for compensation are indigent and their claims are of such a character and the compensation allowed by the commission is so small as not to justify the engagement or service of a member of the bar, and that without the right to have a lay representative the claimant would oftentimes be unrepresented. On the other hand, it is urged that to allow the order to stand would vitally affect the business of lawyers admitted to practice in this state, and would result in inexperienced and inexperienced advice and assistance to a deserving claimant to the latter's detriment; and that the practice of allowing lay representation before boards exercising judicial functions should not be extended. Whatever view may be urged as to the policy of the law in such matters, the Legislature has declared the policy, and we do not feel warranted in this instance in setting it aside. If it be desirable from a legislative standpoint to prohibit lay representation before the Industrial Accident Commission, the act could be amended to accomplish that result.

The award is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

129 Cal.App. 19

**WALTERS v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY.**

Civ. 8680.

District Court of Appeal, Second District,
Division 2, California.

Jan. 19, 1933.

Hearing Denied by Supreme Court March 20,
1933.

1. Infants $\hookrightarrow$ 80(1).

General powers or restraints not intended by Legislature cannot be implied in connection with guardian ad litem for infant (Code Civ. Proc. §§ 372, 373).

2. Infants $\hookrightarrow$ 105.

Court authorizing compromise in action by infant's guardian ad litem for injuries held without authority to order payment of hospital and physicians' charges from money received in settlement (Code Civ. Proc. §§ 372, 373).

3. Guardian and ward $\S$ 35, 37.

Guardian is not made answerable for custody and general management of ward's estate except for conduct authorizing suspension or discharge.

4. Prohibition $\S$ 5(3).

Prohibition lies to restrain enforcement of unauthorized orders directing disposition of proceeds of settlement in hands of infant's guardian ad litem (Code Civ. Proc. $\S$ § 372, 373).

Original application by Elsie N. Walters for writ of prohibition to be directed to the Superior Court of Los Angeles County.

Writ granted.

A. B. Edler and Leslie K. Floyd, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, J.

The petitioner, as guardian ad litem of a minor child who had been injured by an automobile of one Jerome Barak, effected a compromise of an action for damages which she had filed on its behalf and which arose from said occurrence. The Superior Court "authorized" such compromise upon the basis of a specified amount of money and the execution of a full and complete release from liability. The court below "further ordered, adjudged and decreed" that certain sums of money be paid therefrom to defray the charges of the hospital and physicians, and that the remainder be used for the maintenance and support of said minor. Thereafter the guardian was ordered to appear before the court and show cause, if any she had, why an order should not be made directing that she draw checks in payment of said expenses forthwith or that the clerk of the court draw the same. Upon a hearing pursuant to the latter order, its validity was attacked by the petitioner herein, and it was upheld; and she was subsequently cited to show cause, if any she might have, why she should not be adjudged in contempt of court, why an order should not be made demanding her to have the moneys of said minor "returned to the jurisdiction of this court and deposited in a bank," and, further, "why the clerk of said superior court should not be empowered and directed to draw checks upon the account of" said minor for the amounts of said hospital and medical charges. The guardian ad litem then petitioned this court for a writ of prohibition to restrain the enforcement of the foregoing orders.

[1-3] Section 372 of the Code of Civil Procedure provides, in part, that in such a case the guardian ad litem "shall have power to compromise the same and to agree to the judgment to be entered therein for or against his ward, subject to the approval of the court in which such suit is pending." By quotation of the above section and those applicable to general guardians, the respondent attempts to hold the guardian ad litem amenable to its supervision in the collection and disbursement of the ward's estate, but said section permits only of the appointment for an infant of a guardian ad litem when such infant is a party to an action as plaintiff or defendant, and of a compromise by the guardian with approval of the court in which the action is pending. An appointment thereunder is made in a proper case when deemed expedient, "notwithstanding he may have a general guardian and may have appeared by him." Code Civ. Proc. $\S$ § 372, 373. It is to be observed that the creditors were not parties to the action compromised, nor were their claims the subject of compromise or approval. The appointment of a guardian in such event being a special power exercised by the trial court, nothing may be read into section 372 of the Code of Civil Procedure to authorize general powers or restraints not intended by the Legislature. *Kidwell v. Ketler*, 146 Cal. 12, 79 P. 514; *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212. It is the guardian, and not the court, who is responsible for proper administration of the trust. While in certain respects subject to the control and supervision of the court, the guardian is not made answerable except for conduct authorizing suspension or discharge for the custody and general management of the ward's estate. *De Greayer v. Superior Court*, 117 Cal. 640, 49 P. 983, 59 Am. St. Rep. 220. For the reasons stated, argument and citation of authorities by the respondent with reference to litigated questions arising between parties to an action are not pertinent.

[4] Finally, it is contended that prohibition will not lie to review such orders, since the petitioner might have had a right of appeal therefrom. It is unnecessary to determine as to what procedure an unlawful order or judgment may be made the basis, when assailed directly or indirectly for the purpose of having the same tested as to its validity. *Pennell v. Superior Court*, 87 Cal. App. 375, 262 P. 48. That the questioned orders were unauthorized and void we think is manifest.

The writ of prohibition is granted as prayed.

We concur: WORKS, P. J.; STEPHENS, J.

PIERCE v. WALTER et al.
Civ. 8751.

District Court of Appeal, First District,
Division 1, California.
Jan. 26, 1933.

1. Landlord and tenant ⇨42.

Evidence and statutory presumption supported finding that oral agreement was that written lease not fixing term was to run for one year only (Civ. Code, § 1943).

2. Landlord and tenant ⇨94(2).

Where trial court found term under oral lease of realty was for one year, tenant *held* not entitled to remain another year because landlord failed to serve written notice of termination of tenancy (Civ. Code, § 1946).

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Horace F. Pierce against Ernest Walter and others. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Victor J. Miller and W. H. Finley, both of Ventura, for appellant.

Blackstock & Rogers, of Ventura, for respondent.

KNIGHT, J.

In this action to recover possession of certain farming property, plaintiff, the owner of the property, obtained judgment, and the defendant Walter appeals.

[1] The complaint was in the usual form, alleging plaintiff's ownership of, and right of possession to, the property, and that defendant was in the unlawful possession thereof. The answer consisted merely of denials of the allegations of the complaint, except as to plaintiff's ownership, which was admitted. The controversy arose over the fact that the written lease under which defendant went into possession of the property contained no provision fixing the term of the tenancy. It was based on a crop rental, and the two main provisions relating thereto were substantially in the same form; one of them being as follows: " * * * That the said lessors shall receive one-fourth of all the produce and products of said farm the first year and one-third of all the produce and products thereafter of said farm whether the same be beans or alfalfa or any other crop." Defendant claimed at the trial, however, that an oral agreement had been entered into at the time the lease was executed, to the effect that his tenancy was to continue three years, and he sought to introduce testimony to that effect. Plaintiff objected thereto on numerous

grounds, among them being that the terms of the lease presented no ambiguity or imperfection, and that therefore the testimony offered tended to vary and contradict the terms of the written lease; also that testimony concerning any such oral agreement was inadmissible because the question of the asserted imperfection in the lease was not put in issue by defendant's answer, which, as stated, consisted merely of denials of the alleged right of possession of plaintiff and the alleged unlawful possession by defendant. In support of his objections, plaintiff cites subdivision 2 of section 1856 of the Code of Civil Procedure. However, said objections were overruled, and thereupon evidence was adduced upon the issue, consisting of the testimony given by the defendant and the plaintiff. Such testimony was in sharp conflict, and the court found therefrom, as claimed by plaintiff, that the oral agreement was that the lease was to run for one year only, and that consequently defendant's tenancy expired on October 9, 1930. The record discloses that plaintiff's testimony is amply sufficient to sustain such finding. He stated, in substance, not only that it was agreed that the lease was to run for only one year, but that in July, 1930, during one of his several visits to the farm, he had a conversation with defendant in which he told defendant that he was dissatisfied with the manner in which defendant failed to comply with certain provisions of the lease relating to caring for and cultivating the farm, much of which had been planted to young walnut trees by plaintiff, and that during said conversation, and in response to a direct inquiry made by defendant, he told defendant that the lease would not be renewed for another year, and that defendant must vacate at the end of his present term, which defendant agreed to do; furthermore, that at the end of said term defendant promised to vacate in two weeks, if given such time; that the same was granted, but defendant failed to keep his promise. The trial court's finding as to the term of the lease is also supported by the presumption created by section 1943 of the Civil Code, to the effect that a hiring of real property, other than lodgings and dwelling houses, in places where there is no custom on the subject, is presumed to be for one year from its commencement, unless otherwise expressed in the hiring. It is evident, therefore, in view of plaintiff's positive testimony upon the subject and the presumption created by said Code section, that the finding of the trial court relating to the term of defendant's tenancy under said lease is binding on the appeal.

[2] Relying on the provisions of section 1946 of the Civil Code, defendant further contends that in any event he was entitled to remain another year because plaintiff failed to serve upon him, within the time required

by said Code section, any written notice of termination of tenancy. An examination of the provisions of said Code section clearly shows, however, that the same is restricted in its operation to "A hiring of real property, for a term not specified by the parties, * * *" and in the present case, as already pointed out, the evidence shows, and the trial court found, that the term was specified by the parties; the only dispute being as to the extent of the term. Nor can defendant claim the benefit of the provisions of subdivision 2 of section 1161 of the Code of Civil Procedure, because admittedly the written demand for possession required to be given by said section in case of agricultural lands was served within sixty days after the expiration of the one-year term.

The remaining points made by appellant are incidental to those already discussed, and therefore do not require special mention, more than to say that there is no merit therein.

No grounds for reversal appearing, the judgment is affirmed.

We concur: TYLER, P. J. (CASHIN, J.

129 Cal.App. 16

**HEWITT v. SECURITY-FIRST NAT. BANK
OF LOS ANGELES.**

Civ. 7471.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1933.

1. Bills and notes *§*326.

Indorser transferring past-due negotiable instrument without recourse warrants that he has no knowledge tending to prove worthlessness of instrument (Civ. Code, *§* 1774).

2. Bills and notes *§*516.

Evidence sustained finding indorser of past-due note without recourse knew that maker was insolvent, but withheld from indorsee knowledge of such fact (Civ. Code, *§* 1774).

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Paul V. Hewitt against the Security-First National Bank of Los Angeles, successor to G. F. Williams, as administrator with the will annexed of the estate of W. S. Everett, deceased. From an adverse judgment, defendant appeals.

Affirmed.

W. Claire Anspach, of Glendale, for appellant.

R. E. Wallace, of Los Angeles, for respondent.

CONREY, P. J.

The present controversy arose out of an exchange of property between the plaintiff, Hewitt, and one W. S. Everett. After the transaction had been completed, Everett died, and an administrator of his estate was duly appointed. A creditor's claim was presented by Hewitt and rejected by the administrator. Hewitt then brought this action to enforce his said claim. From a judgment entered in favor of the plaintiff, the defendant administrator has presented this appeal.

The contract under which the exchange of properties occurred was in the form of written "escrow instructions" delivered by Everett to the escrow holder, together with corresponding escrow instructions of same date signed by plaintiff, Hewitt, and his wife, and delivered to same escrow holder. The instructions of each party were accompanied by certain described documents, to be delivered to the other party on performance of the concurrent conditions prescribed in the several instructions. These escrow instructions were dated September 13, 1927, and in due course the transaction was completed and closed. Among the documents delivered to Hewitt, as part of the consideration for the property conveyed by him, there were three promissory notes of Magnetic Ice Company, a corporation, payable to the order of W. S. Everett, on which there remained unpaid and due the total sum of \$2,700, besides interest. Said notes were accepted by plaintiff in his contract with Everett as of the value of \$2,700. In the verified claim presented to the administrator by the claimant, as well as in the complaint, it is set forth that the notes were by Everett indorsed "without recourse." But it was stated in the claim as presented, and is alleged in the complaint, that at the time of the indorsement, assignment, and delivery of said notes Everett represented and warranted to the claimant Hewitt that the maker of said notes, the Magnetic Ice Company, was solvent and able to pay its obligations as they accrued; whereas in fact, at the time of such indorsement, assignment, and delivery the said Magnetic Ice Company, was insolvent and that fact was known to the said Everett; that no part of said sum of \$2,700, either principal or interest, has been paid, etc. In the complaint in this action it is further alleged that at the time of said indorsement and delivery of notes to the plaintiff said Magnetic Ice Company was, and at all times since has been, insolvent and unable to pay its obligations, or any of them, and that such fact was well known to Everett and unknown to the plaintiff; that said Everett knowingly and inten-

tionally concealed from the plaintiff the fact of insolvency of Magnetic Ice Company, and withheld said fact for the purpose of inducing the plaintiff, etc.; that the plaintiff believed and relied upon said statements and representations, and so believing and relying entered into said agreement to accept said promissory notes as part of the purchase price of the real property conveyed by him; that by reason of said insolvency the plaintiff has been unable to collect said notes, or any part thereof, and has been damaged in the amount stated.

[1] The trial court found in favor of the plaintiff upon the issues raised by the complaint and answer, relating to the said alleged facts. Section 1774 of the Civil Code, as it existed at the time when the above-stated transaction took place between the plaintiff and Everett reads as follows: "One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause." It is contended by appellant that said section of the Code only applies to transfer of paper in due course and to an innocent taker, citing *James v. Yaeger*, 86 Cal. 184, 189, 24 P. 1005. We have not been able to find any subsequent reference to that statement in any California decision, and we are inclined to question the correctness of it. The section was contained in the Code title on sales, and not in the title on negotiable instruments. The section was broad in its terms, and plainly included instruments other than those which are negotiable. While the notes in this present action were negotiable in form, they were past due at the time of their sale and transfer to the plaintiff. This is not an action to enforce the liability of Everett as an indorser. It is an action to recover upon a claim for damages on account of the detriment suffered by plaintiff by reason of the fact that, relying upon statements and representations of Everett, he accepted said notes as part of the consideration for a transfer of property; whereas, in fact, said representations were untrue, and the notes, instead of being worth their face value, were worth nothing.

[2] Appellant contends that the evidence is insufficient to show that Everett had knowledge of any fact which would have rendered the notes valueless. Unfortunately we have not the benefit of any brief on behalf of respondent to assist us in examining the record. However, we do find from the testimony of the witnesses evidence sufficient to warrant the court in finding that Everett had knowledge of facts which tended to prove that the maker of the note was insolvent, and that he did not reveal those facts to the

plaintiff. Even if Everett did not directly state and represent to the plaintiff that the corporation was solvent, or able to pay its obligations as they accrued, the evidence is sufficient to have warranted the trial court in coming to the conclusion that the corporation was in fact insolvent, and that Everett had withheld from plaintiff his knowledge of the facts concerning said insolvency. This is sufficient to make Everett liable for such loss as resulted to the plaintiff. *Carter v. Turner*, 90 Cal. App. 193, 198, 265 P. 870; *Spiegelman v. Eastman*, 95 Cal. App. 205, 213, 272 P. 761.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

MANICA v. SMITH et al.*
Civ. 4619.

District Court of Appeal, Third District, California.

Jan. 23, 1933.

Rehearing Granted Feb. 21, 1933.

1. Statutes $\S$ 225 $\frac{1}{4}$.

Statute, declaring automobile owner liable for injuries resulting from negligence of another, operating car with his permission, and statute, passed by same Legislature and effective at same time, declaring owner liable for injuries to guest because of operator's willful misconduct or gross negligence, should be read together (Civ. Code, $\S$ 1714 $\frac{1}{4}$; St. 1923, p. 517, $\S$ 141 $\frac{3}{4}$, as added by St. 1929, p. 1580).

2. Automobiles $\S$ 192(1).

Automobile owner, permitting operation thereof by one guilty of negligence, whether slight or gross, is guilty thereof in same degree (Civ. Code, $\S$ 1714 $\frac{1}{4}$; St. 1923, p. 517, $\S$ 141 $\frac{3}{4}$, as added by St. 1929, p. 1580).

3. Automobiles $\S$ 192(1).

Automobile owner is liable for injuries to driver's guest only if driver was grossly negligent (Civ. Code, $\S$ 1714 $\frac{1}{4}$; St. 1923, p. 517, $\S$ 141 $\frac{3}{4}$, as added by St. 1929, p. 1580).

4. Automobiles $\S$ 242(1).

There is no presumption of automobile driver's willful intent to injure another (St. 1923, p. 517, $\S$ 141 $\frac{3}{4}$, as added by St. 1929, p. 1580).

5. Automobiles $\S$ 158.

"Willful misconduct" of automobile driver is conduct willfully designed to accomplish specific result, not aimless of purpose or regardless of results (St. 1923, p. 517, $\S$ 141 $\frac{3}{4}$, as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words and Phrases.]

6. Automobiles ⇨244(4).

Evidence held to justify court's finding in action against driver and owner of rented automobile for injuries to driver's guest that driver was guilty of gross negligence, rather than willful misconduct absolving owner from liability (Civ. Code, § 1714¼; St. 1923, p. 517, § 141¼, as added by St. 1929, p. 1580).

7. Appeal and error ⇨173(13).

Judgment against owner of rented automobile for injuries to driver's guest must be affirmed as against contention that driver was guilty of willful misconduct, where such issue was not raised below (Civ. Code, § 1714¼; St. 1923, p. 517, § 141¼, as added by St. 1929, p. 1580).

8. Appeal and error ⇨892.

Appellate court's function is not to try controversy anew, but to review trial had.

9. Automobiles ⇨244(32).

Evidence and admissions in pleadings in action against driver and company from which he rented automobile for injuries to his guest held to show at least prima facie that such company owned car, though evidence failed to show that driver had use thereof for less than ten days (St. 1923, p. 519, § 16).

10. Damages ⇨191.

Evidence of plaintiff's payment of hospital bill and balance due doctor held sufficient to support findings of special damages, in absence of contrary evidence, though plaintiff did not call doctor as witness and prove value of his services.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Erma Manica against Arthur Le Roy Smith, Berry U Drive, Limited, and others. From a judgment for plaintiff, the last-named defendant appeals.

Affirmed.

Herbert Choynski, of San Francisco, and Anson H. Morgan and Martin I. Welsh, both of Sacramento, for appellant.

Sheridan Downey and Price & Price, all of Sacramento, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The action was to recover damages on account of injuries sustained by plaintiff in an automobile accident, the details of which hereinafter.

The case was tried before the court, without a jury, and judgment went for plaintiff.

Defendant's motion for a new trial was denied, and this appeal follows.

Defendant Berry U Drive, Limited, is engaged in the business of renting automobiles without drivers, and will be hereinafter designated as "Berry Company."

On or about April 28, 1930, Arthur Smith rented from the Berry Company a certain automobile, without driver; the said Berry Company being at all times the owner of the automobile rented. The Berry Company, at the time of the said renting, took each and every precaution required by the provisions of section 76½, subdivision (a) of California Vehicle Act then in force (St. 1929, pp. 523, 524), and the said Berry Company believed that the said Smith was qualified and competent to use, drive, and operate said automobile. The said Smith was not at any time the agent or servant of Berry Company, and at the time of the accident the automobile was not being used or operated by the Berry Company, or any of its agents, servants, or employees, but was being used and operated by Smith, who had been authorized to use and operate the automobile by the owner, Berry Company.

At the time of the accident, the plaintiff was then and there a guest of Smith, and had accepted a ride in said automobile without giving compensation therefor; neither the accident nor any damages or injuries resulting therefrom were caused directly and/or proximately by the willful misconduct and/or gross negligence upon the part of the plaintiff. No act of negligence or carelessness on the part of said plaintiff contributed proximately, or otherwise, to the accident.

The foregoing facts are taken from the court's findings, and no point is urged on the sufficiency of the evidence in support of said findings. There are other findings supporting the charge of gross negligence on the part of the defendant Smith.

It is appellant's contention, at the outset, that no liability rests upon the owner of an automobile to compensate a guest for injuries sustained, save and except under the provisions of section 141¼ of the California Vehicle Act (St. 1929, p. 1580).

The primary question presented is one of construction. Section 1714¼ of the Civil Code, as far as applicable to the instant case, provides that every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, by any person using or operating the same, with the permission, express or implied, of such owner. By the express terms of the statute, and contrary, perhaps, to the general rule of this jurisdiction, an imputed negligence is fastened upon the owner. The statute has been construed in Sutton

v. Tanger, 115 Cal. App. 267, 1 P.(2d) 521. It is there held that a renter has placed upon him this new liability analogous to the doctrine of respondeat superior, without the existence of the relationship of employment or agency or family, and irrespective of negligence in ascertaining the competency of the driver.

Section 141¼ of the California Vehicle Act of 1929 deals with the rights of guests. As far as necessary to quote, the section provides: "Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle."

Appellant insists that section 141¼ of the California Vehicle Act limits plaintiff's right of recovery here to the driver of the automobile, unless said plaintiff can make independent proof of the gross negligence of the owner. In other words, the contention is that the latter statute took away the general liability of the owner as outlined in the Civil Code, and limited the same to the conditions outlined in section 141¼ of the California Vehicle Act. Continuing the argument, the appellant contends that a guest can only recover against the particular one whose gross negligence proximately contributed to the accident; that, if the accident results from the gross negligence of the driver or the person responsible for the operation of the car, then, in the absence of some specific showing of gross negligence on the part of the owner, the latter is not liable.

[1] It may be here noted that section 1714¼, Civil Code, and section 141¼ of the California Vehicle Act were passed at the same Legislature, and took effect at identically the same time. And, further, it is conceded that the Civil Code declared the common-law rule. *Callet v. Alioto*, 210 Cal. 65-70, 290 P. 438.

We are of the opinion that, adopting a construction most favorable to the appellant, the two statutes should be read together.

[2] Section 1714¼, Civil Code, makes the owner liable for injury to person or property resulting from negligence in the operation of a motor vehicle. It establishes a direct contact between the owner and the operator, whereby the negligence of the latter is imputed to the former. And the intent manifest in such Legislature was to make the act of the operator the act of the owner.

It follows that, if the operator is negligent, regardless of the degree, whether slight or gross, the same degree of negligence is imputed to the owner. So, therefore, construing section 141¼ of the California Vehicle Act

with the Civil Code section, we can readily hold that, where the driver or other person responsible for the operation of the vehicle is grossly negligent, the owner is guilty in the same degree, purely by force of the statutes or liability fixed by section 1714¼ of the Civil Code.

Appellant's contention would destroy, not only the effect of section 1714¼ of the Civil Code, but would eliminate entirely the doctrine of respondeat superior, in as far as the rights of any guest might be determined. Surely this was not the intent of section 141¼ of the California Vehicle Act.

We think the use of the term "owner" in the motor vehicle statute was more or less general. The phrase "owner, driver, or person responsible for the operation of the vehicle" was designed to embrace all classes liable under the general statutes, and to limit that liability to gross negligence, willful misconduct, or intoxication. The main intent of the section was to limit the creation of a liability rather than to determine the person liable.

[3] Summing up, we find one statute declaring a common-law right which holds the owner liable for the negligence of an operator. The California Vehicle Act there declares the owner is not liable for injuries to a guest resulting from the negligence of the operator. But by specific proviso the latter section states that the owner shall not be relieved from liability for injuries resulting from gross negligence of the driver or operator. The clause "shall not be relieved from" assumes and recognizes a liability which it leaves unimpaired. In other words, still construing the statutes together, though a separate consideration would result similarly, the Legislature has decreed that, where the injured party is a guest, the actionable negligence for which the owner is held must be gross negligence of the operator.

Appellant next urges that, giving the construction we have, the liability of the owner as fixed by section 1714¼, Civil Code, is limited to cases of negligence, and that an owner is not liable, regardless of section 141¼, California Vehicle Act, for willful misconduct of the operator.

[4] Then, argues appellant, the facts of the instant case present a case of willful misconduct and not negligence, and therefore the owner is absolved. The line between negligence and misconduct has never been definitely drawn. The evidence in the record would indicate that the driver Smith was doing a bit of pantomime on the highway. He was driving at a high rate of speed, zigzagging on both sides of the road, and evidently attempting to frighten his guest. Many people, in some degree or other, attempt the same thing. But there is not a presumption of willful intent to injure. A person driving a car

through an intersection at a speed of sixty miles per hour, and against a signal, might be said to be doing the act willfully, but it would not be classed as free from negligence. Negligence might assume that a man thinks before he acts, but does not think correctly. If we attempt too close analysis, we find ourselves enmeshed in metaphysics, psychiatry, psychology, and the thousand and one allied mazes of mental speculation. We might find ourselves eliminating all responsibility for negligence on the simple averment of the accused that he willfully did or performed the acts complained of.

[5] Willful misconduct may be characterized as conduct willfully designed to accomplish a specific result; not aimless of purpose or regardless of results.

We are cited to the case of *Whiteford v. Yuba City Union High School District*, 117 Cal. App. 462, 4 P.(2d) 266, on the point of distinction between negligence and willful misconduct. Incidentally, the discussion there was not necessary to a decision of the case, but seemed to be interjected only as another reason upholding the conclusion of the trial court. However, the thought embodied in the opinion is that, when a person wills to do an injury, that moment he ceases to be negligent. It will be noted that the willfulness is to do an injury, and not the willful character of an act, which might result in injury.

In *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 P. 510, 512, it is said: "To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act, to the end of averting injury."

[6, 7] Measuring the instant case by that rule, we find Smith, the driver, heading directly for an on-coming car, and, when the danger of collision had become apparent, he would turn back into the proper lane or otherwise reach a point of safety, negating the idea of a conscious failure to act to the end of averting injury. In fact, it was in this zigzag method that the automobile landed in a ditch alongside the highway.

The record here supports the conclusion that Smith, the driver, intended no injury, but that his idea of, as the testimony goes, "being smart," was to avoid injury, notwithstanding the creation of fright in his guest. We might consider the fact from a different angle. Let us assume that the driver Smith, in his playful cavorting, had struck one of the on-coming cars, causing injury to the occupant thereof. The same state of facts would support a finding of negligence in an action by the injured person, and the defense of willful misconduct would not prevail, even under the rule of the *Whiteford Case*, supra.

We concede the question to be close, but we prefer the finding of the trial court, which court was previously called upon to determine the character of the act under scrutiny. There is a dearth of testimony on this point of willful misconduct. The plaintiff testifies that the driver, Smith, was attempting to frighten her and to act "smart." This is purely a conclusion, and there is no testimony or other independent evidence in support thereof. The fact is that Smith said nothing to plaintiff, so therefore her testimony as to his intent is merely conjectural. Smith was a sailor, on shore. He had known the young lady plaintiff for but a few days, and had invited her for a ride in this rented car. They had traveled a mile before the accident happened, and the said accident resulted from Smith's attempts to avoid collisions, the danger of which he had created. Other testimony disclosed that the car skidded into the ditch bordering the narrow highway, and that the force of the impact was so slight as to permit the automobile to be returned on its own power. There was further evidence of an attempt to brake the car for a distance of some thirty feet before it left the highway. From this record and the natural inferences permissibly drawn from the evidence we will not disturb the trial court's finding. There remains, however, another reason for affirmance on this point. In the court below the issue was not raised at any stage of the proceedings. The argument there was on the question first hereinbefore discussed, namely, the liability of an owner, where said owner was not presumably or actually at fault.

[8] Under our scheme of jurisprudence, a clear line of jurisdiction is drawn between trial and appellate courts. The function of the latter tribunals is not to try anew a controversy, but to review the trial as had. Had the issue of misconduct been raised in the court below, respondent may have met it with evidence at least equal to the conjectural opinion relied upon here by appellant. The case was tried upon the theory of gross negligence, and no claim of willful misconduct was urged. From the whole case, as the trial court evidently viewed it, it was a situation where a young man and a young lady, in youthful exuberance, were mentally engaged in something other than the operation of a motor vehicle.

[9] Appellant claims that plaintiff failed to prove the extent of the permission granted, and that appellant was the owner, within the meaning of the statute. The latter part of the contention is that section 16, California Vehicle Act (St. 1923, p. 519), defines the owner as a person having the lawful use or control or right to the use or control of a vehicle under a lease or otherwise for a period of ten or more successive days. The claim is made that the evidence fails to show whether Smith, the renter, had the use of the car for

ten days, or one day, and that therefore plaintiff fails in her proof. There is no merit in the point. The record of the transaction rested with the appellant, and, from the evidence and admissions in the pleadings, at least a prima facie showing of ownership was made. No point of the length of time for which the car was rented was made in the court below, and appellant was afforded abundant opportunity to make any showing it could on the subject.

[10] The final point of appellant is that the evidence does not support the findings as to special damages, embracing hospital and doctor bills. The main contention is that plaintiff did not call the doctor and prove the value of his services. There was other testimony on the subject; namely, the payment of the hospital bill and the indebtedness due the doctor on the balance of his bill as rendered. While technically speaking we might consider this testimony as weak, yet we hold that it sufficiently supports the finding, in the absence of any further evidence to the contrary.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 556

JEWETT et ux. v. CITY TRANSFER & STORAGE CO.

Civ. 7587.

District Court of Appeal, Second District,
Division 1, California.

Jan. 9, 1933.

Hearing Denied by Supreme Court March 9,
1933.

1. Warehousemen $\hookrightarrow$ 33.

Within statute providing that remedy given therein to enforce warehouseman's lien does not preclude other lawful remedies, "remedy" is means authorized for collecting warehouseman's proper storage charges (St. 1909, p. 444, § 35).

As applied to legal phraseology, a "remedy" is the means authorized by law to be employed in preserving or enforcing a civil right, or preventing the happening of a threatened injury, or in securing redress for that which already has illegally resulted in damage.

[Ed. Note.—For other definitions of "Remedy," see Words and Phrases.]

2. Warehousemen $\hookrightarrow$ 30, 33.

At common law, warehouseman had specific lien for proper storage charges, but no means of enforcement except by action.

Although at common law a warehouseman had a specific lien for his proper charges on property stored with him, together with the incident right to retain possession thereof until such charges were paid, he had no direct, personal remedy of selling the property for the collection of his charges, but was relegated to an action which, on the recovery of a judgment therein, carried with it the usual means of its enforcement.

3. Action $\hookrightarrow$ 35.

Statutory remedy to enforce right existing at common law is merely cumulative, and ordinarily either common-law or statutory remedy may be pursued.

4. Warehousemen $\hookrightarrow$ 33.

To enforce lien, warehouseman has remedy provided by Warehouse Receipts Act and also common-law remedy by action, and additional statutory remedy including foreclosure of right of redemption (St. 1909, p. 442, § 33; p. 444, § 35; Civ. Code, §§ 1856, 3011; Pol. Code, § 4468).

5. Warehousemen $\hookrightarrow$ 33.

Remedy afforded by statutes, if applicable to foreclosure of warehouseman's lien, being identical with remedy under Warehouse Receipts Act, held not one of "other remedies" contemplated by such act for enforcing warehouseman's lien, and was superseded thereby (St. 1909, p. 437, as amended; p. 444, § 35; Civ. Code, §§ 3051, 3052).

[Ed. Note.—For other definitions of "Other," see Words and Phrases.]

6. Statutes $\hookrightarrow$ 158.

Law does not favor implied repeals.

7. Statutes $\hookrightarrow$ 167(1).

Later law, when revision of entire subject-matter and designed as substitute for earlier act, is deemed to supersede or repeal earlier act.

8. Warehousemen $\hookrightarrow$ 2.

Respecting implied repeal of earlier legislation, purpose of Warehouse Receipts Act was to revise entire subject-matter (St. 1909, p. 437, as amended).

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by G. A. Jewett and wife against the City Transfer & Storage Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Ray Meacham and Newton M. Todd, both of Long Beach, for appellant.

Dewey L. Strickler, of Long Beach, for respondents.

HOUSER, J.

The defendant appeals from a judgment recovered by the plaintiffs in an action for conversion of certain personal property which belonged to the plaintiffs and which was stored by them with the defendant.

It appears that because of the failure of the plaintiffs to pay certain storage charges on the said property, the defendant caused the same to be sold for the purpose of collecting said charges. It is admitted that in so doing the defendant failed to give the notice required by the provisions of section 33 of the Warehouse Receipts Act (Stats. 1909, p. 437, as variously amended). On the other hand, as a justification for the manner in which it proceeded in making a sale of the property, it is contended by the appellant that by the provisions of section 35 of the Warehouse Receipts Act it was authorized to adopt, and that it did adopt and pursue, the provisions outlined by section 3052 of the Civil Code. Said section 35 of the Warehouse Receipts Act is as follows: "The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property, nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property."

The question, therefore, which is submitted herein for determination is whether on a sale by a warehouseman for the enforcement of a lien for charges on stored property he may adopt the procedure in that regard provided by section 3052 of the Civil Code.

On examination of the section of the Warehouse Receipts Act to which reference herein has been had, it will be noticed that, by express provision therein, in enforcing his lien for charges on stored goods the "remedy" therein provided for is not the exclusive remedy allowed the warehouseman. In the language of the statute, the remedy therein permitted "does not preclude any other remedies allowed by law."

As applied to legal phraseology, a remedy is the means authorized by law to be employed in preserving or enforcing a civil right, or preventing the happening of a threatened injury, or in securing redress for that which already has illegally resulted in damage. *Frost v. Witter*, 132 Cal. 421, 426, 64 P. 705, 84 Am. St. Rep. 53; *Bouvier's Law Dict.*; *Missionary Soc. of M. E. Church v. Ely*, 56 Ohio St. 405, 47 N. E. 537, 539; *United States v. Lyman*, 26 Fed. Cas. 1024, 1031, No. 15,647; *Gutierrez v. Pino*, 1 N. M. 392, 394.

[1, 2] Applying such definition to the facts herein, it would appear that the remedy contemplated by the statute was the means permitted or authorized by which the proper charges of the warehouseman for storage of

personal property might be collected. Although at common law a warehouseman had a specific lien for his proper charges on property stored with him, together with the incident right to retain possession thereof until such charges were paid, he had no direct, personal remedy of selling the property for the collection of his charges, but was relegated to an action which, on the recovery of a judgment therein, carried with it the usual means of its enforcement. *Jones on Liens*, §§ 976, 335; 40 Cyc. 460; 27 R. C. L. 1007; and authorities there respectively cited. In other words, at common law the remedy of a warehouseman to collect for delinquent storage charges was effected by means of an action at law.

[3] In *Stewart v. Naud*, 125 Cal. 596, 598, 58 P. 186, it is said: "At common law a warehouseman had a lien for storage charges, but such lien conferred no right to sell the property to which the lien attached, but only to hold it until his charges were paid. *Jones, Liens*, § 676 [976]. Such common-law liens were enforced by obtaining judgment for the charges and levying an execution upon the goods. * * * By statute, as well as by authority, in the several courts of this state, it is established law that "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, is the rule of decision in all the courts of this state." Section 4468, Pol. Code. Also, that where a right exists at common law a statutory remedy for its enforcement is but cumulative and ordinarily the common-law remedy, or that afforded by statute, may be pursued. 5 Cal. Jur., 253, et seq.

[4] By the terms of section 1856 of the Civil Code, which statute was in force and effect at the time, and ever since, the Warehouse Receipts Act became a law of this state, it is provided that "a depository for hire has a lien for storage charges," and that "the rights * * * to such lien are regulated by the title on liens." Although nowhere in the title to which reference is had in such statute may be found the outline of any procedure to be pursued in enforcing the lien of a warehouseman, the case of *Stewart v. Naud*, 125 Cal. 596, 58 P. 186, contains an adjudication to the effect that the provisions of the statutes relative to the sale of pledged property, particularly sections 3010 and 3011, are appropriate to the sale of personal property for the enforcement of a lien by a depository for hire.

For the reason that the common-law remedy of enforcing a lien by order of court is there specially recognized, it should be noted that the provisions of section 3011 of the Civil Code are that "instead of selling property pledged, as hereinbefore provided, a

pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale." See, also, 21 Cal. Jur. 360, and authorities there cited.

It therefore becomes clear that, in addition to the remedy provided by the terms of the Warehouse Receipts Act for the enforcement of his lien, a warehouseman has not only the common-law remedy to which attention has been directed, but as well has the statutory remedy, including a foreclosure of the right of redemption and the right "to purchase at the sale," suggested by the provisions of section 3011, which may be the "other remedies" reserved to the warehouseman by the terms of the Warehouse Receipts Act.

[5] In the instant case, it should be remembered that in attempting to enforce its lien the defendant admittedly disregarded the provisions of the Warehouse Receipts Act; but that it here contends that the procedure adopted and pursued by it was and is authorized by the provisions of section 3052 of the Civil Code. However, it is doubtful that the provisions of sections 3051 and 3052 of the Civil Code are applicable to, or are legally permissible in, the foreclosure of a warehouseman's lien. Although not therein directly so decided, the indications in each of the following cited authorities are to the effect that any lien to which a warehouseman may be entitled does not arise from, nor is it created by, either of such statutes. *Johnson v. Perry*, 53 Cal. 351; *First National Bank v. Silva*, 200 Cal. 494, 254 P. 262; *Mortgage Securities Co. v. Pfaffman*, 177 Cal. 109, 169 P. 1033, L. R. A. 1918D, 118.

But even assuming that such statutes assure to a warehouseman a right of lien, together with a right of sale thereunder, it is clear that the "remedy" afforded thereby is identical with the remedy provided by the Warehouse Receipts Act. In each instance, the ultimate means authorized by law to be employed in preserving or enforcing the lien, to wit, a public sale of the stored property, is initiated and pursued throughout its course solely by the personal or authorized act of the warehouseman. In effecting his object under authority of such statute or statutes, he neither requires nor seeks the aid of any court, or public officer of any kind. In no sense does the enabling statute contemplate anything of that sort. In effect, the only essential difference between the modes of procedure provided by the Warehouse Receipts Act and that outlined in section 3052 of the Civil Code relates to the manner of giving notice of the intended sale of the stored property. Reverting to section 35 of the Warehouse Receipts Act, under the terms of which appellant contends that it was authorized to adopt the procedure re-

quired by section 3052 of the Civil Code, it will be noted that the language is that "the remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property. * * *

Since, as hereinbefore has been made to appear, the remedy sought by the defendant was not one of the "other remedies allowed by law," but that it was identical with the remedy permitted by the Warehouse Receipts Act, it should follow, especially if the effect of the enactment of the later act was to supersede and repeal the former act as far as it possibly may have related to the creation of a warehouseman's lien and a right of sale of stored property for its enforcement, that the method employed by the defendant herein was unauthorized by law, and consequently was in derogation of the rights of the plaintiffs.

[6, 7] Although in the law the repeal of a statute by implication is not favored, when on comparison of the later law with the earlier statute it becomes apparent that the later law is a revision of the entire subject-matter embodied in the respective legislative acts, and that it is designed as a substitute for the earlier statute, the later law is deemed to supersede or repeal the earlier one. 23 Cal. Jur. 694; *Smith v. Mathews*, 155 Cal. 752, 758, 103 P. 199.

In the case of *Mack v. Jastro*, 126 Cal. 130, 132, 58 P. 372, 373, it is said: "* * * While it is true that repeals by implication are not favored, whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two. * * *

And see the case of *Stoddard v. Crocker*, 100 Me. 450, 62 A. 241, in which was involved a situation relative to goods stored in a warehouse nearly identical with that in the instant case.

[8] Considering the provisions of the statute known as the Warehouse Receipts Act, it is apparent that its purpose was to revise the entire subject-matter relating to the general business of conducting a public warehouse. As hereinbefore indicated, if by any legal reason it may be held that any of the provisions of sections 3051 and 3052 of the Civil Code apply to the subject of liens of warehousemen, those provisions, as to such liens, must be deemed repealed by the later legislative act.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

128 Cal.App. 736

BUTLER v. WYMAN et al.

Civ. 8738.

District Court of Appeal, First District,
Division 1, California.

Jan. 18, 1933.

Hearing Denied by Supreme Court March 17,
1933.

1. Pleading ⚡251.

Question of sufficiency of amended complaint must be determined without reference to original.

2. Master and servant ⚡371.

Employee's injuries, to be within Compensation Act, must be received while performing duty he was employed to perform as one of risks connected with employment, flowing therefrom as natural consequence and directly connected with work (Workmen's Compensation Act [St. 1917, p. 831, as amended]).

3. Master and servant ⚡351.

Where injury is within Workmen's Compensation Act, remedy provided thereby is exclusive of all other remedies (Workmen's Compensation Act [St. 1917, p. 831, as amended]).

4. Pleading ⚡67.

Generally plaintiff need not negative fact that he is within Workmen's Compensation Act, this being affirmative defense (Workmen's Compensation Act [St. 1917, p. 831, as amended]).

5. Pleading ⚡67.

Where complaint shows case to be one covered by Workmen's Compensation Act, pleading must show facts bringing plaintiff within exception thereto (Workmen's Compensation Act [St. 1917, p. 831, as amended]).

6. Pleading ⚡17, 18.

In pleadings, statement of facts must be direct and certain.

7. Pleading ⚡18.

Complaint, in action for personal injuries, alleging certain defendant directed plaintiff to get upon truck for purpose stated, left it uncertain whether defendant gave invitation or a direction to plaintiff as employee and was subject to demurrer (Workmen's Compensation Act [St. 1917, p. 831, as amended]).

8. Pleading ⚡205(5).

General demurrer does not reach uncertainty.

9. Pleading ⚡208.

Demurrer alleging complaint to be uncertain, unintelligible, and ambiguous, should properly be regarded as demurrer on ground of uncertainty.

Demurrer, among other things, specified that amended complaint failed to state facts sufficient to constitute cause of ac-

tion, in that it could not be ascertained therefrom by and under what authority defendant directed plaintiff to board truck on which he was injured or under what duty plaintiff submitted to duty alleged, and demurrer concluded with paragraph alleging complaint to be uncertain and unintelligible and ambiguous for same reasons as stated in other paragraphs thereof.

10. Courts ⚡91(1).

Where demurrer involved was closely analogous to one involved in previous case, District Court of Appeal held bound by Supreme Court's rule in previous case that demurrer should be regarded as one on ground of uncertainty.

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., and James L. Atteridge, Judges.

Action by Henry Elmer Butler against H. E. Wyman and others. From a judgment dismissing the action as against defendant named, plaintiff appeals.

Affirmed.

James Snell, of Hollister, for appellant.

A. M. Runnells, of Hollister, for respondent.

PER CURIAM.

An action to recover damages for personal injuries alleged to have resulted from the negligence of defendants.

Plaintiff's amended complaint alleged, among other things, that on August 23, 1930, he was at a certain ranch near Hollister in San Benito county, and "that at said time and place the said H. E. Wyman and the said defendant Charles Hall directed plaintiff to get in and upon a certain Chevrolet truck then and there driven and operated by defendant Joseph Hall, for the purpose of transporting and conveying said plaintiff from said Charles Hall ranch to said town of Hollister." It was further alleged that plaintiff boarded the truck, whereupon Joseph Hall operated the same in such a grossly negligent manner as to cause injury to plaintiff, and that in so doing defendant last named was the agent and employee of the other defendants, one of whom, namely, Charles Hall, was alleged to have been the owner of the vehicle.

Defendant Wyman filed a general and special demurrer, which was sustained, leave being given to amend. Plaintiff having declined to amend, a judgment dismissing the action as against Wyman was entered. Plaintiff has appealed therefrom and contends that the complaint was sufficient.

The demurrer, among other things, speci-

fied that the amended complaint failed to state facts sufficient to constitute a cause of action against demurrant in that it could not be ascertained therefrom "by and under what authority defendant Wyman directed plaintiff to board the truck, or under what duty the plaintiff submitted to the duty alleged." The demurrer concluded with a paragraph alleging the complaint to be uncertain, unintelligible, and ambiguous for the same reasons as stated in other paragraphs thereof.

In ruling upon the demurrer it was the view of the trial court that if plaintiff was an employee of Wyman acting within the scope of his employment at the time of the injury, his remedy against this defendant would be under the Workmen's Compensation Act (St. 1917, p. 831, as amended); that the allegation that the latter directed him to board the truck made the relationship uncertain, and that this uncertainty should be corrected by an amendment; and the court in so ruling made a reference to the original complaint.

[1-5] As urged by appellant, an amended complaint takes the place of the original pleading, which as a general rule ceases to perform any function; and the question of the sufficiency of an amended pleading must be determined without reference to the original. *Bray v. Lowery*, 163 Cal. 256, 124 P. 1004; *Russell v. Ramm*, 200 Cal. 348, 254 P. 532. As stated, the allegations of the amended complaint, according to the specifications of the demurrer, left it uncertain as to whether appellant was in the employ of Wyman at the time of the accident. While, as contended by plaintiff, the mere fact of employment would not bring him within the provisions of the Workmen's Compensation Act, it being essential in order to have this effect that his injury should have been received while doing the duty he was employed to perform and be suffered as one of the risks connected with his employment, flowing therefrom as a natural consequence and directly connected with his work (*Associated Oil Co. v. Industrial Accident Commission*, 191 Cal. 557, 217 P. 744), yet where these conditions exist the remedy provided by the act is exclusive of all other statutory or common-law remedies (*Alaska Packers' Ass'n v. Industrial Accident Commission*, 200 Cal. 579, 253 P. 926). It is the general rule that a plaintiff need not negative the fact that he is within the act, this being an affirmative defense. *Behringer v. Inspiration Consol. Copper Co.*, 17 Ariz. 232, 149 P. 1065; *Kemper v. Gluck* (Mo. App.) 21 S.W.(2d) 922, Id., 327 Mo. 733, 39 S.W.(2d) 330. Nevertheless the allegation that Wyman directed appellant to get upon the truck for the purpose stated inferentially supports the conclusion that the latter was an employee, and if so the allegations of what

subsequently occurred were reasonably sufficient to bring him within the provisions of the act; and it has been held that if the complaint shows the case to be one covered by the act, then the pleading must show facts bringing the plaintiff within the exceptions thereto. *Michel v. American Cinema Corporation* (Sup.) 182 N. Y. S. 588.

[6, 7] It is a cardinal rule of pleading that every statement of fact must be direct and certain and not by way of inference. *Bliss*, Code Pleading, § 313; 21 Cal. Jur., Pleading, § 22, p. 41. As the court said in *Callahan v. Broderick*, 124 Cal. 83, 56 P. 782, such rules are founded on wisdom and justice, and orderly procedure demands their reasonable enforcement. Uncertainty consists in what is said with an uncertain meaning (*Smith v. Hollander*, 85 Cal. App. 535, 259 P. 958; *Smallhorn v. Freeman*, 61 Mont. 137, 201 P. 567), the objection on such ground going to the doubt as to such meaning (*Callahan v. Broderick*, supra). Where such is the case some definite construction by averment is required; and while we cannot say that plaintiff intended to evade a full and direct statement of his position, nevertheless his complaint left it uncertain whether what the defendant said constituted a mere invitation or was a direction which as an employee plaintiff was bound to follow, and as a pleading failed to fairly meet the above requirements. Defendant was entitled to be apprised of the facts relied upon; and if his demurrer was sufficient in form we are satisfied that the trial court was correct in its ruling.

The demurrer alleged that by reason of the uncertainty mentioned the complaint failed to state a cause of action, and concluded with a paragraph alleging that "said complaint is uncertain, unintelligible and ambiguous for the reasons stated in paragraphs II, III, IV and V"; the paragraphs referred to specifying the several grounds of uncertainty relied upon by defendant.

[8, 9] It is the rule that a general demurrer does not reach uncertainty (*Hunt v. Jones*, 149 Cal. 297, 86 P. 686); and it has been held that where the grounds are stated conjunctively all the grounds must exist, or the demurrer should be overruled. *Kraner v. Halsey*, 82 Cal. 209, 22 P. 1137. However, in *Field v. Andrada*, 106 Cal. 107, 39 P. 323, the court, in passing upon a demurrer similar in form, said: "The objection that the special demurrer is obnoxious to the doctrine of *Kraner v. Halsey*, and for that reason cannot be considered, is not well taken. While there is in the demurrer a general and conjunctive assignment of ambiguity, unintelligibility and uncertainty, the only specifications are the ground of uncertainty, and properly considered we think the demurrer should be regarded as a demurrer on the latter ground."

[10] It is urged by plaintiff that there were other grounds for this decision, and that consequently it is not authority for the rule stated; but, as has been frequently held, where independent reasons are given therefor, there is no reason for calling one ground the real basis for the decision rather than another. *King v. Pauly*, 159 Cal. 549, 115 P. 210, Ann. Cas. 1912C, 1244; *Pugh v. Moxley*, 164 Cal. 374, 128 P. 1037. Here the demurrer was closely analogous in form to that involved in *Field v. Andrada*, and we are bound by the rule in that case.

We are satisfied that the conclusions of the trial court were correct and that the judgment should be affirmed.

The judgment is affirmed.

128 Cal.App. 708

BARRETT et al. v. CITY OF SACRAMENTO.
Civ. 4666.

District Court of Appeal, Third District,
California.

Jan. 16, 1933.

Rehearing Denied Feb. 15, 1933.

Hearing Denied by Supreme Court March 17,
1933.

1. Municipal corporations $\S$ 821(6).

Whether irregular broken area in sidewalk, about three-eighths inch deep and existing over five years, constituted dangerous or defective condition rendering city liable for pedestrian's fall, *held* for jury (St. 1923, p. 675, $\S$ 2).

2. Municipal corporations $\S$ 821(20).

Whether pedestrian falling upon sidewalk having irregular broken area about three-eighths inch deep was contributorily negligent *held* for jury (St. 1923, p. 675, $\S$ 2).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mary Barrett and another against the City of Sacramento. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Hugh B. Bradford, Joseph L. Knowles, and Irving D. Gibson, all of Sacramento, for appellant.

Clifford A. Russell and George E. McCutchen, both of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by the city of Sacramento from a judgment against it for \$4,000 in favor of plaintiff Mary Barrett, awarded by a jury as damages for personal injuries sus-

tained by her in a fall upon a sidewalk within its boundaries.

The question is based upon the Act of 1923, section 2 (Stats. 1923, p. 675), which provides: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

The evidence before the jury showed the defect complained of was a broken area in a cement sidewalk near the center thereof, irregular in outline, approximately twelve inches across and about three-eighths of an inch deep, and that the sidewalk had existed in that condition for over five years, during which time city employees had, on various occasions, been working in that vicinity.

[1] Appellant attacks the judgment from various angles, but the greater emphasis is laid upon the contention that the break was "a mere trifling irregularity in the surface of the sidewalk" and not therefore such a dangerous or defective condition as comes within the purview of the statute, and that damages from an irregularity so slight could not reasonably be anticipated by the city, and hence its existence showed neither an unsafe condition within the meaning of the statute, would not constitute notice of an unsafe condition, nor a want of ordinary care because of its existence.

The grounds for reversal advanced by counsel are very similar to those urged by him in the recent case of *Hook v. City of Sacramento*, 118 Cal. App. 547, 5 P.(2d) 643, in which case Mr. Presiding Justice Preston in a learned and well-considered opinion held that the public is entitled to protection against small defects as well as large ones, and that it was a question of fact for the jury whether such depression constituted a dangerous or defective condition.

We will not here set out the many authorities cited and considered in the case of *Hook v. City of Sacramento*, but content ourselves by saying that we consider that case controlling on the issues here urged.

In *Dawson v. Tulare Union High School*, 98 Cal. App. 138, 276 P. 424, 426, this court said: "The statute does not provide that actual notice is a prerequisite to recovery in such a case. The long-continued existence of a defective condition may establish constructive notice thereof. [Citing case.] It may be inferred from the circumstances in evidence that the principal had constructive notice of the defective condition and he certainly had 'authority to remedy such condition.' To hold that actual notice is required in such a case would be to place a premium on indifference and neglect of duty. 'Neglect of duty cannot be made the basis of exemption from liability.'" (Citing case.)

[2] Appellant also raises the issue of contributory negligence, but that is a question for the jury to determine whether or not plaintiff Mary Barrett exercised ordinary prudence in the use of the sidewalk.

We do not believe that a further discussion of the case would be of value, inasmuch as the various contentions of appellant have all been determined adversely to it in the case of *Hook v. City of Sacramento*, that case differing with the instant case in degree rather than in principle.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.;
PLUMMER, J.

129 Cal.App. 171

MILLER v. SCHIMMING et al.
Civ. 651.

District Court of Appeal, Fourth District,
California.
Jan. 24, 1933.

Hearing Denied by Supreme Court March 24,
1933.

1. Automobiles ⇨245 (14, 80).

Negligence and contributory negligence of truck drivers involved in collision in intersection held for jury.

2. Appeal and error ⇨1002.

Judgment based on conflicting evidence will not be reversed.

3. Appeal and error ⇨994(2).

Where jury accepted plaintiff's testimony notwithstanding its contradictions, appellate court must do so unless it is so inherently improbable as to be no evidence.

4. Appeal and error ⇨930(1).

In case of conflict, it is appellate court's duty to construe evidence to support the judgment if it may fairly be done.

5. Evidence ⇨589.

Contradictions between plaintiff's testimony and deposition and between testimony on direct and cross examination as to conditions immediately preceding intersection collision held not to destroy evidentiary value of his testimony.

Plaintiff testified that, when he looked to the west prior to entering the intersection, his vision was obstructed by two trees standing at southeast corner of intersection, but that he could see about 90 or 100 feet west of the west line of the intersection, that he did not look again either to east or west as he proceeded through. In his deposition, plaintiff stated that point at which he looked both to east and west was the south edge of paved portion of the road at which point he could see for a distance of approximately 500 feet to the west, and that he looked to the west and then saw no vehicle approaching. Plaintiff first denied on cross-examination that in his deposition he had stated that he could see for distance of about 500 feet, but later on admitted that he had so stated.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Harry C. Miller against Julius Schimming and P. J. Wombolt. From judgment for plaintiff, defendants appeal.

Affirmed.

George L. Greer and Walter S. Coen, both of Los Angeles, for appellants.

W. H. Douglass and Irwin H. Roth, both of Los Angeles, for respondent.

JENNINGS, J.

This is an appeal by defendants from a judgment in plaintiff's favor. The evidence produced during the trial of the action was submitted to a jury, which returned a verdict in favor of plaintiff in the amount of \$3,500. Thereupon the judgment from which this appeal has been taken was rendered.

Upon the conclusion of plaintiff's case defendants moved for a nonsuit. The motion was denied. After all of the evidence had been presented and prior to the submission of the case to the jury, defendants moved the court to direct the jury to return a verdict in favor of defendants. This motion was likewise denied. Following the return of the verdict in plaintiff's favor, defendants moved the court to enter judgment in their favor notwithstanding the verdict. This motion was denied. Thereafter defendants presented a motion for a new trial, which was also denied. It is urged on this appeal that the trial court erred in denying the aforesaid motions

and that the verdict and judgment are not supported by the evidence and are contrary to law. These various contentions finally resolve themselves into the single contention that the judgment is not supported by the evidence.

The record on appeal discloses that the action was brought to recover damages for injuries sustained by plaintiff as the result of a collision between an automobile truck driven by plaintiff and an automobile truck which was the property of defendant Schimming and which was being driven by the defendant Wombolt, who was an employee of defendant Schimming. The complaint alleged that the accident was caused by the negligent operation of defendant Schimming's truck by the defendant Wombolt who, at the time of the accident, was acting in the scope and course of his employment. The answer of defendants admitted that the truck which Wombolt was driving was the property of Schimming and that at the time of the accident Wombolt was employed by Schimming and was acting in the scope and course of his employment. The answer denied that the accident was caused by Wombolt's negligent operation of the truck which he was then driving, and for a further defense alleged that whatever injuries were sustained by plaintiff were proximately caused by his own contributory negligence.

[1, 2] The collision between the trucks occurred in the intersection of Ball road and Magnolia avenue, both of which are public highways in Orange county. At the time the collision occurred, Ball road was 35 feet wide from curb to curb. In the center of the street there was a strip of hard pavement 19 feet in width. Magnolia avenue was 28 feet wide from curb to curb and contained a strip of hard pavement which was 17 feet in width. It was stipulated during the trial that the view of drivers approaching the intersection was obstructed on the date of the accident and that the lawful rate of speed of vehicles passing through the intersection was limited to 15 miles per hour. The truck which was being driven by plaintiff was a Moreland truck. It was empty at the time of the collision, and weighed approximately 8,800 pounds. The truck which was being driven by defendant Wombolt was a Ford truck. It was loaded with fertilizer. The Moreland truck was proceeding in a northerly direction on Magnolia avenue. The Ford truck was proceeding in an easterly direction on Ball road. The only eyewitnesses of the accident who testified during the trial were the plaintiff, Miller, and the defendant, Wombolt. Their testimony with respect to the speed at which their respective trucks approached the intersection and proceeded into it was conflicting. Plaintiff testified that he approached the intersection at a speed of about

10 or 11 miles per hour, and that, when he arrived at a point which was approximately 15 feet south of the gutter line of Ball road, he slowed down, changed gears, and looked both to the east and west, and, seeing no vehicles approaching from either direction, entered the intersection and proceeded through it at a somewhat increased speed, which was not, however, as much as 5 miles greater than the speed at which he approached the intersection. He also testified that as he looked to the west prior to entering the intersection his vision in that direction was obscured by two trees which were standing near the southeast corner of the intersection, but that he could see for a distance of approximately 90 or 100 feet west of the west line of the intersection. He also testified that he did not again look either to the east or west as he proceeded through the intersection; that he gave no signal by horn or otherwise and heard no signal given by any other vehicle; that he neither saw nor heard any other vehicle approaching; that he was rendered unconscious by the force of the impact and did not regain consciousness until several hours later. The defendant Wombolt testified that he approached the intersection from the west at a speed of approximately 12 or 13 miles per hour; that, after he had entered the intersection and had proceeded into it for a distance of about 9 or 10 feet, he looked to the south and saw plaintiff approaching the intersection at a speed of at least 25 miles per hour; that plaintiff was then 115 or 120 feet south of the intersection; that he increased the speed of his truck to approximately 14 miles per hour; that as he observed plaintiff approaching at a rapid speed he turned his truck to the left for the purpose of avoiding a collision, and that plaintiff turned to the east, but that nevertheless plaintiff's truck struck the Ford truck then being driven by the witness. It is apparent that the testimony of the two eyewitnesses was irreconcilably conflicting, and the jury was at liberty to accept plaintiff's version of the accident. If this were all, we should feel impelled to hold that plaintiff's testimony indicated clearly that he had the right of way, and, since the jury evidently accepted his version of the manner in which the accident occurred, its verdict based thereon and the judgment rendered in conformity with such verdict may not be disturbed, in accordance with the familiar rule that a judgment will not be reversed when the material evidence produced during the trial is conflicting. However, the defendants zealously contend that the plaintiff's testimony, as shown by the record, is in itself so contradictory and so conflicting that it does not rise to the dignity of evidence, and it is urged, therefore, that the only credible evidence produced consists of the testimony of the defendant Wombolt, from which it is said to follow that the judg-

ment in plaintiff's favor should be reversed for the reason that it is entirely lacking in evidentiary support. This contention necessitates a more detailed scrutiny of plaintiff's testimony.

[3] The record shows that, when plaintiff was giving his testimony upon the trial of the action, he was interrogated on cross-examination with respect to his deposition, which was taken on August 25, 1931. In this deposition, which was admitted in evidence, plaintiff testified that the point at which he looked both to the east and west was at the south edge of the paved portion of Ball road, at which point he testified he could see for a distance of approximately 500 feet to the west along Ball road; that he looked to the west and saw no vehicle approaching the intersection from the west within range of his vision. On cross-examination of the plaintiff during the trial, he was asked if he had not testified during the taking of his deposition that his truck was at the edge of the pavement on Ball road when he looked in both directions, to which he replied that he had so testified. He was then asked if he had not testified during the taking of the deposition that at the time his truck was at the point indicated he could see to his left for a distance of about 500 feet, to which inquiry he replied that he had not so testified. However, upon being later recalled for further cross-examination, he was again asked if he had not testified during the taking of the deposition that, at the time he looked to the west when his truck had arrived at the south edge of the pavement on Ball road, he could see in that direction for a distance of about 500 feet, to which he replied that he had so testified. From the above recital it is apparent that not only was plaintiff's testimony during the trial contradicted by his previous testimony given during the taking of his deposition, but also that his testimony on direct examination as to the location of his truck when he looked both to the east and west, and more particularly the distance to the west within which his vision was unobstructed, was contradicted by his later testimony on cross-examination. Nevertheless, we are not prepared to say that his testimony, although clearly contradictory in the respects mentioned and conflicting in other respects, is entirely discredited and unworthy of consideration. It is not conclusive of this appeal that the record indicates that plaintiff's testimony during the trial was, in many respects, conflicting, and that it was contradicted by his testimony given on another occasion. The question of the credibility of witnesses is one that is to be determined solely by the triers of fact. *Farmers' Bank of Camarillo v. Goodrich*, 90 Cal. App. 717, 266 P. 550; *Winning v. Board of Dental Examiners*, 114 Cal. App. 653, 667, 300 P. 866. The jury, by

its verdict herein, has indicated that it did not consider plaintiff's testimony, inconsistent and conflicting though it undoubtedly was, as being entirely unworthy of belief. By this determination we are bound unless it appears that plaintiff's testimony is inherently so improbable and impossible of belief that, in effect, it constitutes no evidence at all. *De Arellanes v. Arellanes*, 151 Cal. 443, 90 P. 1059; *Crow v. Crow*, 168 Cal. 607, 610, 143 P. 689. We are not prepared, upon careful consideration of plaintiff's testimony, to hold that, because of the contradictions and inconsistencies in it, it is so inherently impossible of belief in its entirety that we can say that the judgment is totally lacking in evidentiary support. We are assisted in arriving at this conclusion by the testimony of plaintiff's witnesses, Cecil Robinson and J. W. Calwell, each of whom testified that he arrived at the scene of the accident shortly after it occurred, and whose testimony is, to some extent, corroborative of plaintiff's testimony as to the manner in which the collision occurred. Furthermore, it is proper to observe that the testimony of the defendant Wombolt, that he saw plaintiff's truck approaching the intersection from the south when the truck which he was driving had proceeded at least 8 or 9 feet into the intersection, at which time plaintiff's truck was approximately 115 or 120 feet south of the south line of the intersection, and that his truck was proceeding at a rate of speed which did not exceed 14 miles per hour and plaintiff's truck was approaching at approximately 25 miles per hour, is not profoundly convincing. As heretofore noted, Magnolia avenue is 28 feet in width and Ball road 35 feet wide. From the marks which certain witnesses testified were produced on the surface of the street by the collision and whose location was fixed as being near the center of the road somewhat to the east of the center of the intersection, it is apparent that the Ford truck driven by Wombolt had less than 20 feet to proceed to the point of impact in the same space of time that plaintiff's truck had to proceed for a distance of approximately 120 feet. The mere recitation of the testimony is sufficient to indicate that the witness, Wombolt, must have been mistaken either as to the speed or location of either or both of the two trucks.

[4, 5] It is a familiar and well-established rule that, in considering a claim that the evidence is insufficient, it is the duty of an appellate court so to construe the evidence as to support the judgment of the trial court if it is fairly susceptible of such construction. *Gett v. Pacific G. & E. Co.*, 192 Cal. 621, 221 P. 376; *Neher v. Kauffman*, 197 Cal. 674, 684, 242 P. 713; *Petersen v. Klitgaard*, 212 Cal. 516, 521, 299 P. 54. Application of this rule to the facts presented by the record herein impels us to the conclusion that the verdict is

not lacking in evidentiary support, and that the judgment rendered in conformity with the verdict is not vulnerable to the attack urged by defendants.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

129 Cal.App. 114

RADER et al. v. KEELER.

Civ. 8517.

District Court of Appeal, First District, Division 2, California.

Jan. 23, 1933.

Hearing Denied by Supreme Court March 24, 1933.

Master and servant ☞373.

Injury to employee sustained while traveling in automobile with employer held as matter of law injury "arising out of and in course of employment," defeating superior court's jurisdiction, where undisputed evidence showed either express or implied agreement to furnish employee transportation.

Plaintiff's evidence showed that plaintiff employee was employed to operate concession in traveling street carnival, and that as part of the consideration the owner of the concession was to transport employee from various places when the show was closed to the next place; while, according to the employer's testimony, supposition at time of hiring was that employee was to ride with him. The accident in question occurred while employer was operating automobile with employee as his passenger, on trip to Los Angeles, for purpose of learning where the carnival would next exhibit, and proceeding to the designated place.

[Ed. Note.—For other definitions of "Arising out of Employment" and "Course of Employment," see Words and Phrases.]

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Ruby Rader and husband against R. E. Keeler. Judgment for plaintiffs, and defendant appeals.

Reversed.

Bronson, Bronson & Slaven, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondents.

SPENCE, J.

Plaintiffs brought this action seeking to recover damages for personal injuries sustain-

ed by plaintiff Ruby Rader. Upon a trial by jury, judgment upon the verdict was entered in favor of plaintiffs, from which judgment defendant appeals.

The determinative question raised on this appeal relates to the jurisdiction of the trial court, and we will therefore set forth only such facts as bear upon this question. Plaintiff Ruby Rader, hereinafter referred to as plaintiff, was admittedly an employee of defendant. Said defendant was the owner of a concession known as a country store in a traveling street carnival known as the Craft Shows. Plaintiff was employed to assist defendant in operating the concession, and was to receive for her services 25 per cent. of the money which she collected from the patrons. Plaintiff had been employed by defendant for about four weeks prior to the accident, during which period the carnival had operated in the towns of Imperial, Calexico, Brawley, and El Centro. Plaintiff had been transported by defendant from town to town in a Ford coupé owned by defendant. On March 8, 1931, the carnival closed its stand in El Centro, and defendant told plaintiff to be ready at 8 o'clock the next morning, at which time he would call for her. On the following morning defendant called for plaintiff at the agreed time and then started for Los Angeles for the purpose of learning where the Craft Shows would next exhibit, and proceeding to the designated place. The accident occurred while defendant was operating his automobile on said trip to Los Angeles with plaintiff as his passenger.

It was appellant's contention in the trial court raised by his answer, his motion for nonsuit, his motion for directed verdict, and his motion for judgment notwithstanding the verdict, that the trial court had no jurisdiction over the controversy, and that the Industrial Accident Commission has exclusive jurisdiction thereof. Appellant contends on this appeal that "according to the undisputed evidence and as a matter of law the injuries of plaintiff Ruby Rader arose out of and in the course of her employment by defendant Keeler and that for that reason the trial court had no jurisdiction of the subject matter of the action." In our opinion this contention must be sustained.

The well-recognized exception to the so-called "going and coming rule" is set forth in *Dominguez v. Pendola*, 46 Cal. App. 220, 188 P. 1025, where the court held that the superior court was without jurisdiction as the Industrial Accident Commission had exclusive jurisdiction. It is there said, on page 222 of 46 Cal. App., 188 P. 1025, 1026: "Where transportation is furnished by an employer, as an incident of the employment, to convey an employee to and from the place of employment, an injury suffered by the employee going or coming in the vehicle so furnished by the em-

ployer, and under the control of the employer, arises out of and is in the course of the employment within the meaning of the compensation act"—citing authorities.

In Bradbury's Workmen's Compensation (3d Ed.) page 480, cited by the court in the foregoing decision, the rule is stated as follows: "If an employee is conveyed to and from his work in a conveyance furnished by the employer, under an express or an implied contract to furnish such conveyance, an injury to an employee while on the journey, arises out of the employment."

Further expression is given to this principle in the recent case of Trussless Roof Co. v. Industrial Accident Commission, 119 Cal. App. 91, at page 93, 6 P.(2d) 254, where the court said: "Without tracing the steps whereby the principle has been developed, it suffices to note that it is now established that injuries received by an employee, while making use of transportation furnished by and under the control of his employer as such, are compensable under the Workmen's Compensation Act, though the employee at the time was not at work, but was going to or from the place of employment. *Dominguez v. Pendola* (1920) 46 Cal. App. 220, 188 P. 1025; and a multitude of cases reviewed in the notes found in 10 A. L. R. 169, 21 A. L. R. 1223, 24 A. L. R. 1233, and 62 A. L. R. 1438. The use of the words 'as such' is necessary because courtesy rides given by the employer do not give rise to liability under the statutes. *Bogges v. Industrial Acc. Com.* (1917) 176 Cal. 534, L. R. A. 1918F, 883, 169 P. 75; *Gruber v. Mercy* (1929) 7 N. J. Misc. 241, 145 A. 106. In other words, the transportation has to be furnished as a part of the contract of employment, to come within the rule. In *re Donovan* (1914) 217 Mass. 76, Ann. Cas. 1915C, 778, 104 N. E. 431."

Numerous authorities on this subject are cited in *Sylcox v. National Lead Co.*, 225 Mo. App. 543, 38 S.W.(2d) 497. It is there said, on page 499 of 38 S.W.(2d), 225 Mo. App. 543: "Generally speaking, it is the scope of the contract of employment which furnishes the determinative test of whether such an accident is one for compensation. In other words, it is the contract of employment, and not the actual commencement of labor, which establishes the relationship of the parties under the act. If the right to transportation is given, either positively or inferentially, by the terms of the contract, the employment begins when the employee boards the bus to go to the scene of his labor; it continues throughout the entire period of transportation; and it terminates when he leaves the bus at his home."

It thus appears that if the transportation in the present case was being furnished "under an express or implied contract," or, in other words, if the right to transportation was given "either positively or inferentially by the terms of the contract," the injury to

respondent while being so transported was one arising out of and in the course of the employment. A review of the record shows without conflict that the transportation was being so furnished, and that the right to transportation was so given.

Starting with the opening statement made by counsel for respondents, we find the following: "The plaintiff was employed to operate a concession for the defendant. * * * The plaintiff was operating what is termed the 'Country Store,' for the defendant. As part of the consideration the defendant was to transport the plaintiff from the various places when the show was closed, to the next place. It was in his agreement that he would provide transportation after a show had closed."

Proceeding to the direct examination of respondent, the following appears:

"Q. In the agreement you made with Mr. Keeler, was anything ever said that he would arrange transportation for you from town to town after the close of the show? A. Yes, sir. Mr. Slaven. Is it admitted there was no written agreement?"

"Mr. Holl. Oh, yes. I merely asked if there was any agreement of that sort. Was that reduced to writing? A. No, he just told my husband and myself that he would transport me from town to town because my husband was not there. * * *

"Q. Were you paid while you were moving from town to town or not? A. I was given my transportation."

She further testified on cross-examination as follows:

"Q. And you were paid for that service 25 per cent of what you took in while you were selling tickets and taking money? A. There wasn't any tickets sold.

"Q. Well, while you were taking the money, then? A. Yes, sir.

"Q. And in addition to that he agreed to transport you from town to town? A. Yes, sir. * * *

"Q. Now, you had ridden with him before, had you not, in that same Ford car? A. Yes, sir.

"Q. He had transported you under this agreement from other towns, had he not? A. Yes, sir. Four towns. We had only been there four weeks.

"Q. And what were those four towns? A. Imperial, Calexico, Brawley, El Centro.

"Q. And between those four towns he had transported you in that same automobile? A. Yes, sir.

"Q. And that was under the agreement he had made to give you 25 per cent of what you took in and to furnish transportation? A. Yes, sir, to transport me from town to town. * * *

"Q. But he said he would transport you from town to town? A. Yes, sir, he told me he would carry me from town to town."

The only other testimony on this subject was given by appellant on his deposition which was introduced on the trial. The following question and answer is there found:

"Q. Did you ever tell her when you hired her it would be understood you were to transport her from place to place as the show moved on, from one show place to another? A. I don't think I ever told her that. The supposition was that she was to ride with me."

It therefore appears that there was no material conflict in the evidence relating to the agreement to furnish transportation. According to respondent, such agreement was express, while, according to appellant, such agreement was implied. As the evidence shows without conflict that there was either an express or implied agreement for furnishing transportation to respondent, it may be said as a matter of law that the injury arose out of and in the course of the employment, and therefore the superior court had no jurisdiction.

The conclusions which we have reached make it unnecessary to discuss the remaining contentions of appellant.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

128 Cal.App. 687

MOORE v. LEVY et al.

MOORE et ux. v. SAME.

Civ. 4642, 4643.

District Court of Appeal, Third District,
California.

Jan. 14, 1933.

1. Damages ☞185(2).

Finding that injuries from automobile collision would cause permanent disability held unsupported.

2. Damages ☞132(6).

\$5,000 for injuries causing cavity in leg and tenderness and limitation of motion and occasional numbness two and one-half years after accident held not excessive.

It appeared that, at time of trial two and one-half years after injury, there still remained a cavity above knee of about one and one-half inches in diameter and three-fourths of an inch in depth, but that prob-

ably no permanent disability would result.

3. Appeal and error ☞1004(1).

Award of damages for personal injuries cannot be disturbed, unless so plainly excessive as immediately to suggest passion, prejudice, or corruption.

4. Damages ☞185(1).

Evidence warranted finding that injuries caused abscess, and that plaintiff, having received medical attention, was not remiss in not consulting another doctor for two weeks.

5. Damages ☞132(5).

\$2,654 for injuries causing pains occasionally incapacitating plaintiff from performing her household duties and allegedly causing retroverted womb held not excessive.

6. Evidence ☞474(20).

Automobile owner's testimony regarding repairs and cost thereof held inadmissible: owner not being continually present when repairs were made, and not being shown to be qualified to testify with reference thereto.

7. Trial ☞400(1).

Judge, without granting new trial or reopening case for additional testimony, could vacate original findings and file amended findings (Code Civ. Proc. § 662).

It appeared that no additional testimony was necessary to enable court to correct findings as originally filed; the corrections being for purpose of clarifying original findings.

Appeals from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Gladys Moore against J. T. Levy and James Thomas, which was consolidated and tried with an action by Victor A. Moore and wife against J. T. Levy, James Thomas, and another. From judgments for each plaintiff, the last-named defendant in each case appeals.

Judgments affirmed, the judgment for the named plaintiff in the second action being modified, and, as modified affirmed.

Jesse W. Carter, of Redding (Glenn D. Newton, of Redding, of counsel), for appellant.

L. C. Smith, of Redding, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The two cases entitled above, consolidated and tried together, were instituted to recover damages resulting from the collision of two automobiles. Respondent Victor A. Moore was the owner of one of the cars involved in the collision, which was at the time being driven by his wife, Catherine L. Moore, a re-

spondent, and seated in the rear seat of the car was his niece, Gladys Moore. The case was tried by the court sitting without a jury, and judgment was rendered in favor of Victor A. Moore in the sum of \$517.69 for damages to the automobile. Catherine L. Moore was awarded the sum of \$2,654 on account of her personal injuries, and Gladys Moore was awarded \$5,000 for the personal injuries she sustained.

Appellant maintains that the award of \$5,000 to Gladys Moore and the damages awarded to Catherine L. Moore are excessive, and the evidence is wholly insufficient to prove that the respective injuries complained of were the result of the accident, and that the amount awarded Victor A. Moore for damages to his automobile is excessive and not supported by the evidence; that the amended findings are insufficient to support the judgment; and, lastly, that the court had no power under section 662 of the Code of Civil Procedure to vacate the original findings and judgment without granting a new trial or reopening the case for the taking of additional evidence, and that the original findings are insufficient to support the judgment.

Let us take up first the award to Gladys Moore.

Gladys Moore testified that, when the collision occurred, she was thrown out of the car on to the road. She was taken to a hospital in Redding, where Dr. J. E. Taylor, the examining physician, found a gouged out or punctured wound on the left leg about three and one-half inches above the knee. The injured girl was confined in the hospital for about two days and later was removed to a private home for an additional two or three days, and then returned to her home in Southern California, where two further operations were performed by Dr. H. E. Tibbets, in order to relieve an abscess which had formed under the *facia lata* of the thigh. She remained under the treatment and observation of her physician until September 10, 1928, or approximately two months after the infliction of the injury.

Plaintiff testified that at the time of the trial, which was approximately two and one-half years after the injury, there was still some limitation of motion, that the wound was tender to the touch, and at times her foot and leg would become numb. Dr. H. E. MacDonald, who made an examination of the young lady at the time of the trial, testified that there was then about a 50 per cent. limitation of extension and about a 25 per cent. limitation of flexion. There still remained a cavity above the knee of about one and one-half inches in diameter and perhaps three-quarters of an inch in depth, practically to the bone.

[1] The trial court found that " * * * plaintiff Gladys Moore, now Gladys McAbee,

was severely and permanently injured on and about her body, having suffered a severe shock to her nervous system and a severe injury to her left leg, as a result of which plaintiff has become permanently deprived of the full use of her left leg." And, further, "that by reason of said injury plaintiff was for a period of three weeks, confined to her bed, and during all of said time she suffered and still suffers great excruciating pain, and by reason of said injury, plaintiff Gladys Moore, now Gladys McAbee, has been made ill in health and has been maimed in her said left leg immediately above the knee to such an extent that the muscles and flesh have failed to restore the form of said leg at said point, thereby decreasing the strength, use and activity of said leg, fifty per cent of normal, and that said injuries are permanent and as a result of said accident plaintiff has lost the normal sense of feeling in her toes, ankle and knee of her left leg, and that said injuries to said left leg, and each of them, are permanent, and will cause her to continue to suffer pain, mental anguish, humiliation and incapacitate her in her future activities for the remainder of her natural life."

Appellant claims that this finding is not supported by the evidence, in that there is no testimony that the injury is permanent. All of the doctors who testified as to the duration of the injury support the claim of appellant that the injuries sustained by Gladys Moore would not result in permanent disability.

Dr. Tibbets, for plaintiff, testified as follows:

"Q. And what was the condition of the thigh at that time? (Referring to September 10, 1928, the day when he last saw the patient.) A. There were no bone changes, no shortening and no, what I would consider to be permanent disability functionally.

"Q. What about the limitation of the motion on the muscle of the thigh? A. There was naturally a limitation of the motion at that time but no reason why it should be permanent.

"Q. And would that leave a permanent scar? A. It would leave a permanent scar."

He also testified: " * * * When I discharged the patient the wound was completely healed, and it was just, I should say, a matter of time until she would have practically a normal leg functionally."

"Q. After a wound in the condition such as this case has healed, is it probable that any future developments in the injured portion should recur? A. I should say no.

"Q. And such a disability as the patient suffered, would that tend to interfere with the use of her limb in any way in the future? A. It would at the time of the damage but should eventually clear up completely without any permanent disability."

Dr. Chester D. Sewall of Redding was called by the defendant and testified:

"Q. Would you say doctor, that there is any probability of any detrimental effect upon the plaintiff Gladys Moore, in the future, as a result of the injury she received to that leg? A. I think it will improve of what slight tenderness and what slight puckering there is; as time goes on that will let go and it will improve.

"Q. In other words the slight tenderness that is there now will entirely vanish. A. I should think so."

Conceding that the uncontradicted testimony shows no permanent disability suffered by Gladys Moore and that there was no testimony upon which the court could base a finding that the injuries were permanent, can this court nevertheless say that the award of \$5,000 evidences an abuse of discretion? The rule in this type of case is well stated in the case of *Kelley v. Hodge Transportation System*, 197 Cal. 587, 242 P. 76, 81: "Unless we are able to say that the award of * * * the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision."

[2] Measured by the foregoing, we cannot say that, regardless of whether the injuries were permanent in character or temporary only, either the record or the award raises any presumption that the amount allowed Gladys Moore is the result of an abuse of discretion or founded upon passion or prejudice.

[3] The amount of damages was in this case first committed to the sound discretion of the trial judge, and thereafter upon motion for a new trial was again reviewed and considered and the facts and evidence reweighed. Upon appeal, the decision of the trial court upon the subject cannot be set aside, unless the verdict is "so plainly and outrageously excessive as to suggest at the first blush, passion or prejudice or corruption."

"The law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury," or, if a jury is waived, then to the trial judge. "The leading object of such actions is to obtain reasonable and just compensation for the injury sustained, comprehending both the present and the future." *Aldrich v. Palmer*, 24 Cal. 513.

[4] Appellant also contends that the principal injuries of respondent Gladys Moore were the result of an abscess which had no

connection with the injuries caused by the automobile collision and was aggravated by her delay in securing medical attention.

Dr. Tibbets testified that when he saw Gladys Moore on July 28, 1928, in Whittier, Cal., some sixteen days after the collision before referred to, he found an abscess under the fascia lata of the left leg which required an incision to drain the area, and upon opening the tissues removed pus and old blood clots which indicated a preliminary blood clot due to a hemorrhage from some traumatic cause, and that it would require from one to two weeks for such clot to break down into an abscessed condition. The physician in Redding who first treated the young lady had her under his charge approximately four days, and she was told by him, so she testified, that he thought she would be all right, but apparently the blood clot was not absorbed and the abscessed condition was the result. From the evidence in the case, the trial court can clearly draw the conclusion that the abscess was the result of the injury, and that the patient was not remiss in allowing a period of approximately two weeks to pass without consulting a doctor after receiving the first treatment in Redding.

It therefore appears from the enumeration of the injuries sustained by Gladys Moore, and regardless of whether they are temporary or permanent, this court cannot say as a matter of law that \$5,000 is excessive.

[5] As to Catherine L. Moore, she testified she was driving their automobile, and the collision threw her against the steering wheel so violently that her stomach was injured, and whereas she had never, before the accident, had any pain, but afterward she had pains "through the stomach and back, colicky pains," and had been under the treatment of physicians for several months, and as a result of these pains she was at times unable to perform her household duties and was compelled to have some one else do the household work for her.

Dr. MacDonald made a physical examination of Mrs. Catherine L. Moore just prior to the trial, and found that she had a retroverted womb. When asked if that condition could have been brought about by external violence, he said he was of the opinion that it could.

Dr. Sewall found from his examination of the witness that such a condition existed, but described its cause as usually congenital and very improbably due to a bruising of the abdomen. This testimony, however, merely raised a conflict which the trial court resolved in favor of the plaintiff.

What we have said concerning the contention of appellant that the award to Gladys Moore was excessive is also applicable to the case of Catherine L. Moore. As was said by Mr. Justice R. L. Thompson in the case of

Rannard v. Harris, 121 Cal. App. 281, 8 P.(2d) 864, 866: "The determination of a sum of money which will be deemed to adequately compensate one for damages suffered on account of personal injuries sustained and the pain and suffering incident thereto, necessarily rests largely in the sound discretion of the trial judge or of the jury. This discretion may not be interfered with unless it clearly appears that the amount which is awarded is so grossly excessive as to shock the conscience or enforce the inference that it is the result of passion or prejudice. [Citing cases.] The record in the present case impels no such conclusion. In contemplation of the foregoing well-established rule of law, the judgment is not excessive."

[6] The next point is that the award to Victor A. Moore for damages to his automobile is not supported by the evidence. The automobile was taken to a garage in Redding where certain repairs were made, but as to these items appellant makes no complaint. The witness, when interrogated about repairs made later in Los Angeles, testified:

"Q. Were you present in Los Angeles when the repairs were made to the car? A. I wasn't there every bit of the time they were putting them in, but I was always in when they were working, practically all of the time down there. I was there quite a bit of the time, because at that time I wasn't working; I was hobbling around down there."

Without further proof and over the objection of appellant, the witness was allowed to testify as to the amount of the repair bill paid by him to the mechanic in Los Angeles. He also was asked, over the objection of appellant, if there was any part replaced in the car in the items paid to the Los Angeles garage which were not made necessary by reason of the collision, but he was not asked nor did he state what repairs were made in Los Angeles.

Appellant also offered in evidence the bill or invoice of the work and labor performed by the Los Angeles garage, but it was admitted for identification only and was never received in evidence. Plaintiff Moore testified that no parts were replaced in the car that were not damaged or injured by the collision, but that statement is a conclusion of the witness, and there was no testimony showing that he was qualified to answer the question either by training or by observation. We believe that the court erred in admitting the testimony as to the repairs in Los Angeles.

The case of *Menefee v. Raisch Improvement Co.*, 78 Cal. App. 788, 248 P. 1031, 1032, discusses quite fully the measure of damage and the proof of repairs in a case such as this: "The measure of damages in cases of this character is the difference in the value of the property immediately before and immediately after the injury, subject to the proviso that,

if the property be susceptible of repair at an expense less than such difference, the measure of damages is the reasonable cost of the repairs [citing cases], and it is unnecessary to prove that the liability incurred for such repairs has been discharged (*Kincaid v. Dunn*, supra [26 Cal. App. 686, 148 P. 235]). That plaintiff caused the car to be repaired and incurred a liability therefor is clearly shown, and an itemized statement rendered by those performing the service was introduced in evidence without objection. The statement was hearsay and insufficient alone to prove the reasonable value of the repairs, their necessity, or that the time consumed in making them was reasonable [citing cases]; but, having been admitted without objection, the statement therein that certain material and labor had in fact been furnished not having been contradicted, the court was justified in accepting it as evidence tending to prove the facts stated (*Lucy v. Davis*, 163 Cal. 611, 126 P. 490)."

Says *Corpus Juris*: "Competent evidence of the cost of repairs may be admitted, and one who is qualified from his proved experience to be a judge of the amount ordinarily charged, at the usual and market rates for the work and material necessary to repair a motor vehicle, and who supervised the making of repairs upon the vehicle in question, is a competent witness as to the reasonable cost thereof. Evidence of the amount expended for repairs is admissible only as it may bear upon the reasonable cost of those reasonably proper and necessary, but the actual cost of repairs may be shown in connection with evidence that such cost was reasonable, and a bill for repairs may be admitted to prove the reasonable cost, when there is testimony to the effect that the items contained therein are correct and that the charges therefor are all just and proper, but not in the absence thereof. Thus a repair bill merely identified by the manager of a shop which made the repairs who did not supervise them, or have any personal knowledge thereof, is not admissible. It is error to admit testimony as to the cost of repairs other than those shown to be due to the injuries complained of." 42 *Corpus Juris*, 1297.

[7] Findings of fact and conclusions of law were originally signed and filed in this case, and thereafter were vacated and set aside and amended findings filed.

Appellant urges various specific objections to the form of these amended findings, and, while we must concede they are somewhat inartistically drawn, we believe that, taken as a whole, they cover the issues as presented and determined. The principal objection of appellant seems to be that the trial court had no power under section 662 of the Code of Civil Procedure to vacate the original findings of fact without granting a new trial or

reopening the case for the taking of additional testimony.

Section 662 of the Code of Civil Procedure provides: "In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered."

The courts of review have on several occasions had before them the construction of section 662 of the Code of Civil Procedure, and in no case has the scope of the section been limited. *Heron v. Bray*, 122 Cal. App. 79, 9 P.(2d) 513; *Holland v. Superior Court*, 121 Cal. App. 523, 9 P.(2d) 531; *Meda v. Lawton*, 214 Cal. 588, 7 P.(2d) 180; *Barcroft v. Cullen*, 213 Cal. 208, 2 P.(2d) 353.

No additional testimony was necessary to enable the court to correct the findings as filed; the corrections being for the purpose of clarifying the original findings of the court.

The judgments in favor of respondents Gladys McAbee, formerly Gladys Moore, and respondent Catherine L. Moore, are affirmed, and the judgment in favor of respondent Victor A. Moore, is modified by striking therefrom the sum of \$246.49, and, as so modified, is affirmed.

Respondents to recover costs herein.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

129 Cal.App. 162

PEOPLE v. HATFIELD.

Cr. 238.

District Court of Appeal, Fourth District,
California.

Jan. 24, 1933.

1. Indictment and Information $\S$ 15(4).

Resubmission of case to grand jury after indictment for murder was set aside on ground of newly discovered evidence, tending to establish self-defense, that knife, with which deceased was claimed to have pursued defendant, was found in latter's house, *held* not error (Pen. Code, §§ 1385, 1387).

2. Criminal law $\S$ 178.

Dismissal of indictment for murder on ground of newly discovered evidence support-

ing defendant's contention of self-defense *held* not bar to prosecution under subsequent indictment (Pen. Code, §§ 1385, 1387).

3. Criminal law $\S$ 1119(1).

Contention that record did not show admonition given jury, shown to have been "excused with the usual admonition of the court" on first adjournment, or that jury ever heard it, *held* without merit (Pen. Code, § 1122).

The transcript showed that jury was fully and completely admonished in accordance with statute and in usual form at least eight times during preceding two days.

4. Criminal law $\S$ 675.

Exclusion of testimony in answer to question of same import and almost identical in form with question previously asked and fully answered was not error.

5. Criminal law $\S$ 673(4).

Refusal to strike portion of witness' testimony concerning conversation with acquitted defendant *held* not error, nor ground for complaint by convicted defendant, where testimony was offered and received as binding on acquitted defendant only and jury was properly instructed respecting it.

6. Witnesses $\S$ 236(1).

Objection to purported question, which was merely argumentative statement, was properly sustained.

7. Criminal law $\S$ 1129(3).

Assignment of error in ruling on admission of evidence may be disregarded, where no reason is given therefor.

8. Criminal law $\S$ 1129(3).

Specification of error in allowing witness to explain on redirect examination testimony previously given by him *held* without merit, where no authority was cited or reason shown why explanation was improper.

9. Witnesses $\S$ 388(2).

Exclusion of testimony on cross-examination of state's witness as to whether certain questions were asked him before grand jury *held* not error, where no foundation was laid for his impeachment.

10. Witnesses $\S$ 270(1).

Exclusion of testimony on cross-examination of state's witness as to trivial matters, concerning which court permitted full and complete cross-examination of witness, *held* not error.

11. Criminal law $\S$ 753(2).

Refusal of advisory instruction to acquit all defendants *held* not error; jury not being compelled to acquit even when such instruction is given (Pen. Code, § 1118).

12. Criminal law $\S$ 696(4).

Defendant's motion in murder trial to strike out all testimony as to disposition of

deceased's body *held* properly denied as too broad, in view of evidence of footprints, which fitted his shoes, in mud along river wherein body was found.

13. Homicide Ⓒ268.

Evidence that tracks along river, in which deceased's body was found, fitted shoes of three defendants charged with murder, presented fact question for jury as to whether defendant, moving to strike testimony as to disposition of body, had anything to do therewith.

14. Homicide Ⓒ281.

Evidence *held* to justify submission to jury of question whether acquitted defendants were connected with murder charged as principals, though sufficient to show that neither fired fatal shot (Pen. Code, § 31).

15. Homicide Ⓒ276.

Whether defendant shot deceased in self-defense *held* fact question for jury on conflicting evidence.

16. Homicide Ⓒ244(1).

Evidence *held* to support conviction of manslaughter as against contention that defendant shot in self-defense.

17. Homicide Ⓒ305.

Instructions indicating that defendant, convicted of manslaughter, was guilty of acts committed by codefendants after deceased's death, *held* not error, in view of evidence that he participated in disposition of body.

18. Homicide Ⓒ294(2).

Defendant's testimony in murder trial as to what occurred at time of shooting *held* to justify refusal of instruction, based on theory that he was too drunk to know what he was doing, that person cannot be punished for crime committed without being conscious thereof.

19. Criminal law Ⓒ829(1).

Refusal of instructions, fully and completely covered in other instructions, was not error.

20. Statutes Ⓒ63.

Refusal of instruction based on unconstitutional section of Code was not error.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Joseph R. Hatfield was convicted of manslaughter, and he appeals.

Affirmed.

Ernest R. Utley, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, P. J.

Joseph R. Hatfield, John Williams, and Robert Kloss were jointly charged by indictment with the crime of murder and tried together. The jury found Williams and Kloss not guilty and found Hatfield guilty of manslaughter, and he has appealed from the ensuing judgment and from an order denying his motion for a new trial.

It appears that on May 10, 1932, a Mexican named B. Gomez was living with the appellant in a one-room house on the bank of the Alamo river, near the city of Calipatria. The appellant admits that some time on the afternoon of that day he shot and killed Gomez, claiming, however, that the act was done in self-defense. At the time of the shooting Williams and Kloss were present, as was also one John Robertson, although he was asleep at the time. All of the parties had been drinking home brew, and, according to the testimony of the three defendants, just before the shooting occurred the appellant ran out of the house with a rifle in his hand pursued by Gomez armed with a knife. The appellant ran to the back of a car standing a few feet from the house and about the time Gomez reached the front of the car and turned around, the appellant fired the fatal shot. After Robertson awoke he was told of the shooting. One of the three parties, other than appellant, although there is a conflict in the evidence as to which one, threw the body of Gomez over the bank, where it dropped 20 feet below to a point near the river's edge. It is undisputed that Kloss and Williams then put the body in the river, floated it downstream some 400 feet, and there attached weights to the neck and feet by means of baling wire, leaving the body under water. There is evidence that the parties continued drinking that night and the next day, and that on the next day all of the parties started to leave the place for the purpose of informing officers of the shooting but were too drunk to drive a car, although Robertson testified that he was ordered not to leave by the appellant. About noon on May 12th, Robertson left the place and immediately telephoned an officer, whereupon several officers went to the scene, finding the three defendants there. The officers then went down to the river where they found a pool of blood with marks in the sand indicating that an object had been dragged into the water. One of the officers waded downstream about 400 feet and in so doing walked against the body, which was clear out of sight and about 15 or 20 feet from the edge of the water. Footprints were found along the bank and in the mud through the course of this 400 feet, which compared with the shoes taken from the three defendants respectively. An autopsy disclosed that the cause of death was a bullet wound in the head; that the bullet

entered about 4 inches back of the left ear and slightly below and came out at the left nostril, going straight through without upward or downward course; and that death must have been instantaneous. Other portions of the evidence will be later referred to.

[1, 2] The first assignment of error is that the court erred in denying appellant's motion to set aside the indictment and a plea in bar entered thereto. This is based upon the fact that a prior indictment against these defendants charging them with this crime was returned by the grand jury on May 17, 1932; that on May 20, 1932, on motion of the district attorney, this indictment was set aside upon the ground that there had been discovered additional evidence which should be submitted to the grand jury; and that the case was ordered resubmitted to the same grand jury, which was still in session, the minutes showing that the order was based on the ground of newly discovered evidence. On May 23d another indictment was returned by the grand jury upon which the defendants were later tried. The appellant maintains that the dismissal of the first indictment was a bar to this proceeding and that the resubmission of the matter to the grand jury was unauthorized by law. It fully appears that the dismissal of the first indictment and the resubmission of the matter was done upon the ground of newly discovered evidence. The new evidence referred to related to the discovery of a knife which had been found behind some wall board in the house occupied by appellant, which new evidence tended to support appellant's contention of self-defense and might have been most beneficial to him. We think no error is shown in ordering this resubmission and that a further prosecution in the case was not barred. Pen. Code, §§ 1385, 1387; *People v. Head*, 105 Cal. App. 331, 288 P. 106.

[3] The second point raised is without merit, it being urged that on the first adjournment after the taking of evidence began, while the record shows that the jury was "excused with the usual admonition of the court," there is nothing in the record to show what that admonition was or that the jury had ever heard it. The transcript shows that the jury had been fully and completely admonished in accordance with section 1122 of the Penal Code, and in the usual form, at least eight times on the preceding two days.

[4-10] It is next contended that the court erred in a number of rulings on the admission of evidence, which will be briefly treated in order. The first relates to an objection sustained on the ground that the question had been previously answered. The record shows that a question of the same import, and almost identical in form, had been previously asked and fully answered, the matter taking up more than a page in the tran-

script. The second objection is to the refusal of the court to strike out a portion of the testimony of the witness Robertson concerning a conversation he had with the defendant Williams. This was offered and received as binding upon Williams only and the jury was properly instructed in reference thereto, and it neither appears that error was committed nor that the appellant has a right to complain. The third matter complained of is that an objection to a question was sustained on the ground that it was argumentative and that it had been asked and answered. It not only appears that the question, as apparently intended, had been asked and answered, but, in fact, there was no question, the purported question being merely a statement which could not be construed as other than argumentative. The fourth claim, that a question had not been previously answered, although an objection on that ground was sustained, is not borne out by the record. In the fifth ruling attacked, an objection to a question was sustained on the ground that it was indefinite, argumentative, and unintelligible. Each of these objections was well taken. No reason is given for the sixth complaint made and the same may be disregarded. In the seventh specification the appellant complains of the fact that the court allowed a witness, on redirect examination, to explain certain testimony he had previously given. No authority is cited and no reason appears why the explanation as allowed was not proper under the circumstances appearing. Finally, a lengthy argument is presented to the effect that objections were sustained to two questions which prevented the appellant from fully cross-examining a witness, it being argued that various portions of this witness' testimony demonstrate that he was utterly unworthy of belief. The question asked related only to whether certain questions had been asked of this witness before the grand jury. The matter complained of could only go to the impeachment of the witness, and no foundation was laid for this purpose, although it appears the appellant had a transcript of the proceedings before the grand jury. It also appears that the particular questions complained of referred only to trivial matters and that the court permitted a full and complete cross-examination of this witness, during which the entire situation upon which the appellant bases his argument was brought out.

[11-14] Appellant next complains of the refusal of the court to advise the jury to acquit all of the defendants and of the denial of a motion made by him to strike out all of the testimony "as to what happened after the deceased was shot by the defendant Hatfield." It is argued that there was no evidence to connect Kloss and Williams with the killing and that the denial of this motion

left evidence in the record which was prejudicial to appellant. It may first be observed that even where such an advisory instruction is given, the jury are not compelled to bring in a verdict of not guilty. Pen. Code, § 1118. In addition, the motion as made was much too broad, as it included evidence of the acts and conduct of the appellant after the shooting and statements made by him, which clearly should not have been stricken from the record. This contention is based upon the appellant's construction of the evidence as showing that he had nothing to do with disposing of the body of the deceased. On the other hand, there was some evidence tending to connect the appellant with the disposition of the body, namely, the evidence of footprints in the mud along the river which fitted the appellant's shoes. While the appellant tried to establish that Kloss had worn his shoes at the time the body was disposed of, there was evidence that the various tracks along the river fitted the shoes of all three of the defendants, and a question of fact was presented for the jury. While the testimony of Kloss and Williams, if believed, was sufficient to show that neither of them fired the shot which killed the deceased, all of the facts and circumstances justified the submission to the jury of the question of their connection with the crime as principals under section 31 of the Penal Code.

[15, 16] It is next urged that the evidence is not sufficient to show that any crime was committed but conclusively discloses a case of shooting in self-defense. While portions of the testimony of the defendants Kloss and Williams, if believed, would justify such a conclusion, the record contains other evidence, including a part of that given by Kloss and Williams, which justifies a contrary conclusion. The deceased was shot squarely in the back of the head, a circumstance not supporting the appellant's version of the affair. There were many inconsistencies in the evidence given by the defendants, which we need not take the space to discuss, which could well have caused the jury to question certain portions of their evidence and to draw from other portions inferences different from those drawn by the appellant. Kloss testified that as the two ran from the house the appellant ran to the back end of the car standing near, and the deceased ran to the front end of the car. He then testified, "Ben (the deceased) was going back and Joe (the appellant) turned and headed him off from getting around the car." He also testified that the appellant ran to the southeast corner of the car and then turned and came back and that the deceased "just turned to go around the other way." He then expressed the conclusion that the deceased had turned the other way to meet the appellant, but from this evidence, especially in view of the context, the jury could well have drawn

a contrary inference. Again, this witness testified: "I saw him (the appellant) go around the corner and the Mexican turned and he shot," after which he testified that the Mexican had turned and started around the west side of the car at that time. Since the deceased had turned before the shot was fired, and was shot directly in the back, it is a reasonable inference that, while he was facing the appellant just before the shooting, he had turned and was proceeding the other way before the shot was fired. Williams, after testifying that the appellant ran "past the car and in behind old man Robertson's coupe," and that the deceased was pursuing him with a knife, testified: "Just before the Mexican got to the car he stopped and he started to turn and about the time he turned or before he turned a shot was fired and he dropped right then." On cross-examination he was asked whether the Mexican was going away from appellant at the time the shot was fired. He replied: "I could not say he was going away. He was just turning about, something like that (indicating)." If the testimony of these witnesses that the deceased was pursuing the appellant is to be believed at all, the fact that he was shot in the back of the head indicates that he had desisted and turned away and the evidence as a whole justifies the inference that this is what occurred. The entire situation presents a question of fact for the jury and the evidence supports the verdict. It may also be mentioned that Robertson testified that after he awoke on the day of the shooting, Kloss told him of the affair in the presence of the appellant, showed him a knife he said he had picked up outside and said: "We must—you and I and Williams saw this. Joe killed him in self-defense. We must say that."

[17] The appellant next attacks a number of instructions given. Three instructions on the matter of principals and accessories are first criticized as "emphasizing this point" and also indicating to the jury that the appellant was guilty of any acts committed by Kloss and Williams after the death of the deceased "notwithstanding the fact that there was no showing whatsoever that Hatfield participated in these acts." As we have already pointed out, there was evidence tending to show that Hatfield participated in the disposition of the body. The instructions correctly set forth the law, were necessary because of the evidence relating to the various defendants, the point was not unduly emphasized, and we are unable to see how any possible injury to the appellant could have been caused thereby. It is next urged that in three instructions on circumstantial evidence the court assumed the guilt of the appellant. The contention is in no way borne out by the record. Three instructions are then attacked on the ground that they were not justified by the evidence. They all relate to one phase

of the issue of self-defense and are justified by the fact that the deceased was shot in the back, as well as by a number of other portions of the evidence with the reasonable inferences therefrom.

[18-20] Complaint is next made of the court's refusal to give an instruction asked for by the appellant, to the effect that a person cannot be punished for a crime committed by him without his being conscious thereof. Apparently this is based upon the theory that the appellant was at the time too drunk to know what he was doing. The appellant's own testimony of what occurred at the time was sufficient to justify the refusal of this instruction, and the court did instruct the jury in reference to the matter of intoxication. We find nothing erroneous or missing along this line. The refusal to give certain other instructions, which refusal was based upon the statement that they were covered by other instructions, is assigned as error. All of these matters were fully and completely covered in other instructions given with the exception of one, which was based upon a section of the code which has been held to be unconstitutional.

We find no errors in the record justifying a reversal and the judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

129 Cal.App. 193

ATOWICH et al. v. ZIMMER et al.
Civ. 8748.

District Court of Appeal, First District,
Division 1, California.
Jan. 25, 1933.

1. Appeal and error ⇐607(1).

Whether party should be relieved from default in failing to file timely request for transcript rests almost entirely in trial court's discretion (Code Civ. Proc. § 953a).

2. Appeal and error ⇐607(1).

Failure to file timely request for preparation of transcript held not jurisdictional to appeal (Code Civ. Proc. § 953a).

3. Appeal and error ⇐607(1).

Where appellants acted in good faith and incurred much expense in obtaining transcript before learning of oversight in not filing timely request therefor, court properly relieved them from default (Code Civ. Proc. § 953a).

Facts disclosed that appellants were represented in action by two law firms,

and that through some misunderstanding between them request for transcript within statutory period was not filed; that period therefor ended on November 16, 1930; that on December 3d they learned that request had not been filed, and took steps immediately to be relieved of default, motion being made and granted on December 11. In the meantime, and on December 1, reporter's transcript had been completed, appellants having requested reporter to prepare it even before order was made denying their motion for new trial, and they paid reporter \$250, which was half of estimated cost of transcript.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Kevo Atowich and another against Max Zimmer and others. From an order relieving plaintiffs from default in failing to file timely request for transcript on an appeal taken by them from a judgment rendered against them, defendants appeal.

Affirmed.

Wheeler & Wackerbarth, of Los Angeles, for appellants.

Joseph W. Wapner, of Los Angeles, for respondents.

KNIGHT, J.

The defendants appeal from an order relieving plaintiffs from default in failing to file timely request for a transcript on an appeal taken by them pursuant to section 953a of the Code of Civil Procedure from a judgment on the merits theretofore rendered against them in the above action.

[1, 2] We find no merit in the appeal. The determination of the question of whether a party shall be relieved from his default must be left almost entirely to the discretion of the trial court, and it is only in exceptional cases that orders granting such relief will be reversed. Aside from the foregoing general rule, it is well settled that failure to file request for the preparation of the transcript within the statutory time is not jurisdictional to the appeal (Lynch v. Coe, 203 Cal. 422, 264 P. 747; Rubin v. Platt Music Co., 79 Cal. App. 756, 251 P. 243; Tasker v. Warner, 202 Cal. 445, 261 P. 474); and the decisions show that a liberal policy has been consistently followed in sustaining the action of trial courts in relieving defaulting parties for failure to file such request within the statutory period. For illustration, it has been definitely held that no formal application under section 473 of the Code of Civil Procedure is necessary; that the act of certification of the record by the trial judge is in effect the equivalent of granting relief under said section 473. Keys

v. Mother Lode Extension Mines, 212 Cal. 612, 299 P. 524; Weaver v. Shell Oil Co. (Cal. App.) 12 P.(2d) 167; In re Barney, 191 Cal. 18, 214 P. 853, 854. In so holding, the court in the case last cited said: " * * * If the court had jurisdiction to relieve the appellant under section 473, Code of Civil Procedure, the certification of the transcript under these circumstances was an exercise of that power, notwithstanding the lack of formality in the request for such relief." And in Lynch v. Coe, supra, in dealing with the question of a defective request for a transcript the court stated that technical objections are not favored, as the appellate court, whenever possible, seeks to review the decision of the lower court upon all of the facts which that tribunal had before it when it made its decision.

[3] In the present case, notice of entry of the order denying plaintiffs' motion for a new trial was served on November 6, 1930; consequently the ten-day period fixed by statute for the filing of the request for a transcript ended on November 16, 1930. Plaintiffs were represented in the action by two law firms, and it appears that through some misunderstanding between them said request for a transcript was not filed. On December 3d, however, they learned that the same had not been filed, and they took steps immediately to be relieved of such default. The motion in that behalf was made and granted on December 11th; the court directing that said request be filed within three days. In the meantime, and on December 1st, the reporter's transcript had been completed, plaintiffs having requested the reporter to prepare the same even before the order was made denying their motion for new trial; and they paid the reporter \$250, which was half of the estimated cost of the transcript. Following the granting of the order relieving them from their default, the transcript was settled, approved, and certified by the trial judge, and filed with the Supreme Court; and thereafter plaintiffs filed their opening brief, the cost of printing which, so they assert, was some \$230. Furthermore, the record shows that defendants knew at the time they served notice of the entry of the order denying the motion for new trial that plaintiffs had ordered the transcript and that the same was then in the course of preparation; and that on December 1st defendants closed negotiations with the reporter for delivery to them of certain portions thereof.

From the foregoing, it clearly appears the plaintiffs intended in good faith to take the appeal and to prosecute the same without delay; that they incurred much expense to obtain a transcript before they learned of the oversight in not filing the request therefor within the statutory period; that they moved promptly to be relieved from their default,

and thereafter in due course perfected their appeal. Under such circumstances, and in view of the law as declared in the cases above cited, a reversal of the trial court's order relieving plaintiffs from their default, and thus deprive them of their appeal, would be wholly unwarranted.

The order is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

129 Cal.App. 154

DERRER v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.

Civ. 8717.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

1. Prohibition $\S$ 10(1).

Writ of prohibition is available only for purpose of halting attempted exercise of jurisdiction not possessed by respondent sought to be restrained (Code Civ. Proc. $\S$ 1102).

2. Prohibition $\S$ 5(3).

Prohibition held not to lie to restrain Superior Court from hearing habeas corpus proceeding brought by general guardian to obtain custody of minor, though appeal was pending from order appointing guardian (Code Civ. Proc. $\S$ 1102; Probate Code, $\S$ 1500).

Application by Raymond A. Derrer for a writ of prohibition prayed to be directed to the Superior Court in and for Los Angeles County, Hon. Carl A. Stutsman, as Judge thereof, to restrain hearing of a habeas corpus proceeding.

Writ denied.

Esli L. Sutton, of Los Angeles, for petitioner.

Karl W. Marks, of Los Angeles, for respondents.

WORKS, P. J.

Raymond A. Derrer and Walter A. Stratton were before respondent court in a contest, upon rival petitions, for a determination of the question as to which of the two should be appointed general guardian of a certain minor. The appointment was awarded to Stratton, and Derrer appealed from the order making the award. Stratton then sued out a writ of habeas corpus in respondent court for the purpose of obtaining custody of the person of the minor; the custody for

a long time theretofore having been in Der-rer. The latter thereupon applied to this court for a writ of prohibition restraining respondent court from determining the habeas corpus proceeding and an alternative writ issued.

[1, 2] The writ of prohibition is available only for the purpose of halting the attempted exercise of jurisdiction not possessed by a respondent who is sought to be restrained by it (Code Civ. Proc. § 1102; 21 Cal. Jur. 579), and we think a question of jurisdiction is not presented here. Petitioner relies upon *In re Ballas*, 53 Cal. App. 109, 199 P. 816; *In re Green*, 67 Cal. App. 504, 226 P. 76; *In re Mathews*, 176 Cal. 156, 167 P. 873, 874. The first of these cases is of no assistance to us. The effect of the other two is fairly shown by a reference to *In re Mathews*. In that case an appeal was pending, as here, in a guardianship proceeding. During its pendency a writ of habeas corpus was issued by the Supreme Court, requiring the production of the person of the minor who was the subject of controversy in the guardianship matter. The court said: "Upon the return, the court concluded that a decision in the habeas corpus proceeding should not be made pending the final determination of the guardianship contest, and the matter was accordingly postponed to await such determination." Later the court decided the pending appeal and "thereupon the habeas corpus proceeding was restored to the calendar." The court did not rule that it had no jurisdiction of the habeas corpus matter, but merely postponed a decision of it. In truth, the attitude of the court is only explicable upon the theory that it did possess the jurisdiction, for, if it had not possessed it, action on the matter would not have been postponed, and it would not later have been restored to the calendar. If the jurisdiction had not existed, the proceeding would have been dismissed, or the writ would have been discharged as having been improvidently issued. The postponement was ordered for the reason that a decision on the appeal would have settled the point involved in the habeas corpus proceeding, for quite naturally the general guardian of the person of a minor is entitled to the custody of his person. Probate Code, § 1500; 13 Cal. Jur. 171. Further, the postponement was ordered for practically the same reason that often impels this court to strike a cause from its calendar because a question presented by it is known to be before the Supreme Court for decision in some other cause or proceeding. The stricken cause is restored to the calendar after the point has been passed upon by the higher tribunal, and it is then decided.

If a habeas corpus matter may ever be halted by any other proceeding, which is

very much to be doubted because of the beneficent nature of the writ, no such rule can be applied in the present instance. It was only long after *Matter of Zany*, 164 Cal. 724, 130 P. 710, was decided that even a right of appeal was provided for in habeas corpus proceedings. See section 1506 of the Penal Code, enacted in 1927 (St. 1927, p. 1061).

The alternative writ of prohibition is vacated, and a peremptory writ is denied.

I concur: CRAIG, J.

129 Cal.App. 265

PIRRONE v. PRICKETT et al.

Civ. 4625.

District Court of Appeal, Third District,
California.

Jan. 27, 1933.

Rehearing Denied Feb. 25, 1933.

Hearing Denied by Supreme Court March 27,
1933.

Appeal and error ~~C~~773(2).

Appeal was dismissed for failure to file points and authorities within time prescribed, or to obtain extension based on stipulation or affidavit (Rule 1, § 4; Rule 5, § 1).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Leonard Pirrone against George W. Prickett and another. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

Albert Picard, of San Francisco, and Griffin & Boone, of Modesto (Chester J. Keith, of San Francisco, of counsel), for appellant.

Dennett & Zion, of Modesto, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Motion to dismiss an appeal for failure of appellant to file points and authorities within the time provided by the rules of the court.

The transcript was filed in this court January 25, 1932. The time within which to file points and authorities was by stipulation extended from time to time until August 15, 1932. On November 26th, notice of motion to dismiss the pending appeal was served upon appellants, fixing December 27, 1932, as the time for the presentation of said motion. The hearing thereof was by the court continued to January 3, 1933. On December 31, 1932, appellant, without stipulation or order of court, and approximately four months after the expiration of the last stipulation entered

into between counsel, filed his points and authorities. The rules prescribed by the Supreme Court and Judicial Council of the State of California for the government of this court provide: "Within thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities, with proof of the service of one copy thereof upon the attorney or attorneys of each respondent who shall have appeared separately in the superior court." Section 4 of rule I. Section 1 of rule V provides: "If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed, upon notice given, either on motion of the respondent or of the court in which the appeal is pending. If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion."

Not only were the points and authorities not on file at the time the notice to dismiss was given, but they were not on file at the time the motion was originally noticed to be heard, and were not filed until three days prior to the time to which the motion was postponed.

Under the rules the time for filing of points and authorities could be extended only upon an order therefor, based upon either a stipulation or an affidavit. There was here no order or any stipulation or affidavit on file, and no showing of any reason why there had been no compliance with the rules of the court.

Appellant has shown no reason why the motion to dismiss should not be granted, and in accordance with the rules of the court heretofore stated, the motion is granted and the appeal dismissed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

129 Cal.App. 237

O'GRADY v. O'GRADY.

Civ. 667.

District Court of Appeal, Fourth District,
California.

Jan. 26, 1933.

1. Trial $\S$ 156(3).

Motion for nonsuit made at close of plaintiff's case admits truth of competent evidence and reasonable inferences to be drawn therefrom.

2. Gifts $\S$ 47(3).

Where aged or enfeebled parent conveys entire estate, without consideration, to one of several children, donee must show gift was made freely and with perfect understanding of transaction.

3. Deeds $\S$ 78.

Whether aged mother's deed to son in whom mother confided was procured through undue influence *held* for jury.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Action by Elizabeth O'Grady, an incompetent, by Grace Evans, her guardian, against Harry O'Grady. Judgment for defendant, and plaintiff appeals.

Reversed, and attempted appeal from order denying motion for new trial dismissed.

Alva D. McGuire, of Elsinore, for appellant.

Jesse L. Morain, of Perris, for respondent.

MARKS, J.

This is an appeal from a judgment entered after granting respondent's motion for a nonsuit. Appellant has also attempted to appeal from an order denying her motion for new trial.

Elizabeth O'Grady is the mother of Harry O'Grady, who had several brothers and sisters. Grace Evans, a daughter of Mrs. O'Grady, was appointed guardian of her person and estate on April 13, 1931; she qualifying the next day. The only other information we have of the contents of the order appointing the guardian is the allegation of the complaint that the court "adjudged said plaintiff (Elizabeth O'Grady) to be incompetent."

The complaint seeks to cancel a deed dated August 30, 1930, from Elizabeth O'Grady to Harry O'Grady, conveying to him a house and three lots in Perris, Riverside county, and to recover the sum of \$725 alleged to have been paid to him. While the complaint is not artistically drawn, we believe that, in the absence of an exception to the sufficiency of the pleading in the trial court, its allegations are sufficient to sustain a recovery on two grounds; undue influence on the part of the defendant, and mental incompetency on the part of Mrs. O'Grady.

[1] The motion for nonsuit made at the close of the plaintiff's case admits the truth and full probative value of all of the material and competent evidence and all reasonable inferences to be drawn from it and presumptions fairly arising from it. Evidence contradicting evidence favorable to the plaintiff must be disregarded.

"Judges are no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character (as) that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.

Therefore, to avoid a nonsuit, the evidence of the plaintiff must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. The court may grant the motion when, viewing the evidence of the plaintiff in its most favorable aspect for him, it is of the opinion that the evidence will not support a verdict in his favor, or where the evidence does not establish a *prima facie* case." 9 Cal. Jur., p. 557.

Mrs. O'Grady was over the age of eighty years at the time of the transaction in question. She was not educated, and could not write her own name. She tended to her own small business affairs, except when prevented from doing so by physical injuries resulting from accidents. The witnesses are practically unanimous in the view that her mental condition had not changed in a number of years before August 12, 1930. While the evidence shows that Mrs. O'Grady was easily influenced and often swayed by the wishes of her children, it falls far short of indicating the lack of capacity necessary to invalidate her acts on the ground of mental incompetency. Her mental condition becomes important only in connection with the charges of undue influence against her son.

Mrs. O'Grady lived on the property in question in Perris. Her son Harry and his wife lived across the street and cared for her during two illnesses following accidents, except during the time spent by her in a hospital. Her other children lived at greater distances from her, and did not see her so frequently. For a number of months prior to the execution of the deed in question Mrs. O'Grady reposed her confidence in Harry and had him tend to her affairs. She was then incapacitated physically by reason of an accident. He seemed to be her business adviser during this time.

Mrs. O'Grady had made other deeds to her property. About five years before the trial she made a deed to her son Gus, about two years later to her daughter Kate, and about one year later to her daughter Grace, her present guardian. These three deeds were each left with a bank by Mrs. O'Grady and subsequently withdrawn by her.

Mr. Clifford R. Stewart, a banker of Perris, was the only witness called who was present when the deed to Harry was executed. He gave the following account of the happening:

"Q. Are you acquainted with Elizabeth O'Grady? A. Yes.

"Q. And with her guardian, Grace Evans? A. Yes.

"Q. And with Harry O'Grady, the defendant? A. Yes.

"Q. And how long have you known them? A. I have known them practically since I have been in Perris, about 20 years.

"Q. Are you acquainted with the whole family? A. Yes, sir.

"Q. Now, did you have occasion to be present on or about the 12th day of August of 1930, when Elizabeth O'Grady executed a deed to certain property to Harry O'Grady? A. Yes.

"Q. And where was that instrument signed? A. Signed in Mrs. O'Grady's home.

"Q. Mrs. Elizabeth O'Grady? A. Yes, sir.

"Q. Who was present, Mr. Stewart? A. My father and my wife, and I think also Mrs. Harry O'Grady came in before the transaction was completed.

"Q. And what was Mrs. O'Grady's physical condition at that time? A. Why, she was incapacitated in regard to a fall that she got in her home, as I understand it.

"Q. You were asked to come to her home to witness the execution of a deed? A. Yes, sir.

"Q. Who asked you to do so? A. I think it was Harry O'Grady asked us to come down.
* * *

"The Court: I think the witness can testify, if he had occasion to observe Mrs. O'Grady on that day, he can testify as to her mental condition as he observed it.

"A. It appeared to me that Mrs. O'Grady has been in the same mental condition for the past several years. I think right now she is in the same condition. She knows what she is doing when things are explained to her, and she understands, too, only different ones of her children could influence her to do anything that they wished. That is my personal opinion.

"Q. You mean by that, that most any one of the children could influence her? A. Yes.

"Q. Your opinion is that the one who might talk to her last would probably be the one that would influence her to do anything at that time? A. Yes, sir.

"Q. And you base that upon the long contact you have had with them in a business way and through the bank? A. Yes, sir. I have seen her children at different times that wanted things, and they would ask Mrs. O'Grady, and she would usually give it to them if she had it. * * *

"Q. At that time did Mrs. O'Grady say why she was deeding her property? A. She said she wanted to leave her property to Harry O'Grady.

"Q. Did she state at that time why? A. Well, as I understood it, Harry O'Grady was having charge of her affairs, and was going to take care of her funds. * * *

"Q. I will show you the deed here, Mr. Stewart, and ask you if that is the deed you refer to (showing to witness)? A. Yes, sir; that is the deed I refer to.

"Q. That is your signature, and your wife's signature? A. Yes, sir.

"Q. And the acknowledgment here, 'W. W. Stewart' is your father? A. Yes, sir, 'Notary Public.' * * *

"Q. When was the last time you have spoken to Mrs. Elizabeth O'Grady? A. Yesterday morning.

"Q. Was her conversation rational? A. Yes, sir; I met her in the grocery store yesterday morning, and she seemed to be perfectly rational.

"Q. Has she always appeared to you, from the time you have known her, in the same condition of mind? A. Yes, sir. * * *

"The Court: Mr. Stewart, at the time Mrs. O'Grady executed the deed in question here, in your opinion, did she know what she was doing? A. Yes, sir."

George O'Grady had a conversation with his mother several months after she executed the deed to Harry, which he described as follows:

"* * * I got to talking with her, and she told me she signed the paper. I asked her what kind of a paper, and she said a paper for the place. That is as far as she knew what she signed. If she signed anything, I have not seen any of them.

"Q. Did she tell you at that time why she had signed the paper to Harry? A. I asked her what was her idea in doing that, and she said she had signed two or three deeds to the other children, * * * my brothers and sisters, of course * * * and she was going to try Harry this time."

In considering the question of undue influence of Harry over his mother in obtaining a deed to all her property, we must bear in mind: (1) That the judgment rendered was upon a motion for nonsuit where the evidence, in favor of the plaintiff, must be taken as true and construed most strongly in her favor; (2) that a confidential relation of trust and confidence existed between Mrs. O'Grady and her son Harry; (3) that she was of very advanced years, physically incapacitated, uneducated, and easily influenced by any of her children; (4) that Harry was at the time her business adviser; (5) that he received a deed to all her property without other consideration than love and affection, and subsequently recorded it; (6) that thereafter he moved from Perris, taking with him linoleum from the floor of the house and part of his mother's dishes and bedding, leaving insufficient for her use so that the guardian, when appointed, had to replace the articles taken; (7) that the notary who prepared the deed and the witnesses to the mark of Mrs. O'Grady were procured by Harry; (8) that Mrs. O'Grady had no independent advice in the transaction.

[2, 3] We think the facts of this case bring it within the rule announced in *Soberanes v. Soberanes*, 97 Cal. 140, 31 P. 910, 912, as follows: "There is no doubt as to the principle applicable to cases of this kind. Transactions like the one under consideration are watched by courts of equity with the most scrutinizing jealousy, and are generally held to be presumptively void. They will be set aside upon the discovery of the least fraud, and every presumption ought to be indulged against them. The person who makes the donation and bestows the confidence is not bound to show that any imposition has been practiced upon him. It is sufficient for him to establish intimate and confidential relations with the donee. Some of the cases hold that undue influence is not to be inferred from the relation of parent and child, where the gift is from the parent to the child (*Millican v. Millican*, 24 Tex. 426); but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer."

The trial court should not have granted the motion for a nonsuit under the facts in the record before us.

The attempted appeal from the order denying the motion for new trial is dismissed.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

129 Cal.App. 86
GETRIDGE v. STATE CAPITAL CO. et al.
Civ. 8710.

District Court of Appeal, First District, Division 1, California.
Jan. 21, 1933.

1. Corporations $\S$ 650.

Statute providing that books of "every corporation" shall be open to inspection of shareholders, *held* applicable to foreign corporation doing business within state (Civ. Code, $\S$ 278, 355).

[Ed. Note.—For other definitions of "Every," see Words and Phrases.]

2. Statutes $\S$ 188.

Words of statute are to be interpreted according to their common acceptance.

3. Corporations $\S$ 650.

Permitting shareholders in foreign corporation doing business in California to in-

spect its books does not constitute interference with internal affairs of corporation (Civ. Code, §§ 278, 355).

4. *Mandamus* ☞ 164(2).

Answer to shareholder's petition for writ of mandate to compel permission to inspect certain of defendant corporation's books, *held* demurrable as stating mere conclusions (Civ. Code, §§ 278, 355).

Defendant's answer alleged that plaintiff shareholder's demand was made with intent to use defendants' books to the injury of the corporation upon the receipt of the information sought to be acquired, and, further, that the demand for inspection was influenced by and made with bad motive and purpose.

5. *Mandamus* ☞ 165.

Sustaining demurrer to answer without leave to amend, to shareholder's petition for writ of mandate for permission to inspect corporation's books, *held* no error, absent showing of request for amendment (Civ. Code, §§ 278, 355).

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Petition by C. W. Gettridge against the State Capital Company and others for writ of mandate to permit petitioner to inspect certain books. From the judgment granting the writ, defendants appeal.

Affirmed.

Ellis, Lyman & Steindorf, of San Francisco, for appellants.

Milton U'Ren, of San Francisco, for respondent.

PER CURIAM.

Plaintiff, who was the owner of certain shares of the capital stock of State Capital Company, a corporation, filed a petition in the superior court for a writ of mandate, directing its officers to permit him to inspect certain of its books, namely, the share register, books of account, and the minutes of the stockholders' and directors' meetings. He alleged that a demand in writing for such inspection had been made and refused; that his purpose was to enable him to ascertain the present value of his stock in order to determine whether to sell or to hold the same. The defendants filed an answer to the petition alleging that plaintiff's demand was made with intent to use the books mentioned "to the injury of such corporation upon receipt of the information sought to be acquired thereby," and, further, that the demand for inspection "was influenced by and made with bad motive and purpose." A demurrer to the answer was sustained without leave to amend, and the

writ issued as prayed. Defendants have appealed from the judgment.

Section 355 of the Civil Code provides that the share register, books of account, and minutes of the shareholders' and directors' meetings of "every" corporation shall be open to inspection upon the written demand of any member or shareholder or holder of a holding trust certificate at any reasonable time and for a purpose reasonably related to his interests as a shareholder.

[1] Appellant corporation was organized under the laws of the state of Delaware, and is doing business in California. Appellants claim that, the company being a foreign corporation, the above section has no application. In this connection they call attention to section 278 of the Civil Code, which defines certain terms used in title 1 of the Code, which title contains the general provisions applicable to all corporations, and chapter 16, of which deals with foreign corporations. The section provides that "corporation," unless otherwise expressly provided, refers only to a domestic corporation." As to this, it will be seen that said section 355 does expressly provide otherwise, namely, that the books mentioned of "every" corporation shall be open to inspection at any reasonable time and for a purpose reasonably related to the stockholder's interest.

[2, 3] The words of a statute are to be interpreted according to their common acceptance (23 Cal. Jur., Stats. § 124, p. 749; Perrin v. Miller, 35 Cal. App. 129, 169 P. 426), and it was plainly the intention to include all corporations doing business and whose books are within the state. Such a rule does not constitute an interference with the internal affairs of the corporation, and the right is well established. Ballantyne Corporation Law and Procedure, § 294; Thompson on Corporations (3d Ed.) § 6698; Richardson v. Swift, 7 Houst. [Del.] 137, 30 A. 781.

[4] The answer filed to the petition stated no facts showing that plaintiff was not acting in good faith or for any purpose other than that provided by the statute and alleged in his petition. The allegations of the answer were mere conclusions, and justified the order sustaining the demurrer. 1 Bancroft Code Pleading, § 51, p. 115; Lavelle v. Julesburg, 49 Colo. 290, 112 P. 774; McCrimmon v. Raymond, 77 Colo. 81, 234 P. 1058.

[5] Nor is there merit in appellants' contention that the court erred by sustaining the demurrer without leave to amend. So far as appears, no request for permission to amend was made. Hogan v. Horsfall, 91 Cal. App. 37, 266 P. 1002; Mortensen v. Los Angeles Examiner, 112 Cal. App. 194, 296 P. 927.

The judgment is affirmed.

BROWN v. GOW.

Civ. 660.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1933.

Hearing Denied by Supreme Court March 13,
1933.**1. Evidence** ⇨183(1), 187.

Under statutes, proof of loss or destruction of original is necessary before admitting evidence of contents of writing, and sufficiency of such proof is for trial court (Code Civ. Proc. §§ 1855, 1937).

2. Appeal and error ⇨970(2).

Unless discretion is abused, judge's determination respecting sufficiency of proof of loss or destruction of original to justify evidence of contents of writing is conclusive (Code Civ. Proc. §§ 1855, 1937).

3. Witnesses ⇨165.

In suit between employee and employer's executrix for balance allegedly due for services, employee *held* incompetent to testify regarding correctness of entries in book of account allegedly kept by her.

4. Appeal and error ⇨1056(1).

Error, if any, in excluding copy of book of account *held* harmless, in absence of competent evidence showing correctness of entries in original.

5. Payment ⇨74(1).

Unless overcome by clear satisfactory evidence, receipt should prevail on question of payment.

6. Master and servant ⇨80(9).

In employee's action for balance allegedly due, judge did not err in accepting employee's receipt reciting full payment and refusing to accept explanation that receipt covered rental of room occupied by employer.

7. Master and servant ⇨80(9).

In employee's action for balance allegedly due for services, evidence supported finding of payment in full.

8. Payment ⇨70(6).

Canceled bank checks drawn by debtor payable to creditor's order and indorsed by creditor are admissible as evidence of payment.

9. Trial ⇨395(2).

Findings which can be made certain by reference to record are sufficient.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by M. E. Brown against J. R. Brightman, for whom, after his death, Mabel Bright-

man Gow, as executrix of his will, was substituted as the defendant. Judgment for defendant, and plaintiff appeals.

Affirmed.

See, also, 14 P.(2d) 322.

Martin J. Coughlin, of San Bernardino, for appellant.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondent.

JENNINGS, J.

This action was originally instituted by plaintiff against J. R. Brightman to recover a balance of \$3,060.50 alleged to be due for services performed by plaintiff at Brightman's request. During the pendency of the action and prior to trial, J. R. Brightman died, and the executrix of his will was substituted as the defendant in his place. The trial resulted in the rendition of a judgment in defendant's favor, from which judgment plaintiff has prosecuted this appeal.

[1-4] Appellant's supplemental complaint filed subsequent to Brightman's death contains four counts. In the first count the sum demanded is alleged to be due on an open book account for services rendered. The second count is based upon a mutual open and current account for services rendered. The third count is upon quantum meruit for services rendered. The fourth count is based upon an express contract for services performed. In support of the allegations contained in the first and second counts of the supplemental complaint, appellant offered in evidence a copy of a book of account which she testified she kept and in which she stated she had made entries showing the dates on which she had performed services for the deceased, and the number of hours she had worked on each date. Objection to the admission of this evidence was interposed by respondent, and was sustained. It is contended that the trial court erred in sustaining the objection and in declining to receive the evidence proffered. As above noted, the evidence consisted, not of the original book of account, but of a copy which appellant testified she made prior to Brightman's death. Sections 1855 and 1937, Code of Civil Procedure, permit evidence of the contents of a writing to be given when the original has been lost or destroyed. Preliminary proof of the loss or destruction of the original is required, and it is for the trial court to determine whether the evidence thus offered is or is not sufficient. The trial court's determination in this regard is conclusive, unless it clearly appears that the court abused the discretion committed to it. 16 Cal. Jur., § 11, p. 701. The record fails to show an abuse of discretion by the court. The evidence tending to show that the original document was lost was far from satisfactory, and

the court was amply justified in its refusal to admit the proffered copy. Furthermore, no witness other than appellant testified as to the correctness of the entries contained in the original book. Appellant was not herself competent to testify that the entries were correct. *Tipps v. Landers*, 182 Cal. 771, 776, 190 P. 173; *Colburn v. Parrett*, 27 Cal. App. 541, 544, 150 P. 786. Therefore, even if the court erred in refusing to admit the copy, no harm resulted therefrom, in the absence of competent evidence showing that the entries in the original book were correct.

[5, 6] Appellant's principal contention relates to the sufficiency of the evidence to sustain the court's finding that no part of the sum claimed is due. The record shows that appellant was employed by the deceased in a store operated by him in the city of Redlands. Her employment extended over a term of several years which may be divided into two periods; the first covering the years from 1923 until 1925, and the second from 1926 until some time in the month of August, 1929. There was no contention that the deceased owed appellant any amount for the first period, since it was shown that when her employment ceased in 1925 the deceased owed her the sum of \$500 which was paid by a check containing the statement that it was given in full payment of all demands to date. With reference to the second period comprising the years from 1926 to 1929, it is urged that the uncontradicted evidence showed that during the month of November, 1929, and subsequent to the institution of this action, J. R. Brightman admitted that he was indebted to appellant to the extent of about \$3,000. Evidence to this effect was produced by appellant. To meet this evidence respondent produced a receipt dated June 16, 1930, which is in the following language: "Received of J. R. Brightman ten dollars payed in full up to date. \$10.00. Mrs. M. E. Brown." Appellant admitted signing this receipt, but testified that it was given by her to cover rental of a room occupied by Brightman. It was for the trial court to determine whether or not appellant's testimony in this regard was true. The language of the receipt is sufficiently broad to indicate that it amounted to a written acknowledgment that payment in full of all demands had been made. It is now the rule that a receipt is evidence of a high order which is entitled to prevail, unless overcome by clear and satisfactory evidence. 20 Cal. Jur., p. 954. We cannot say that the trial court was without warrant in refusing to accept appellant's explanation of the receipt given more than six months after the time when, according to appellant's witnesses, he admitted that he owed appellant about \$3,000, and in preferring to consider that the receipt meant what it stated, i. e., that full payment of all demands of appellant up to the date of the receipt had been made.

[7, 8] It is further contended that the burden of showing payment rested upon respondent, and that this burden was not successfully maintained. Irrespective of the above-mentioned receipt, we are of the opinion that the contention is not well taken. It was shown by evidence which is uncontradicted that on two different occasions appellant admitted that she had received full payment for her services up to the date of such admissions. The first of these admissions occurred on March 27, 1927, when an attempt was made by a constable to garnish wages due appellant at which time she stated to Brightman: "You do not owe me anything." The second admission occurred on January 13, 1928, when an attempt was made to levy a writ of execution upon wages due appellant, at which time appellant stated that she had drawn her wages in advance. From this uncontradicted evidence the court was justified in finding that nothing was due to appellant from Brightman on January 13, 1928. Respondent further produced in evidence a series of checks drawn by Brightman during the year 1928 payable to appellant and bearing her indorsement. These checks totaled \$855. Eight additional checks each for \$60 drawn by Brightman during the year 1928 payable to appellant and bearing her indorsement were admitted in evidence, and one other check for \$100 dated June 2, 1930, drawn by Brightman payable to appellant and bearing her indorsement was also received in evidence. Appellant herself testified that the last-mentioned check was given her on account of her services. This evidence warranted the court in finding that full payment for such services had been made. It appears that appellant contends that the canceled checks drawn by the deceased in favor of appellant and bearing her indorsement were not properly admitted in evidence. This contention cannot be sustained. A paid bank check, payable to the order of the creditor and indorsed by him, is admissible as evidence of payment. *Light v. Stevens*, 8 Cal. App. 74, 77, 103 P. 361.

[9] The contention is also made that the findings are fatally defective in failing to find what amount was paid by the deceased to appellant for the services rendered by her, so that a reviewing court might determine whether the amount paid was fair compensation for such services. This contention likewise is without merit. In view of the issues raised by the pleadings and the evidence presented by the record, the trial court was not required to find specifically what amount had been paid by the deceased to appellant. The record clearly shows the amount that was paid to appellant subsequent to January 13, 1928, and there was evidence that appellant had admitted that she had drawn all wages due her for services performed prior to said date. It is the rule that findings are suffi-

clent if they can be made certain by reference to the record. 24 Cal. Jur., p. 964; Kennedy, etc., Co. v. S. S. Const. Co., 123 Cal. 584, 56 P. 457. Application of this rule indicates that the findings of the trial court are not vulnerable to appellant's attack.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 768

PEOPLE v. JUDSON.

Cr. 2271.

District Court of Appeal, Second District, Division 2, California.

Jan. 18, 1933.

As Modified on Denial of Rehearing Jan. 30, 1933.

Hearing Denied by Supreme Court Feb. 16, 1933.

1. Homicide ⇨254.

Evidence held sufficient to support conviction, of one performing abortion, of murder in second degree.

2. Criminal law ⇨371(4).

In prosecution of one committing abortion for murder, admitting evidence that another asked defendant to perform operation on her and what defendant did held admissible.

Evidence that, when witness asked defendant to perform operation on her defendant packed her uterus with cotton, and on following day told her she was not pregnant was properly admitted under circumstances, jury having been instructed that evidence of similar acts was admitted, not for purpose of establishing commission of independent offense by defendant, but for sole purpose of establishing guilty knowledge and intent.

3. Criminal law ⇨1144(12).

Where no objection was made to use of document to refresh witness' recollection, appellate court must assume it was proper for such purpose.

4. Criminal law ⇨1136.

Defendant could not complain that state's witness was compelled to incriminate herself.

5. Criminal law ⇨959.

Denying continuance of defendant's motion for new trial held not error, where defendant had filed affidavit three months before asking for continuance of trial set to procure same witness.

Facts were that defendant was charged with murder for death resulting from abortion, and continuance of motion for new trial was sought for witness whom defendant claimed would testify that some unknown doctor had performed operation on decedent some time before she went to defendant's home, but record showed that witness was not produced at either first or second trial, and evidence presented at time motion was made did not show any diligent effort to procure witness' presence at any time, and the evidence was undisputed that act could not have possibly been performed prior to time she arrived at defendant's house.

6. Criminal law ⇨1147.

Refusal to entertain application for probation after conviction cannot be reviewed on appeal, as such matter rests entirely in trial court's discretion.

7. Criminal law ⇨1186(4).

Appellate court could not set aside judgment or grant new trial, where no miscarriage of justice had resulted from any errors (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Eleanor Judson was convicted of murder in the second degree, and she appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

The evidence shows that one Virginia Stewart went with her mother to the home of defendant on February 7, 1932, and that at the time she was pregnant and in apparently good health. She passed away February 9, 1932; the only witness present being the defendant. The circumstances surrounding the death indicated that an abortion had been performed which was not necessary to save the patient's life, and defendant was arrested upon the charge of murder. The jury failed to agree upon a verdict at the first trial, concluded June 7, 1932, and the case was reset for July 6 of that year. In the meantime the public defender of Los Angeles county was substituted as counsel for defendant, and the case continued to July 8, 1932. The verdict of the jury was returned July 16 and found defendant guilty of murder in the second degree. At the time set for sentence, July 21, a motion for new trial was presented; the hearing thereon as well as the passing of judgment and sentence being continued

to July 29. On the latter date defendant asked for a further continuance, which was denied, and judgment was pronounced. From the order denying her motion for a new trial and from the judgment defendant has appealed.

Appellant contends (1) that the evidence was insufficient to support the verdict; that the court erred (2) in admitting the testimony of the witness Fay tending to prove a similar offense; (3) in denying defendant's motion to continue the hearing on her motion for new trial; and (4) in denying her permission to file application for probation.

[1] 1. The testimony of Dr. Frank R. Webb, assistant county autopsy surgeon, that decedent died as the result of an illegal operation is undisputed, and that fact, as well as the fact that no operation was necessary to save the life of the girl, is clearly established by the evidence. Such facts were also admitted by counsel for appellant; the defense being that "defendant did not do it at all." It appears that a set of instruments for performing such an operation was found in a cloth bag in an incinerator at appellant's home, ownership of which was admitted by her at the trial, at which she stated she had hidden the instruments in the incinerator because the girl "died under circumstances that I knew an abortion had been started, and I had them." She also testified that she had owned them for ten or twelve years.

At the time the officers were called, on February 10, they found appellant in her living room. She appeared to be "extremely nervous" and on several occasions got up from her chair "and would glance through the west bedroom window." One of the investigators then looked out of the window and saw a large oil drum which had been used as an incinerator. Examining this later, he found the bag of instruments. Appellant was asked if she owned any surgical instruments, to which she replied that she did not. Asked as to what she would say if they found some on her place, she replied that she would say they had been planted there. On being shown the instruments and asked if they belonged to her, she said they did not and that she had never seen them before. Footprints led from the house to a trash pile and from there to the drum where the instruments were found, and at the request of an officer appellant produced a pair of shoes which she stated she had worn while working in the back yard and which had fresh mud on them. The shoes thus produced fitted the tracks "perfectly." A small carton containing two broken vials labeled "Pituitrin" was found on the dining room table. This was shown by one of the officers to appellant, who, when asked if the package belonged to her replied that it did not. Asked as to how it came to be in her room, she said she did not know, "unless the girl had brought it there." At the first trial

appellant stated that she had purchased the pituitrin at a drug store at about 9 o'clock p. m. of February 9, 1932.

Appellant testified that about 10 o'clock p. m. on the night of February 9th she went to the kitchen to get a drink of water "and I heard her calling me"; that she "found her out in the back"; that decedent told her "she had jumped off the ladder, or the house"; that she picked the girl up and took her in the house, undressed her and put her to bed; that decedent was "flowing pretty heavily," and that she "cleaned her up," in which process she noticed "that there was a catheter coming out of her vagina" which was "twisted like, and the wire was still in the catheter"; that she thereupon got in her car "and went to the drugstore and bought this pituitrin"; that this was between 10 and 10:15 p. m.; that she called an aunt of decedent, after failing to get her mother, on the telephone, and told her to come quick and bring a doctor; that shortly thereafter the girl passed away.

The officers found a number of holes near the back door which had apparently been made by the heels of a French slipper, and, after examining a pair of decedent's shoes, found that the heels filled the marks on the ground, but at such an angle that the sole of the slipper did not touch the ground, indicating that the heel tracks had not been made by jumping from a ladder. Dr. Webb testified that decedent died from exsanguination following an attempted abortion; that the uterus contained a five months' fetus, placenta, and attached umbilical cord; that the amniotic water had been expelled by mutilation of the uterus and the cervix of the uterus, caused "by the apparent use of instruments, or the handling of the parts during the procedure of mutilation"; that the lacerations and mutilations "were all fresh and of the same appearance," and could not have been caused by a fall or jump from any height. The doctor further testified that death occurred following mutilation of the parts, that collapse took place during the time of mutilation, and that "following collapse, inside half an hour to an hour, death would proceed."

Without reviewing the evidence further, we will say that it is amply sufficient, in our opinion, to sustain the verdict and judgment.

[2-4] 2. Called by the prosecution, the witness Genevieve Fay testified that she visited the appellant around the 1st of February of 1932. Asked if she was pregnant at the time, she answered in the negative; also that she did not have any conversation with appellant regarding an abortion. Thereupon the district attorney claimed surprise and asked leave to show a document to the witness, which was exhibited to defendant's counsel, for the purpose of refreshing her

memory. This was done, by permission of the court, and the witness was then asked: "Having read that document, does that refresh your recollection as to whether or not you were pregnant at the time you went to Mrs. Judson's?" to which she replied: "I don't know whether I should answer that or not." The court then stated: "Yes, you must answer the question, madam," and the witness replied: "It refreshes my mind all right." Following this, Miss Fay testified that she asked appellant "if she would perform an operation on me"; that appellant packed her uterus with cotton and gauze, and told her to come back next day; that she did so, and that appellant removed the gauze and told her that she was not pregnant—that she "had fibroid tumors"; that about two weeks after this visit she had a miscarriage. No objection was made to the effect that the document exhibited to the witness was not a proper one from which to refresh her recollection or that no foundation was laid for its use, but objection was made that the statement did not "show any abortion at all."

We think the testimony of this witness was properly admitted; the jury having been instructed that evidence of a similar act is admitted, "not for the purpose of establishing the commission of an independent offense by the defendant, but for the sole purpose of establishing guilty knowledge and intent." While this evidence was not as clear as it might be as to just what happened, the inference might well be drawn by the jury that the witness went to appellant in a pregnant condition for the purpose of having an abortion performed, and that such result was obtained, which circumstance certainly bears upon the intent of appellant as to the decedent in the particular instance under consideration. Appellant urges that the court erred in compelling the witness to testify, as it was in effect permitting the prosecution to impeach its own witness. We fail to see where there was any attempt at impeachment. The statement shown Miss Fay refreshed her recollection; and, no objection having been made as to such use of the document, we must assume that it was a proper document for such purpose. If appellant means to urge that the court erred in compelling the witness to incriminate herself, a sufficient answer, assuming, without conceding, that the privilege was claimed by her, is that it was not an error committed as against appellant, and therefore not a matter of which she can complain. *People v. Gonzalez*, 56 Cal. App. 330, 204 P. 1088.

[5] 3. We fail to see any error in the ruling of the court denying the motion of appellant for a continuance of her motion for a new trial. The verdict was rendered July 16, 1932. The date for pronouncing judgment was set for July 21 at 10 o'clock, at which

time an oral motion for new trial was made, hearing of which was set for July 29, and the matter of pronouncing judgment and sentence was continued to the same date. It would seem that under section 1191 of the Penal Code judgment was required to be pronounced before July 31, which day was Sunday. *People v. Treschenko*, 159 Cal. 456, 114 P. 578. Assuming, however, that appellant—having asked for the continuance for the purpose of procuring the testimony of a witness named Mrs. McDaniels—was in no position to demand a new trial under section 1202 of the Penal Code, still we see no error, inasmuch as the record shows that she had filed affidavits on April 29, three months before, asking for a continuance of the trial set for that date in order to enable her to secure the presence of the same witness. Said witness was not produced at either the first or the second trial, and the evidence presented to the court at the time the motion was made did not show any diligent effort to secure her presence at any time. Assuming further, as claimed, that the witness mentioned would testify that some unknown doctor had performed the operation on decedent some time before she went to appellant's home, still the evidence could not have availed appellant in the face of the undisputed fact that such act could not have possibly been performed prior to the time the decedent arrived at appellant's house. At the hearing of the motion for new trial, the witness who testified that she had had some such a conversation with the missing Mrs. McDaniels was asked if she knew that the latter would so testify. Her reply was: "I couldn't swear to it, of course."

[6] 4. We see no abuse of discretion in the refusal of the court to permit the filing of an application for probation. Probation was summarily denied, and such action is purely discretionary under section 1203 of the Penal Code. In denying the application, the trial judge very frankly said: "I regret to state that I do not believe this is a proper case for probation. The nature of the crime committed by the defendant, resulting as it did in the loss of life of a young girl eighteen years of age, is not one that would commend itself to the court even if the defendant proved to be a woman of the best of reputation. It is not a proper case for probation and the application is denied." In any event, a refusal to entertain an application for probation after conviction cannot be reviewed on appeal, as such matter rests entirely in the discretion of the trial court. *People v. Dunlop*, 27 Cal. App. 460, 150 P. 389; *People v. Laborwits*, 74 Cal. App. 401, 240 P. 802; *Svoboda v. Purkitt*, 75 Cal. App. 148, 242 P. 81.

[7] Appellant urges that she is entitled to a dismissal under section 4½, article 6, of

the Constitution. We fail to understand such contention. Under the section cited, even though we were convinced that the trial court erred in the particulars referred to, the judgment could not be set aside or a new trial granted in view of the fact that, after an examination of the entire cause, we are unable to say that a miscarriage of justice has resulted therefrom.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

129 Cal.App. 250

JARVIS et ux. v. SINGLETON et al.

Civ. 641.

District Court of Appeal, Fourth District,
California.

Jan. 26, 1933.

Rehearing Denied Feb. 25, 1933.

Hearing Denied by Supreme Court March 27,
1933.

1. Evidence ☞434(3).

Parol evidence held admissible to establish that false representations that easement did not exist induced purchase of land, notwithstanding deed provided that land was subject to usual rights of way.

2. Fraud ☞41.

Purchasers' allegation that vendors' representations were false and fraudulent and known to be such and that they were made for purpose of inducing sale held sufficient allegation of intent to deceive.

3. Fraud ☞58(3).

Vendors' intent to deceive purchasers may be proved by circumstantial evidence.

4. Fraud ☞10.

Vendors' statement that no easement existed held representation as to nonexistence of fact constituting sufficient basis of action for fraud notwithstanding representation involved question of law.

5. Fraud ☞58(1).

Evidence sustained finding that vendors represented that no right of way easement existed over land.

6. Appeal and error ☞1011(1).

Conclusion of trier of fact on what portion of conflicting testimony is true is conclusive on appeal.

7. Fraud ☞23.

That purchasers saw roadway crossing property held not to preclude them from suing vendors for misrepresentation that no right of way easement existed, where purchasers did not know how long way had been used.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by H. Jarvis and wife against Charles E. Singleton and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

U. F. Lewis, of Riverside, and Fred A. Wilson, of San Bernardino, for appellants.

Sarau & Thompson and Robert E. Nelson, all of Riverside, for respondents.

MARKS, J.

This action went to trial upon the allegations of a second cause of action of a complaint wherein damages were alleged to have resulted from fraudulent representations of appellants concerning the condition of the title to real property in Riverside county, sold to respondents. Judgment was rendered in favor of respondents, from which this appeal is taken.

Appellants were the owners of lots 122 to 127, inclusive, in block 7 of the Kadota Fig Groves in Riverside county. The deed contained the following recitals: "Subject to second installment of taxes for fiscal year 1928-29. Usual rights of way, covenants and restrictions as now of record." At the time of the sale there was a way across the property which had been in use for many years, and was finally determined to be an easement. The existence of this way as an easement furnished the basis for the recovery of damages by respondents.

The evidence discloses that the respondents possessed little education, were without experience in the purchase of farming lands, had no independent advice in the purchase of the property, and relied upon the representations made by appellants in the course of the negotiations concerning the road and right of way on and around the property. They saw the way across the property and inquired of appellants concerning it and were told that "It was nothing but a path that people took liberty to take and travel over. * * * They said it didn't matter; we could just go ahead and plow it up if we wanted; just as quick as we bought it we could plow it up and put down our building. * * * Plow it up, put wires across or board fence,—anything; that it didn't mean anything. * * * They said it was their property, they (persons using it) would have to take the road where they would make it for them. They told me that themselves. * * * Mr. and Mrs. Singleton told us to close the road, plow it up, stretch wires, plow it deep."

To further lull the fears of respondents concerning the way across the property, appellants showed them a subdivision map upon which "Condit Avenue" was marked along

the boundary of the property in question, with no right of way shown across it. A surveyor employed by appellants staked Condit avenue. They told respondents that Condit avenue was the road along the property which they could open and compel others to use, instead of the way in question, which they could close.

Respondents testified that they believed and relied upon these representations and as a result purchased the property. It subsequently developed that the way had been used adversely for many years and was an easement with which they could not interfere.

Appellants urge that the following finding is contrary to and is unsupported by the evidence: "That so far as is manifest by the terms of said grant, the plaintiffs took said real property subject only to the second installment of taxes for the fiscal year 1928-29 and usual rights of way, covenants and restrictions then of record, but plaintiffs actually took said real property subject to the easement or right of way hereinafter mentioned."

[1] If we correctly understand appellants' arguments, they are based upon the fact that the deed expressly provided that the land conveyed was subject to taxes and "usual rights of way, covenants and restrictions as now of record." From this they argue that evidence of the easement across the property could not be received as it should be barred under the extrinsic evidence rule. This contention has been decided adversely to them in the case of *Ferguson v. Koch*, 204 Cal. 342, 268 P. 342, 345, 58 A. L. R. 1176, where it was said: "Parol evidence is always admissible to prove fraud, and it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud. Hence, the fact that the sale of an automobile is evidenced by a written contract will not prevent the purchaser from proving by parol evidence that the sale was induced by fraud. And this is true even though the contract recites that all conditions and representations are embodied therein. *Mooney v. Cyriacks*, 185 Cal. 70, 195 P. 922; *Hunt v. L. M. Field, Inc.*, 202 Cal. 701, 262 P. 730; *Whiting v. Squeglia*, 70 Cal. App. 108, 232 P. 986. There is no such sanctity surrounding a writing that parties may not be permitted to go back of it and show that there was such fraud practiced in the procurement of the same as to vitiate the writing. The law never countenanced a rule which would deny to one the right to prove that fraud had been practiced upon him."

[2, 3] Appellants next urge that there is neither pleading nor proof of a fraudulent intent upon their part. It is alleged that the representations were false and fraudulent and were known by appellants to be false and

fraudulent, and were made "for the purpose of inducing plaintiffs to purchase said real property" and "for the purpose of inducing said plaintiffs to consummate the purchase of said real property." This is a sufficient allegation of intent to deceive. An intent to deceive may be proved by circumstantial evidence and may be deduced from the circumstances of the case.

"As the representations were made prior to the transaction, and directly related to it, it must be presumed that they were made for the purpose and with the design of inducing plaintiffs to enter into the contract." *Eichelberger v. Mills Land, etc., Co.*, 9 Cal. App. 628, 100 P. 117, 120.

[4] It is next urged that the representations were as to a matter of law and not of fact. Of course, the question of whether or not the way across the property had ripened into an easement by adverse use over a period of years, involved a conclusion that the law draws from proven facts. The false representation in this case went to the fact that no right of way existed over the property. While it involved a question of law, the representation actually made was as to the non-existence of a fact. In similar cases such representations have been held to be sufficiently representative of a fact to support a judgment for damages. *Hargrove v. Henderson*, 108 Cal. App. 667, 292 P. 148; *Jackson v. Meinhardt*, 99 Cal. App. 283, 278 P. 462; *Grady v. Luy*, 117 Cal. App. 292, 3 P.(2d) 577.

[5, 6] Appellants maintain that finding No. 6 is not supported by the evidence. This finding concerns false representations made by them. They summarize the portions which they contend are not supported by the evidence as follows: "a. That the roadway was not a public road or private right of way. b. That the roadway no longer existed. c. That it would be proper to plow up the roadway." Subdivision "b" is not a fair summary of any portion of the finding. It is clear that the court intended to find that appellants represented, not that the road no longer existed, but that it never was a public road or an easement. We have already quoted sufficient evidence to support this finding. It is true that there is a conflict in the evidence on the facts found. We are not concerned with conflicts here. They are addressed to the trier of fact and his conclusion on what portion of the testimony is true is conclusive on appeal.

[7] Appellants urge that, as respondents saw the roadway crossing the property and knew that others used it, they were not entitled to rely upon the false representation that it was neither a public road nor a private right of way. Their knowledge of these facts is admitted. They did not know that lapse of time had ripened the use into an easement. They did not know how long the

way had been used. These facts were known to appellants and concealed by them. In *Shermaster v. California Bldg., etc., Co.*, 40 Cal. App. 661, 181 P. 409, 411, it was said:

"One who makes statements false in fact, and induces another to buy property, cannot defeat liability for the false statements by showing that if the other party had suspected him of falsehood or doubted the accuracy of the statements, such party, by ordinary diligence and by inquiry of persons whom he knew to be cognizant with the truth, could have learned of the accuracy or falsity of the statements." *Spreckels v. Gorrill*, 152 Cal. at 395, 92 P. 1017.

"One party to a contract is under no obligation to investigate and verify the statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." *Dow v. Swain*, 125 Cal. 674, 58 P. 271."

It is not necessary to consider the other points presented by appellants.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App. 659

In re STANTON.

Cr. 75.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1933.

1. Justices of the peace ☞8.

Justices of peace of judicial townships continued to hold office after effective date of ordinance consolidating townships, and until justice of new township took office.

2. Habeas corpus ☞92(1).

Court in habeas corpus proceeding could not consider question whether petitioner was convicted upon uncorroborated testimony of accomplice.

Application by Elmer Stanton for writ of habeas corpus to secure release from the custody of the Sheriff of Riverside County.

Writ discharged and petitioner remanded.

Joseph Seymour, of Riverside, and Albert Trujillo, of San Bernardino, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, for respondent.

MARKS, J.

On July 9, 1932, a criminal complaint was filed with the justice of the peace of Mecca

judicial township in Riverside county, charging petitioner with the unlawful possession of intoxicating liquor. A warrant was issued for his arrest, and he entered a plea of not guilty to the charge, and the case was set for trial by Justice of the Peace Max M. Zimmerer of Mecca township. At the time set for the trial Judge Zimmerer was ill and, at his request, Justice of the Peace R. M. Aitchison of Thermal township presided at the trial, which resulted in the defendant being found guilty. Judgment was pronounced upon him, and he sought a writ of habeas corpus from this court to effect his release from confinement by the sheriff of Riverside county.

The principal ground relied on by petitioner is that neither Justice Zimmerer nor Justice Aitchison were justices of the peace, and that neither Mecca township nor Thermal township was in existence as a judicial township of Riverside county after July 6, 1932.

On June 6, 1932, the board of supervisors of Riverside county passed an ordinance dividing the county into nine judicial townships. This abolished the judicial townships of Mecca and Thermal and incorporated them within the boundaries of the judicial township of Indio.

[1] It is the contention of petitioner that this ordinance went into effect thirty days after its passage and immediately abolished the two judicial townships in question and deprived the two justices of the peace of their offices. All of his argument in support of this contention has been decided adversely to him in the case of *Proulx v. Graves*, 143 Cal. 243, 76 P. 1025. The *Proulx* Case is authority for our holding that the justices of the peace of Mecca and Thermal judicial townships will hold their offices until their successor, a justice of the peace of Indio judicial township, takes his office following the next general election.

Petitioner relies upon the decision of *Deupree v. Payne*, 197 Cal. 529, 241 P. 869, which he contends in effect reverses the *Proulx* Case. We cannot agree with this contention. It clearly appears that the conclusion in the *Deupree* Case was reached under the constitutional amendment providing for the establishment of municipal courts and the statute passed under the provisions of this amendment. Article 6, § 11, Const.; Stats. 1925, p. 648. This decision is clearly inapplicable to the facts of the instant case because there is no municipal court in Riverside county and there is no city in that county with a sufficient population permitting the establishment of such a court.

[2] Petitioner contends that he was convicted upon the uncorroborated testimony of an accomplice. It was held in the case *In re Kelso*, 147 Cal. 609, 82 P. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178, that: "In this

proceeding, we cannot, of course, consider the evidence given upon the trial of petitioner, or determine whether or not that evidence showed that he committed the acts charged against him. The adjudication of the trial court, and the affirmance of the judgment by the superior court, are conclusive upon that question here."

In his petition petitioner asserts that he was held in custody under a void commitment because the justice of the peace neglected to sign the certification on this document. The return of the sheriff shows a certification was properly executed on the 17th day of October, 1932. In the case of *In re Nakamishi*, 19 Cal. App. 552, 126 P. 508, this was held sufficient to hold petitioner.

The writ heretofore issued is discharged, and the petitioner is remanded to the custody of the sheriff of Riverside county.

We concur: BARNARD, P. J.; JENNINGS, J.

129 Cal.App. 62

TROPP v. TROPP.

Civ. 8717.

District Court of Appeal, First District,
Division 2, California.

Jan. 20, 1933.

1. Bankruptcy ☞421(1).

Divorced husband's agreement to pay wife \$50,000 in annual installments *held* "debt incurred in effecting property settlement" dischargeable in bankruptcy proceeding (Bankr. Act, § 17, as amended by Act Feb. 5, 1903, § 5 [11 USCA § 35]).

Under agreement which was embodied into and approved by terms of divorce decree, husband agreed to pay \$250 per month for maintenance and support of wife until her remarriage, and agreed to pay \$50,000 in ten equal annual installments, and that husband's obligation to pay \$50,000, or balance thereof, would continue in event of wife's remarriage.

2. Bankruptcy ☞391(3½).

Where defendant was released from debt by decree of discharge in bankruptcy, order for perpetual stay of execution *held* proper.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Divorce action by Violet W. Tropp against E. Tropp. A decree was rendered for plaintiff, and, from an order terminating defend-

ant's liability for payment under agreement embodied into decree, plaintiff appeals.

Affirmed.

James P. Sweeney, of San Francisco, for appellant.

Young, Hudson & Rabinowitz, of San Francisco, for respondent.

SPENCE, J.

By the terms of the agreement of the parties hereinafter set forth, which agreement was embodied into and approved by the terms of the amended interlocutory decree of divorce and also the final decree, defendant was required to pay to plaintiff the sum of \$250 per month, and the further sum of \$50,000, payable in ten annual installments. Subsequently the defendant moved the trial court for an order terminating his liability for the payment of said sum of \$250 per month on the ground that plaintiff had remarried, and for a further order perpetually staying execution of that portion of the judgment providing for the payment of \$50,000, upon the ground that defendant had "obtained a discharge in bankruptcy from all of his provable debts including that for said \$50,000." From the order granting said motion, plaintiff has appealed.

Said agreement, which recited that the parties "desire to completely settle and adjust all property rights between said parties," provided as follows:

"Now, therefore, the party of the first part agrees to pay the party of the second part the sum of \$250.00 per month, subject to reduction thereof as provided for in the next paragraph, payable on or about the first day of each and every month hereafter as and for the maintenance and support of the party of the second part until remarriage of said party of the second part, and thereupon the obligation of the party of the first part to continue such payments shall cease and determine.

"The party of the first part hereby further agrees to pay the party of the second part the sum of fifty thousand dollars in ten equal annual installments, the first of which shall be payable one and a half (1½) years from date hereof and the remaining installments on the same date of each and every year thereafter until the said sum of fifty thousand dollars has been paid without interest. Upon payment of each annual installment of five thousand dollars, the monthly allowance of two hundred and fifty dollars provided for in the preceding paragraph shall be reduced to the extent of twenty-five dollars per month, it being distinctly understood that each respective \$25 per month reduction shall only take effect upon payment of each respective \$5000 installment. First party's obligation to pay said monthly allowance shall cease in the

event of remarriage of second party, but in this event first party's obligation to pay said \$50,000 and/or balance thereof shall continue in full force and effect. * * *

"The party of the second part hereby releases the party of the first part from all claims and demands of every character arising out of the marital status of said parties, including attorneys' fees in the action between said parties, costs, temporary alimony, permanent alimony, support and maintenance, right of family allowance and right to inherit, and all claims of every character and description held by the said second party against the said first party, save as herein provided. The second party further relinquishes all right, title, claim and demand in and to community property of said parties and hereby sets over, transfers, assigns and delivers to the said first party all properties, claims and demands of every character and description owned by said parties, it being distinctly understood and agreed that this agreement comprises the complete adjustment and settlement between said parties of all claims and demands of every character and that said second party shall have no rights, titles or claims against said first party, save as herein provided. * * *

The amended interlocutory decree recited that it appeared "to the satisfaction of the court from the agreement submitted to the court adjusting the property rights of the parties to this action that the same is fair and equitable and reasonable provision is made for the maintenance and support of plaintiff," and decreed "that the agreement by and between the parties hereto settling their property rights is hereby ratified and approved."

Appellant makes no attack upon that portion of the trial court's order terminating the liability of respondent to pay appellant the sum of \$250 per month. Appellant had remarried, and such liability had terminated by the express terms of the agreement. The attack is directed at that portion of the order relating to respondent's liability to plaintiff in the sum of \$50,000, and the only question which arises is with respect to the effect of the discharge in bankruptcy upon said liability. In this connection it appears that respondent had duly filed his petition in bankruptcy together with the required schedule listing said obligation as one of his liabilities, and had thereafter obtained a decree of discharge in the bankruptcy proceedings.

[1, 2] Appellant contends that respondent's liability to pay said sum of \$50,000 was a liability for "maintenance or support" within the meaning of section 17 of the Bankruptcy Act, as amended in 1903 (U. S. Stat. L., vol. 32, part I, p. 798 [11 USCA § 35]), and that the trial court erred in concluding that said liability was "a proven and dischargeable debt in said bankruptcy proceedings." In our opinion this contention is without merit.

By the terms of that section, as amended, the decree of discharge released respondent from "all of his provable debts," except liabilities for "alimony due or to become due, or for maintenance or support of wife or child. * * *" No exception is made by said section for a liability incurred in effecting a property settlement. If then the liability to pay the sum of \$50,000 was a liability incurred in effecting a property settlement as distinguished from a liability for "maintenance or support," it was one of respondent's provable debts from which he was released.

It appears entirely clear that the agreement of the parties provided for two distinct liabilities. In the first paragraph of the agreement above set forth, it was expressly agreed that the liability for the monthly payment was one for "maintenance and support." It was not so agreed with respect to the liability for the payment of the \$50,000. It was further agreed that the liability for the monthly payment was to "cease in the event of remarriage," while the liability for the \$50,000 was to "continue in full force and effect," despite such remarriage. Taking the agreement by the four corners, it appears that it was essentially an agreement made for the purpose of effecting a property settlement with provision incidentally made for maintenance and support of appellant during the time provided for the completion of such property settlement. We are therefore of the opinion that the trial court correctly concluded that the only liability for "maintenance or support" within the meaning of the Bankruptcy Act was the liability for the monthly payment, and that the remaining liability for the payment of the \$50,000 was a "debt" from which respondent was released.

Our attention has not been called to any authority dealing with an agreement similar to the one before us. It was generally held, even prior to the amendment of 1903, that a husband was not released from his obligation of support by a decree of discharge in bankruptcy, even though such obligation had been made specific in amount by decree or agreement of the parties. *Wetmore v. Markoe*, 196 U. S. 68, 25 S. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; *Dunbar v. Dunbar*, 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084; *Audubon v. Shufeldt*, 181 U. S. 575, 21 S. Ct. 735, 45 L. Ed. 1009; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351. It further appears that the amendment of 1903 was "merely declaratory of the true meaning and sense of the statute" as it previously existed. *Wetmore v. Markoe*, supra. The foregoing authorities rested upon the conclusion that the liability for maintenance and support was not a "debt" within the meaning of the Bankruptcy Act. In support of this position, reference was made to the propriety of enforcing the liability by imprisonment for contempt without violating the constitutional provision prohibiting imprisonment for debt.

Barclay v. Barclay, supra. A reading of the above-mentioned authorities shows that in every case the liability was one which was clearly imposed with reference to the husband's obligation for maintenance and support, and that the amount was a reasonable one for that purpose. In the present case the situation is quite different. A substantial monthly payment was provided in the agreement for the maintenance and support of appellant, and we believe it is clear that respondent's liability for the payment of the \$50,000 constituted a "debt" incurred in effecting a property settlement. Respondent having been released from said debt by the decree of discharge in bankruptcy, the order for a perpetual stay of execution was proper. 7 Corp. Jur. 398.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

community property accumulated by husband after he abandoned wife and lived with another woman who claimed interest in property (Civ. Code, § 137).

No issue was raised in the pleadings in wife's action for separate maintenance concerning division or other disposal of the community property accumulated by defendant husband in state where he resided with another woman, but complaint asked only an allowance for wife's support; and, in view of the fact that husband claimed to hold the realty in joint tenancy with the other woman with whom he lived, and who was not a party to the maintenance action, trial court properly eliminated from the maintenance action the disposition of the community property.

5. Appeal and error ☞110.

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Martha Moffitt against Arthur C. Moffitt, sometimes known as C. A. Maple, for separate maintenance. From a judgment for plaintiff and from an order denying defendant's motion for new trial, defendant appeals.

Affirmed.

J. E. Light, of Los Angeles, for appellant.

J. R. Wilder, Halford R. Thomas, and Josef Widoff, all of Los Angeles, for respondent.

VAN ZANTE, Justice pro tem.

This is an appeal by defendant Arthur C. Moffitt from a judgment granting plaintiff Martha Moffitt a decree of separate maintenance, without divorce, on the ground of desertion. These parties intermarried May 10, 1885, and resided together in the state of Indiana for a period of approximately twenty years, or until about the 26th day of March, 1904, when defendant, with another woman, and without the knowledge or consent of plaintiff, came to California and lived in this state under the assumed name of C. A. Maple. Here he accumulated considerable property.

In the year 1909, plaintiff came to California and apparently quite by accident discovered defendant's whereabouts in Los Angeles. She visited his home where he was living with the other woman as husband and wife under the assumed name. Some steps were taken looking toward a reconciliation between the husband and wife, but during this same year defendant left Los Angeles and California and lived for a time in the state of Washington. For a period of less

128 Cal.App. 676

MOFFITT v. MOFFITT. Civ. 1007.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1933.

1. Trial ☞403.

Order substituting new findings and conclusions nearly five months after original findings and conclusions were filed and which had become lost *held* authorized (Code Civ. Proc. § 1045).

2. Divorce ☞69.

Husband and wife ☞288.

Whether lapse of time in suing for divorce or separate maintenance is reasonable is for trial court to determine.

3. Husband and wife ☞288.

Finding that action for separate maintenance not commenced until over 23 years after husband's disappearance was not barred by laches *held* warranted.

The facts disclosed that, after husband and wife lived together in Indiana for about 20 years, husband, with another woman and without wife's knowledge, came to California and lived in state under assumed name and accumulated considerable property, and that wife did not discover his presence in state until about 5 years later, when steps for reconciliation failed.

4. Husband and wife ☞299(1).

Judgment for separate maintenance *held* not erroneous for failure to dispose of com-

than a year he sent plaintiff several letters and some money. Then communication between the parties ceased until in 1927. In the interim plaintiff returned to her home in Indiana, but again came to California in 1924. In the year 1927 she again discovered defendant living with the same woman under the assumed name in Los Angeles. He again gave her some money, but no further steps were taken looking to a reconciliation. During all the time from 1904 to 1927, except for the period of less than one year when defendant was in the state of Washington, plaintiff was more or less diligently searching for defendant. The plaintiff in part earned a living by doing menial labor, and in part was dependent for support on the charity of friends. However, she did own some property in Indiana. This was incumbered, and she had been unable to sell it.

[1] Defendant contends that the judgment awarding plaintiff separate maintenance should be reversed on the following grounds: First, that no findings were made; and, second, that plaintiff was guilty of laches. As to the first ground, since the defendant filed his notice of appeal, the plaintiff, on a showing made before the trial court on the 21st day of October, 1930, obtained the following minute order: "J. R. Wilder appearing as attorney for plaintiff and J. E. Light for defendant. It appearing to the Court that the Findings of Fact and Conclusions of Law signed and filed May 29, 1930, have been lost and after diligent search, have not been found; now upon motion of the plaintiff, it is ordered that a copy thereof, which the Court has duly signed and ordered filed this day, be and the same is hereby substituted in the record as of the original date for the said lost Findings of Fact and Conclusions of Law."

In accordance with said order, findings of fact and conclusions of law signed by the same judge who tried the case, and dated on the 29th day of May, 1930, were filed on the 21st day of October, 1930. The order was in effect nunc pro tunc, and the filing of a copy of the findings of fact and conclusions of law under the circumstances here disclosed is expressly permitted under section 1045 of the Code of Civil Procedure. When so filed they become the findings and conclusions in the case.

[2, 3] As to defendant's second ground, that plaintiff was guilty of laches, we think his position untenable. He cites no authorities to sustain his position, and we take it there are none. The question whether the lapse of time in bringing an action for divorce or separate maintenance is reasonable or not is one which the trial court must determine. There is ample evidence in the record to support the conclusion of the trial court. *Hansen v. Hansen*, 86 Cal. App. 744, 261 P. 503; *Johnston v. Johnston*, 21 Cal. App. 181, 131 P. 81; *Dee*

v. Dee, 87 Cal. App. 17, 261 P. 501. Furthermore, it has been held that willful desertion is a continuing offense. *Dee v. Dee*, supra; citing *McMullin v. McMullin*, 140 Cal. 112, 73 P. 808; *Locke v. Locke*, 153 Cal. 56, 94 P. 244.

[4] At the hearing on appeal, appellant urged that the case should be reversed on the further ground that no disposition was made by the trial court of the community property. In the findings the trial court found with reference to property rights involved, as follows: "The Court Further Finds that said defendant has acquired certain community real property since the date of said marriage, and the same is situate in the said County of Los Angeles, State of California, and more particularly described as—(then follows particular description). But the Court makes no determination as to the rights thereto of the parties hereto, or division thereof."

In the decree of separate maintenance no mention is made of community property. In separate maintenance actions the requirements with reference to the disposition of community property are the same as in actions for divorce. Section 137, Civ. Code. The evidence on the part of the defendant indicates that he claims to hold the real property in Los Angeles county in joint tenancy with the other woman. The indication that there was a third party interested in this property evidently led the trial court to the conclusion that the property rights should be determined in a subsequent action. Indeed, assuming this evidence of the defendant to be true, a complete determination of the property rights of the three persons could not have been had without the presence of the cotenant. Under the circumstances, we believe the trial court was justified in leaving the property rights of the parties undetermined in this proceeding. "In this state the parties may wholly omit, or in part omit, to cause their property rights to be adjudged in the interlocutory decree, or they can cause such rights to be adjudged in such interlocutory decree. *Brown v. Brown*, 170 Cal. 1, 3, 4, 147 P. 1168. As to all matters contained in the interlocutory decree, every attack can be made that can be made on a final decree in any other kind of a suit. Civ. Code, § 131." *Abbott v. Superior Court*, 69 Cal. App. 660, at page 664, 232 P. 154, 155. See, also, *Minium v. Minium*, 53 Cal. App. 55, 199 P. 1104; *Percy v. Percy*, 188 Cal. 765; *Taylor v. Taylor*, 192 Cal. 71, 218 P. 756, 51 A. L. R. 1074. The defendant and appellant injected this issue that a third party claimed an interest in the property involved as a cotenant. No issue was raised in the pleadings concerning a division or other disposal of the community property, the complaint asking only an allowance for the support of the plaintiff. For these reasons we deem it proper and expedient on

the part of the trial court to eliminate from the maintenance proceeding the disposition of the community property.

[5] Appellant has attempted to appeal from an order denying his motion for new trial. No appeal lies from such an order. *Burk v. Extrafine Bread Bakery*, 208 Cal. 105, 280 P. 522; *In re Guardianship of Hann*, 100 Cal. App. 743, 281 P. 74. The appeal from said order is dismissed.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

129 Cal.App. 236

In the Matter of the Application of P. M.
STEPHENS, for a Writ of Habeas
Corpus.
Cr. 2310.

District Court of Appeal, Second District,
Division 2, California.
Jan. 26, 1933.

Application for writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure the release of petitioner on the ground of illegal detention. Writ discharged; petitioner remanded.

Robert R. Weaver, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Leonard Comegys, of Los Angeles, for respondent.

STEPHENS, J.

Through the writ of habeas corpus petitioner asks this court to determine that he is held in illegal restraint under two sentences issued out of the justice's court. He claims that the acts found by the court to have been committed by him are not prohibited by any law. He raises no question as to the sufficiency of the criminal complaints that served as the bases of the prosecutions, nor does he question the legality of the act that is alleged to have been violated.

To present his case to us, petitioner admits that a trial was had upon each complaint and sets out copies of certain exhibits which he introduced in the trials. There is no claim that these exhibits constitute all of the evidence, and there is nothing before us as to what facts were found by the court. It should be understood that we are not intimating any conclusion as to the propriety of presenting any evidence to us. In the circumstances, it is obvious that the writ must be discharged

and the petitioner remanded, and such is our order.

We concur: WORKS, P. J.; CRAIG, J.

129 Cal.App. 88
PEOPLE v. CASERI.
Cr. 1238.

District Court of Appeal, Third District,
California.
Jan. 21, 1933.

1. Parent and child §17(2).

Father, unable to find continuous employment, who sent most of money earned to divorced wife for support of children, held not punishable for willfully failing to support children (Pen. Code, § 270).

2. Parent and child §17(2).

One who exercises reasonable diligence to procure employment but is unsuccessful, and is without property or means of supporting children, is not guilty of willful nonsupport (Pen. Code, § 270).

3. Criminal law §304(2).

Court takes judicial notice of prevalence of unemployment in America in 1932.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Robert Caseri was convicted of willfully failing to supply his minor children with necessary food and clothing, and he appeals. Reversed.

E. T. Taylor, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of the misdemeanor of willfully failing to supply his minor children with necessary food and clothing, contrary to the provisions of section 270 of the Penal Code. He was sentenced to imprisonment in the county jail for a term of six months. The judgment was suspended and he was released on his own recognizance for the purpose of permitting him to support his family. From the judgment of conviction the defendant has appealed. It is contended the judgment is not supported by the evidence.

The defendant is divorced from his wife, Emma Caseri. There were six children as

the issue of their marriage. The ages of these children ranged from seven to fourteen years. The children were awarded to the custody of Mrs. Caseri in the divorce proceeding, together with the sum of \$40 a month for their support. For about two years Mrs. Caseri and the children lived with her father, John Tunzl, at Crows Landing. During that period of time Mr. Tunzl furnished these children and their mother with nearly all the food and clothing which they required. It appears without dispute that the defendant, Robert Caseri, was a farm laborer without property or means who lived in a dilapidated old cabin and was unable to find employment during most of the time he is charged with failure to support his children.

[1] The defendant testified that he contributed to the maintenance of his children in 1931 a total sum of \$148, which was practically all that he earned. He explained that his compensation for farm services included his own board and lodging. He specified the amounts which he received during each month, and the various names of his employers who live in Stanislaus county. He claimed that he sent to his wife in 1931 all that he earned except about the sum of \$20, which he spent for tobacco and incidental necessities. There was no effort to dispute this evidence. Mrs. Caseri was a witness at the trial in behalf of the prosecution, but she did not dispute her husband's statement as above related. He further testified that he was able to find no employment in December, 1931, or in January, 1932. He said that he worked for Henry Johnson in February and March, 1932, pruning fruit trees; that he earned only \$20.94. He named five other persons for whom he worked in 1932, mentioning the sum of money which he was paid by each of them. He claimed that he sent to his wife for the support of their children all that he earned that year except the sum of \$13.75. Regarding his inability to secure work, he testified that: "I tried all over to get work. I went as far as Petaluma to get work. * * * I have worked every job I could get on, every place. * * * (From the money which I earned I kept for myself) just enough to live on, and a poor living at that, I was baching in an old cabin." He mentioned the names of local farmers from whom he sought work in vain. There was no effort to contradict the testimony of the defendant. His evidence must therefore be accepted as true. The district attorney conceded that it was true. He said: "We cannot refute his statement that he may have been attempting to get work, and failed to get it." Mr. Henry Johnson, for whom the defendant pruned trees, was called as a witness in behalf of the prosecution. He corroborated Mr. Caseri with respect to the sum of money which he paid to him, and the time

during which he was employed. He said that his services were satisfactory, and that at the request of the defendant he sent the check for a portion of his wages to his wife. Johnson also corroborated the defendant by testifying that he knew he had worked for his neighbor, Pedroni, pitching hay. Mrs. Caseri testified that her husband had given her \$46 during the months of 1932 prior to his arrest. She did not contradict anything that he said regarding the work which he performed, the money which he received; the proportion thereof which he claims to have paid her, or his inability to find work during a considerable portion of the time.

The defendant's testimony indicates that he paid to his wife nearly all he was able to earn; that he sought for work and was unable to find employment during most of the time he is charged with failure to support his children. The only evidence which even tends to show the defendant's ability to furnish the necessary food and clothing which he is charged with failing to supply to his children is Mrs. Caseri's reply to the following inquiry:

"Q. *Do you think* that he has the ability to provide * * * the necessities of life for your children, if he would work? A. Yes sir. * * *

"Q. *Is it your opinion* that he has the ability to furnish these necessities of life if he would work and do so? A. Yes sir."

These statements are valueless as evidence of ability to supply the necessities of life on the part of the defendant. They are not based upon facts or knowledge on the part of the witness. The answers purport to be based upon mere speculation and opinion. Not a circumstance is related upon which these suppositions are based. It would amount to a miscarriage of justice to support a judgment upon such flimsy evidence of ability to support minor children. The wife does not even testify that her husband was lazy. Her own witness, Johnson, appears to refute that theory. There is no substantial evidence to support the judgment of conviction.

Section 270 of the Penal Code provides that a father "who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor."

[2, 3] One who exercises reasonable diligence to procure employment and fails to secure work through no fault of his own, and who is without property or means with which to support his children, is not guilty of willfully omitting to supply them with necessary food or clothing. *People v. Wallach*, 62 Cal. App. 385, 393, 217 P. 81; 20 Cal. Jur. 422, § 21. A man is expected to neither steal nor beg in order to supply his children with the

necessities of life All that is required to refute the theory of willful failure to supply the necessities of life is that a man shall honestly seek for employment and diligently perform his service to the best of his ability, contributing all that he can reasonably spare for the maintenance of his children. This court will take judicial knowledge of the fact that millions of men were out of employment in America in 1932 and that it was difficult for a laboring man to find work. The judgment of conviction lacks support of the evidence. The trial judge recognized this fact. To the assertion of defendant's attorney that, "I do not believe that the evidence justifies the finding of guilty," the judge replied: "I think it is very doubtful, myself, but I was trying to see whether we could not get some solution of this matter."

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 703

PEOPLE v. HIDALGO.

Cr. 2267.

District Court of Appeal, Second District,
Division 1, California.

Jan. 16, 1933.

Hearing Denied by Supreme Court Feb. 15,
1933.

1. Forgery $\S$ 44(1/2).

Evidence held insufficient to sustain conviction for forgery of checks (Pen. Code, $\S$ 470).

2. Forgery $\S$ 44(2).

In check forgery prosecution, if neither of two names signed under name of corporate drawer was fictitious, prosecution was required to show that neither of such persons was authorized to sign check, and, if authorized, that neither had signed or authorized his name to be signed by defendant (Pen. Code, $\S$ 470).

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Joe Hidalgo was convicted of forgery, and he appeals.

Reversed.

Delamere F. McCloskey, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

HOUSER, J.

On each of six separate counts of an information filed against him, defendant was convicted of the crime of forgery. From the ensuing judgment, as well as from an order by which his motion for a new trial was denied, defendant appeals to this court.

In each count of the information the instrument alleged to have been forged and "passed" was a check on Seaboard National Bank of Los Angeles, purportedly drawn by "Baker Ice Machine Company, L. Baker, H. Spencer." The only variations that distinguished any one of such checks from either of the others were its serial number, its date, the amount for which, and the person in whose favor, it was drawn. The following is a copy of one of such checks:

"Baker Ice Machine Co., Inc.

"Los Angeles Factory No. 33292

"Los Angeles, April 14, 1932.

"Pay to the order of Antonio Gomez \$18.54
Eighteen Dollars Fifty Four Cents only Dollars

"Baker Ice Machine Co.

"L. Baker,

"H. Spencer

"To Seaboard National Bank

"Los Angeles, California."

In effect, it is contended by appellant that each of the several verdicts returned by the jury was "contrary to law * * * and to the evidence"; that is to say, that neither the verdict nor the judgment was supported by the evidence.

[1] On the part of the prosecution it was shown that a large number of blank checks had been stolen from Baker Ice Machine Company; that defendant admitted having had such blank checks in his possession, and that in each instance a stolen blank check was made use of in uttering a so-called forged check; also that defendant "passed" each of the checks in question. As to three of such checks only, testimony was received in substance that defendant indorsed each of them; but, as to the three remaining checks, no evidence was offered which tended to show that defendant had indorsed either of them. The evidence disclosed the facts that Baker Ice Machine Company was a foreign corporation; that it had a branch office in the city of Los Angeles; that one J. M. McKenzie was its local manager; and that the said corporation had a banking account with Seaboard National Bank. By reference to "signature cards" and other records of Seaboard National Bank, the assistant cashier thereof testified that the bank was "authorized" to honor Baker Ice Machine Company checks on the signature of "J. L. Baker, President; F. J. Bette, Secretary; J. M. McKenzie, Manager of the Corporation, or any other by said J. M. McKenzie, and there are two other signatures,

Charles E. Hollingsworth, and Laurel K. Brink."

Another witness, who was "head of the bookkeeping department of the Seaboard National Bank," testified that the bank was not "authorized" to honor any checks drawn by H. Spencer or L. Baker, or "by the joint signatures of those two names," and that the "authority" to honor checks came from J. M. McKenzie, who was the local manager of Baker Ice Machine Company. A man who called himself the "office manager" of the branch office of Baker Ice Machine Company testified that he did not know defendant; that to his knowledge defendant was not "connected" with Baker Ice Machine Company; that none of the officers of that company was in Los Angeles; that "Mr. Baker's" name is J. L. Baker, and that the signature "L. Baker" on each of the questioned checks was not the signature of J. L. Baker; that he did not know L. Baker or H. Spencer, nor was he acquainted with the person in whose favor either of the questioned checks was drawn.

Section 470 of the Penal Code is the statute under the provisions of which defendant was prosecuted. As far as concerns the particular offense which defendant was alleged to have committed, the statute requires that "with intent to defraud," defendant sign either the name of another person or the name of a fictitious person to the questioned check; or that he utter or pass such check "as true and genuine * * * knowing the same to be * * * forged * * * with intent to prejudice, damage, or defraud any person. * * *

[2] Reverting to the evidence introduced on the trial of the action, and applying to it the statutory requirements, it will be noticed that the evidence is lacking in sufficiency to support either of the several verdicts returned therein in at least the following particulars: Other than the mere passing of the check (not shown to have been forged), there was no specific, or even general, evidence of "intent to defraud" (see *People v. Mitchell*, 92 Cal. 590, 28 P. 597, 788; *People v. Ball*, 102 Cal. App. 353, 282 P. 971); no evidence that defendant either signed the name of another person or persons to the check, or that either of such names was fictitious, or that, if fictitious, it was signed by defendant. By no evidence did it appear that the handwriting of either of the signatures on the check was identical with the indorsed signature of the payee thereof. Nor was any direct evidence introduced from which it might be inferred that defendant passed either of such checks "knowing the same to be forged." The prior theft from the corporation of the blank checks, and the subsequent admission by defendant that they had been in his possession, had no tendency to prove that a forgery had been committed either in the issuance, or in

the utterance, of checks which purportedly were authorized to be drawn and issued by the corporation. The fact that defendant "passed" the checks in question merely tended to show that, if a forgery had been committed, defendant might have been the person who committed the offense. No evidence that the check, or any checks, had been forged was placed before the jury. The most that appeared was that Baker Ice Machine Company had a banking account with Seaboard National Bank, and that as far only as the bank was concerned, it would honor checks drawn against said account which were signed by certain designated individuals. Neither by the minutes, nor by the records, of Baker Ice Machine Company was it shown that no other person or persons (possibly including L. Baker and H. Spencer) was or were respectively authorized by the corporation to draw checks on the said banking account. In part to the contrary, according to the records of the bank, it was "authorized" to honor a signature by "J. M. McKenzie, Manager of the Corporation, or any other by said J. M. McKenzie." No showing was made that J. M. McKenzie did not authorize L. Baker and H. Spencer to draw the checks which were the subject of the forgery. It is probable that even within the city of Los Angeles there are many different persons whose names would be properly represented by that of "L. Baker"; and the same situation would apply to the name "H. Spencer." Assuming that neither "L. Baker" nor "H. Spencer" was a fictitious name, it was necessary for the prosecution to show that neither of those persons was authorized to sign the check, and, if authorized, that neither of them had either signed the check or authorized his name to be signed by defendant thereto. *People v. Elliott*, 90 Cal. 586, 27 P. 433; *People v. Mitchell*, 92 Cal. 590, 28 P. 597, 788; *People v. Whiteman*, 114 Cal. 338, 46 P. 99; *People v. Lundin*, 117 Cal. 124, 48 P. 1024; *People v. McWilliams*, 117 Cal. App. 732, 4 P.(2d) 601; 12 Cal. Jur. 666, and authorities there cited. No attempt was made by the prosecution so to do. In fact, neither J. M. McKenzie nor any other officer of the corporation was called as a witness. If the checks were not forged, manifestly in that regard no crime was committed.

By no evidence did it appear that the payee of either of the checks was a fictitious person; nor that defendant indorsed either of three of such checks; nor, as to the three checks that he did indorse, that he was unauthorized by the payee thereof so to do, which latter fact was one of the essential elements of the crime to be proved by the prosecution. *People v. Lundin*, 117 Cal. 124, 48 P. 1024; *People v. Mitchell*, 92 Cal. 590, 28 P. 597, 788.

It follows that, on each of the six counts of the information on which defendant was

convicted, the evidence was insufficient to support the verdict returned by the jury.

It is ordered that the judgment and the order by which defendant's motion for a new trial was denied be, and they are, reversed.

I concur: CONREY, P. J.

I dissent: YORK, J.

129 Cal.App. 93

SMITH et al. v. CALIFORNIA THORN
CORDAGE, Inc., et al.
Civ. 4577.

District Court of Appeal, Third District,
California.
Jan. 21, 1933.

1. Contracts ⇨121.

Contract giving finance committee complete charge of corporation's finances and empowering committee to raise funds and providing that, when corporation indebtedness was discharged, committee's powers should thereafter be exercised by directors held illegal as usurping directors' powers (Civ. Code, § 305).

2. Contracts ⇨137(2).

Where main purpose of indivisible contract vesting directors' powers in finance committee was illegal, secondary stipulations for stock transfer were also illegal (Civ. Code, § 305).

3. Contracts ⇨138(1).

Party to illegal contract cannot base case thereon.

4. Contracts ⇨138(1).

Where parties to illegal contract are in pari delicto, courts will leave parties where they are.

5. Contracts ⇨140.

If property is transferred independent of illegal agreement, illegality is no defense in action to recover property.

6. Contracts ⇨138(3).

Transferor's "consent" to stock transfer authorized the carrying out of transfer; hence transferor could not recover stock transferred under illegal contract where stock stood in names of transferees at time of action.

"Consent" as a verb implies not merely that a person accedes to but authorizes an act.

[Ed. Note.—For other definitions of "Consent," see Words and Phrases.]

7. Corporations ⇨283(3).

Transferees whose claim to vote stock was based on illegal contract could not set aside election of directors though, as against transferor who voted stock, transferees had title (Civ. Code, § 315).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Wilburn Smith and others against California Thorn Cordage, Inc., and others, wherein defendant John C. Thorn filed a cross-complaint. From an adverse judgment, plaintiffs appeal.

Reversed with directions.

Lorrian Andrews, of Los Angeles, for appellants.

Finlayson, Bennett & Morrow, Lee Combs, Jr., George I. Devor, Pacht, Pelton & Warne, Frank M. Willcox, George A. Judson, and Hill, Morgan & Bledsoe, all of Los Angeles, for respondents.

TUTTLE, Justice pro tem., delivered the opinion of the court.

This action was brought under the provisions of section 315 of the Civil Code to set aside an election of the directors of a defendant corporation, and for an injunction to prevent certain defendants from acting as officers and directors of said corporation. Defendant Thorn filed a cross-complaint praying that he be adjudged owner of 1,632 shares of the capital stock of the corporation. The trial court entered judgment giving no relief to plaintiff, but granting the relief sought by defendant upon his cross-complaint. This appeal is prosecuted by plaintiffs from said judgment.

Pursuant to a call issued by the secretary of defendant corporation, a special meeting of the stockholders was held on July 6, 1929. The following were elected as directors at said meeting: Defendants Thorn, Langdon, Devor, Williams, Sawyer, Weiss, and Chambers. Thereafter the directors elected Thorn president, Williams vice president, Langdon secretary, and Sawyer treasurer. Prior to said election plaintiffs Smith, Lyday, Richey, and Cassidy were directors of said corporation, but, as indicated, failed to be re-elected at the July meeting.

While some attack is made upon the validity of the call for the stockholders' meeting, it is admitted by all parties that the real question at issue at the trial was the right of defendant Thorn to vote 1,632 shares of common stock. If he had no such right, a quorum was not present (as required by the by-laws) and no election of directors could be had.

The undisputed facts show that defendant corporation was organized in 1924, for the

purpose of manufacturing rope and twine. Defendant Thorn was one of the organizers and promoters of the company, and always took an active and dominant part in its management and affairs. Promotion stock in the amount of 1,632 shares was issued to Thorn, and, under the rules of the state corporation commissioner, were deposited in escrow with National City Bank of Los Angeles. Thorn parted with no monetary consideration when he acquired the stock, it being issued in consideration of services rendered the corporation. On and prior to December 2, 1926, one William Diller was a creditor of said corporation, having loaned to it large sums of money, secured by mortgages upon the real and personal property. These claims were assigned to plaintiff Cassidy, who had filed suit to foreclose said mortgages. During said time plaintiff Smith was a large creditor of the company, and his loans were all overdue and unpaid. Diller and Smith were the largest stockholders so far as actual cash purchases of stock were concerned.

On December 2, 1926, Diller, Smith, and Thorn executed an agreement concerning the affairs of the corporation. This agreement was merged into a second agreement, dated December 16, 1926. It recites that certain differences had arisen between the parties who were stockholders and directors of the corporation, in respect to its financial affairs and management. It is agreed that a finance committee be formed, composed of Diller, Smith, and Lyday, their appointment to be ratified by the directors, and that the by-laws be amended to give said committee the powers necessary to carry into effect the agreement. This committee is empowered to take complete charge and control of the finances of the corporation; to raise funds for the development of the corporation, either by sale of its capital stock or a bond issue, and to become guarantors upon its notes. Diller agreed, when the directors had ratified the contract, to dismiss all actions brought by him against the corporation. Thorn agreed to resign as general manager and accept a position as director of sales and production. The latter, as party of the third part, also agreed as follows:

"6th: Said party of the third part hereby agrees to forthwith assign and transfer to said finance committee in trust all, to-wit: 1632 shares of the common capital stock of said corporation heretofore issued to and now held by him, subject to escrow under control of the commissioner of corporations of said state; and he further agrees to transfer to said committee all other shares of the common capital stock of said corporation which may hereafter be acquired by him or to which he shall be entitled by reason of permits heretofore or hereafter granted by said commissioner of corporations. The stock so transferred and delivered to said committee in trust shall be held by said committee for the

following purposes, viz.": then follows an agreement whereby 720 shares of said stock shall be returned to Thorn when all the indebtedness of the corporation has been paid, and the balance, 912 shares, to be divided among certain stockholders under certain conditions. It is provided that, when all the obligations of the company have been discharged, the committee shall "automatically cease to exist and its powers shall thereafter be exercised by the board of directors of said corporation."

Shortly after the execution of this agreement, an application was filed with the corporation commissioner for permission to transfer the said 1,632 shares of stock which were in escrow. This application refers to the contract and the agreement by Thorn to forthwith assign and transfer said stock to Diller, Smith, and Lyday. It was executed by the corporation, and also signed by Thorn as vice president. Attached to the application is the following document:

"Consent to Transfer of Stock of Escrow by Transferor and Transferees. I, John C. Thorn, the transferor of a total of sixteen hundred and thirty-two (1632) shares of the common capital stock of California Thorn Cordage, Inc., do hereby consent to the transfer thereof for the purposes and in the manner and to the transferees upon each and all of the terms and conditions set forth in that said duly executed amended application for permit to transfer and issue stock in escrow, filed with the commissioner of corporations on the 16th. day of December, 1926. John C. Thorn [Signed] Transferor
Henry M. Lee [Signed]
Witness."

Thereafter the corporation commissioner gave his written consent to the transfer of said stock, according to said application, to the said three parties as trustees. The secretary of the corporation then issued a new certificate of stock, No. 248, in the name of the three trustees, and covering 1,632 shares, which had formerly been represented by three certificates in the name of Thorn, Nos. 203, 204, and 205. The new certificate was delivered to the bank, and the three other certificates were returned to the corporation. Indorsed upon each of said three certificates was the following language in the handwriting of Thorn:

"This stock certificate cancelled only on the condition of agreement dated December 16th, 1926, between William Diller, Dr. Wilburn Smith and John C. Thorn, and consent of Chester S. Lyday."

Shortly after the execution of the agreement of December 16, 1926, Diller caused the suits commenced in his behalf to be dismissed, and the finance committee started to function and continued until July, 1929. Diller also advanced to the corporation, upon notes, many thousand dollars, which has never been

repaid, nor has the indebtedness to Smith ever been discharged by the company.

Thorn resigned as general manager of the corporation, and was appointed director of sales and production, in accordance with the terms of the agreement.

With this background before us, we come to the stockholders' meeting of July 6, 1929. At said time this stock stood upon the books of the corporation in the names of Diller, Smith, and Lyday "in trust for J. C. Thorn." None of the plaintiffs appeared at said meeting. Thorn, as vice president, presided, and he presented the following document:

"To the Secretary of California Thorn Cordage, Inc., and to the Secretary of the meeting of the stockholders of said corporation held Saturday, July 6th, 1929;

"Please Take Notice that I hereby exercise my right to vote the 1632 shares of stock of which I am the beneficial owner, and which stands in the name of Wilburn Smith, Chester S. Lyday and William Diller, as trustees, for myself.

"I exercise this right under Section 313 of the Civil Code of California, and upon the further ground that any agreement made by and between myself and the said named persons as trustees is void, illegal, and contrary to law.

"[In pencil] John C. Thorn."

Without this block of stock, a quorum would not have been present. Thorn was permitted to vote these shares, and the election of new directors was held, as indicated.

The first question to be decided is the legality of the contract of December 16th. The trial court concluded that it was "contrary to public policy, is illegal, null and void." No serious contrary contention is made by appellants. Section 305 of the Civil Code read, when the contract was executed, as follows:

"The corporate powers, business, and property of all corporations formed under this title, must be exercised, conducted, and controlled by a board of not less than three directors, be elected from among the holders of stock."

[1] A casual reading of the contract at once discloses that it is a bald attempt to usurp the powers and duties of the directors. For instance, the "finance committee" is given "complete charge" of the finances of the corporation; and they are empowered to raise funds by sale of stock or a bond issue, and when the indebtedness of the company has been discharged, they shall cease to function, and their powers "shall thereafter be exercised by the Board of Directors." Agreements of this character have been consistently condemned and held void by our courts, upon the ground that they are contrary to public policy. *Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918E, 247; *Jackson v. Hooper*, 76 N. J. Eq. 592, 75 A. 568, 27 L.

R. A. (N. S.) 659, 664; *Farmers' Gin Co. v. Kasch* (Tex. Civ. App.) 277 S. W. 746; *Halde-man v. Haldeman*, 176 Ky. 635, 197 S. W. 376; *Teich v. Kaufman*, 174 Ill. App. 306. The prerogatives and functions of the directors of a stock corporation are definitely fixed and established by our Civil Code. Section 305 et seq. The effect of this contract would be to withdraw from the directors of the corporation that control and direction of its corporate affairs, business, and management which is vested in them by law and place such control and direction in the hands of three stockholders. Such contracts are clearly illegal and unenforceable in law and in equity.

[2] Appellants contend that the contract is divisible, and that the portion thereof which relates to the assignment and transfer of Thorn's stock is legal, though the other portions may be illegal. We are unable to agree with this construction. Without further elaboration, we hold that the legal provisions are so inextricably interwoven with the illegal that they cannot be separated therefrom. The main purpose—that these three men shall perform the most vital functions of the corporation—being illegal, the secondary stipulations fall with it. *Manson v. Curtis*, supra. The contract is single and indivisible, and the illegal part cannot be expunged.

We now come to the question as to what relief, if any, should be granted to either of the parties to the action. The judgment denied any relief to plaintiff. On the other hand, defendant was granted everything he asked, under his cross-complaint. He was adjudged to be the owner and holder of the 1,632 shares of stock. It was decreed that he could vote them, and that Smith, Diller, and Lyday had no right, title, or interest in said stock and their claims to the same were adjudged wrongful. All certificates of shares (Nos. 203, 204, 205, and 248) are ordered delivered up and canceled by the secretary of the corporation, and the secretary ordered to issue a new certificate to Thorn for 1,632 shares of stock, and the secretary is ordered to make an entry in his books showing Thorn to be the owner of said stock.

[3] Appellants contend that the trial court erred in granting such relief to defendants. Conceding that the contract was illegal, they insist that as the parties were in pari delicto, the court must leave them where it finds them. No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and set up a case in which he must necessarily disclose an illegal contract as the groundwork of his claim. 13 Cal. Jur. 492. In the case of *Dunn v. Stegemann*, 10 Cal. App. 38, 101 P. 25, 26, it is said: "It is well established that no recovery can be had by either party to a contract having for its object the violation of law. The courts re-

fuse to aid either party, not out of regard for his adversary, but because of public policy. Where it appears that a contract has for its object the violation of law, the court should *sua sponte* deny any relief to either party."

In *Domenigoni v. Imperial Live Stock, etc.*, 189 Cal. 467, 209 P. 36, 39, the court stated: "But it does not follow that the plaintiff was entitled to any relief. The entire transaction was an attempt to circumvent the law. * * * In such a case the court will give no relief even if the point is not raised by either party."

In 6 R. C. L. at page 826 the following appears: "In cases in which the parties are in *pari delicto* the courts not only refuse to enforce rights arising out of an executory illegal contract, but even where the contract has been executed in whole or in part by one of the parties, as for instance by the payment of money, the courts, notwithstanding the fact that the other has received the benefit thereof without giving anything in return, generally refuse to give relief, unless, as will be seen, the former repudiates the contract before the execution of the unlawful purpose."

In 6 R. C. L. at page 825 it is stated: "Where the parties are in *pari delicto*, no affirmative relief of any kind will be given to one against the other. The only equitable remedies which they can obtain are such as are purely defensive."

[4] Under the foregoing authorities, where the parties to an illegal contract are in *pari delicto*, the courts will not, on the one hand, undo what has been done, nor on the other, perfect what has been left unfinished.

[5, 6] In an attempt to justify the trial court in granting affirmative relief concerning the subject-matter of the contract, respondents take the position that defendant John C. Thorn did not rely upon the contract in making out a case under his cross-complaint. The record shows that he refers to the contract in his pleading, and alleges that it is illegal. He also sets up the fact that he never transferred the shares of stock, and that the purported transfer was without authority from him. It is true that, if certain property is transferred, not pursuant to an illegal agreement, but independent of that agreement, the illegality will not be a defense in an action brought to recover the same. But the cases which we have cited hold that, if the transfer is made pursuant to or purporting to have been made in the carrying out of the terms of the contract, the court will leave the parties just where it found them. It may be true that the defendant John C. Thorn is not seeking relief under the terms of the contract. What he is trying to do is to restore his own status quo by taking from the other parties property which he had transferred under the illegal agreement, pursuant

to its terms and conditions, something which, in this particular action, is not only wholly inequitable, but contrary to the express policy of the law. To this, the answer of respondents is that the court is changing nothing, and that the stock was legally his own property when the action was commenced. In the contract defendant Thorn "forthwith agrees to assign and transfer the stock." As an officer of the corporation John C. Thorn signed an application to the commissioner to have such transfer made. Attached to this application was his writing, wherein he stated that "I hereby consent to the transfer thereof." As defined in 12 C. J., page 519, "consent" as a verb "implies not merely that a person accedes to, but authorizes an act." The foregoing was sufficient authority for the carrying out of the stock transfer, so that the stock finally stood in the names of the parties as designated by the contract. We see no reason for giving extended consideration to the argument of respondents that title never passed under the contract, it being executory in character. Suffice it to say, that the transfer of the stock to three of the plaintiffs was pursuant to the terms of the illegal agreement, and, when this action was commenced, the stock stood in their names, and there, we believe, it should be left. The law does not undertake, in such cases, to settle any question of conscience between the parties. It found this stock to be in the names of these three plaintiffs as trustees. With the contract a nullity, the situation in which the parties are left may be anomalous, but that is one of the penalties which those who contract in defiance of the law must suffer.

The case is one where neither party has come into court with clean hands, but we are not prepared to lave one or the other. And yet, to permit this judgment to stand would outrage all considerations of equity. Since the contract was executed, plaintiffs dismissed their actions to enforce their obligations against the corporation, and have advanced to it thousands of dollars upon the faith of defendant Thorn's promises, and in reliance upon their ability to hold and vote this stock and thus control the affairs of the corporation. The evidence shows that at the March stockholders' meeting of the corporation in 1927, Thorn sat by and saw plaintiffs vote this stock, without protest. (We cite the latter instance merely to indicate the attitude of Thorn, and do not intimate that estoppel is available to plaintiffs in a case of this character.) And while plaintiffs have altered their positions to their financial prejudice, Thorn is permitted to take away from them the stock which he had transferred to them, pursuant to the contract. The granting of such relief is contrary to the principles governing actions of this character.

[7] As to plaintiffs, they are not entitled to any relief in respect to the legality of the

meeting of July 6th for the reason that their claim to vote the stock is based upon this illegal contract.

We conclude that the record shows that both parties entered into an agreement to circumvent the law, and that such agreement is therefore illegal and void, and that the law will not transfer the subject-matter of the contract from one to the other, but will leave the title and possession of the stock just as it stood when the action was commenced.

The judgment is reversed, with directions to the trial court to dismiss the action.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

129 Cal.App. 127

McINTYRE et al. v. CONSOLIDATED WATER CO. et al.
Civ. 4740.

District Court of Appeal, Third District,
California.
Jan. 23, 1933.

Hearing Denied by Supreme Court March 24,
1933.

1. Waters and water courses ☞ 156(1).

Contract whereby water company agreed to furnish water to landowners held not violative of Constitution; no preferential rights being given.

2. Waters and water courses ☞ 156(9).

Water company and its grantee, while retaining landowners' property, could not, merely by giving notice, cancel contract to furnish water.

It appeared that contract in question provided for its cancellation or annulment by giving notice thereof, and on annulment landowners were to be restored to original rights and privileges held by them regarding water rights.

3. Waters and water courses ☞ 156(9).

That water company, having sunk new well, abandoned well existing when company contracted to furnish water owned by landowners, did not entitle company to cancel contract.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Samuel B. McIntyre and others against the Consolidated Water Company and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Allard & Stead and Charles R. Stead, all of Pomona, and Allen G. Mitchell, of Los Angeles, for appellants.

Nichols, Cooper & Hickson, of Pomona, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiffs, numbering some sixty persons, are asking for declaratory relief for the construction of a contract, etc., under section 1060 of the Code of Civil Procedure. From the judgment entered in the action awarding the relief prayed for by the plaintiffs, the defendants appeal.

This case was before the Supreme Court upon an appeal from a judgment sustaining a general demurrer interposed by the defendants. The opinion reversing the judgment of the lower court is reported in 205 Cal. 231, 270 P. 444, to which reference is hereby made for a more complete statement of the facts than is necessary to be set forth herein. The case, as referred to, decided upon demurrer by the Supreme Court, had to do with the law involved in the action, and, upon this appeal, an examination of the record shows that the findings of the trial court are in accordance with the law as laid down by the Supreme Court. The findings are not attacked as being unsupported by the evidence.

The defendants upon this appeal urge: (1) That the contract of March 15, 1900, in so far as it affected waters dedicated to a public use, is invalid. (2) That the contract of March 15, 1900, was annulled in the manner therein provided. (3) That the judgment entered created a new contract, etc. (4) That the provisions of the contract were erroneously extended to persons not parties thereto.

The findings of the court show that on or about the 14th day of September, 1887, one Fred J. Smith and William Everett entered into a certain written agreement, by the terms of which Smith agreed to sell and Everett agreed to purchase a certain quantity of water that should be produced by Smith on lot 32 of Loop and Meserve tract, Rancho San Jose, county of Los Angeles. Deeds were executed thereafter, conveying title to the water in pursuance of the contract or agreement just referred to. The water was to be delivered through pipes to certain lots in a subdivision belonging to Everett. These lots were subsequently conveyed to the plaintiffs, together with water rights apportioning to each purchaser a certain quantity of water. In pursuance of the agreement between Smith and Everett and the deeds of conveyance, Smith developed water on lot 32, which water, by means of pipes, was thereafter conveyed to the lots belonging to the plaintiffs in this action. Thereafter lot 32 and the waters developed thereon, and to be developed thereon, were by mesne conveyances, transferred to the defendant Consolidated Water Company and by the Consolidated Water Com-

pany to the city of Pomona. In all of the transfers a reservation was made of the water and water rights conveyed and belonging to the plaintiffs and their grantors in this action.

The record shows that from 1887 until 1900 water was supplied as originally covenanted and agreed upon, and that, after some misunderstanding or dispute had arisen as to the rights of the respective parties, an agreement was entered into on March 15, 1900, under the terms of which water was supplied by the Consolidated Water Company to the plaintiffs for the period of about 26 years. In 1926 the Consolidated Water Company conveyed all its interest in the waters produced and being produced from said lot 32. Prior to the conveyance, the Consolidated Water Company gave notice to the plaintiffs of rescission of the contract, and after the conveyance to the city of Pomona this notice of rescission was affirmed. After the conveyance passing between the Consolidated Water Company and the city of Pomona, the city of Pomona refused to deliver water to the plaintiffs, except at an increased cost, which the plaintiffs were required to pay, and the judgment in this action fixes the amount thereof and adjudges that the plaintiffs are respectively entitled to a return of the excess charges paid by them, fixing the amount for each plaintiff.

The contract entered into between the plaintiffs and the Consolidated Water Company on the 15th day of March, 1900, set forth, among other things, that the plaintiffs, being the parties of the second part to said action, owned certain water rights and privileges and certain wells on lot 32 of the Loop and Meserve tract in the city of Pomona, under various deeds, and that the Consolidated Water Company owned certain rights therein, through mesne conveyances, and that for the purposes of settling their differences, it was agreed that the Consolidated Water Company would furnish and deliver, by pumping or other means, to each of the parties of the second part, from a well on said lot 32, or from other sources, water for domestic use, in quantities desired, and to which they were entitled under their respective deeds, the parties of the second part, the plaintiffs herein, to pay for said water at the rate of 8 cents per thousand gallons, up to the quantity to which each party was entitled. Any water furnished in excess of such quantity was to be paid for at the rates established by the municipal authorities of the city of Pomona.

The agreement further provided for the cancellation or annulment thereof, by giving notice thereof. Upon annulment, the plaintiffs were to be restored to the same rights and privileges held by them regarding the water rights about which the parties were contracting. The agreement further provided

for the installation of meters, the measuring of water, and other incidentals not material in this action.

During the time the parties were observing the provisions of the deeds and contracts to which we have referred, additional wells were sunk upon said lot No. 32, and the well producing water at the time of the trial of this action was sunk on said lot at about 9 feet distant from the well in existence at the date of the execution of the contract being considered. The old pipe line appears to have been allowed to fall into disuse; the old well was allowed to fill up, several hundred feet of the casing being removed, and the top of the well being covered over with concrete.

The first point for reversal made by the appellants that the contract is invalid in so far as it related to waters dedicated to a public use, appears to be entirely without foundation. A reading of the findings disclosed beyond question that it relates only to water and water rights belonging to the plaintiff in this action, in which the appellants have no ownership whatever, and to which none of the grantors of the appellants had any ownership after the title passed from Fred J. Smith, and ownership therein was transferred to William Everett, and through him down to the plaintiffs. That the Consolidated Water Company may have developed more water on lot 32 than was conveyed to the plaintiffs in this action, and devoted such water to public uses, does not lessen the ownership of the plaintiffs. The facts in this case do not present the question of whether a corporation engaged in the distributing of water for public purposes may enter into a contract to furnish one consumer water at a lower rate than is furnished to other consumers. In the instant case the Consolidated Water Company and the city of Pomona bought the water rights appurtenant to lot 32, remaining and existing after, over, and above the water rights theretofore vested in and belonging to the plaintiffs. In other words, the plaintiffs are the owners of a certain quantity of the water produced on lot 32, and the appellants in this action are the owners of the remainder thereof.

[1] When considered from its strict legal aspect, the case at bar does not present a sale of water at all. It is a case where certain waters have been sold, and the contract in this case obligated the Consolidated Water Company to furnish the water upon being paid a certain sum of money per thousand gallons; that is, the Consolidated Water Company was simply to furnish water owned by the plaintiffs. That part of the waters furnished from a common source may be privately owned, and the remainder thereof devoted to a public service, is supported by the following cases: *Del Mar Water, etc., Co. v. Eshleman*, 167 Cal. 666, 140 P. 591, 948; *Williamson v. Railroad Commission*, 193 Cal. 22,

222 P. 803; *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 P. 404, 29 L. R. A. (N. S.) 213. See, also, *McIntyre v. Consolidated Water Co.*, 205 Cal. 231, 270 P. 444, 446, where the Supreme Court, when this case was before it upon appeal, said: "The mere fact, therefore, that the water company was a public utility at the time the contract was made in no manner affected the plaintiffs' right to their interest in the water and distributing system." In the opinion just referred to, the Supreme Court also held that the contention of the contract being invalid, as a violation of article 14 of the Constitution, was without merit. No preferential rights being given under the contract, no violation of any portion of the Constitution is made to appear upon this appeal. As we have said, the contract provided for payment for services, and was in no sense a contract for the sale of water. None of the cases relied upon by the appellants touch the real issues here involved, and need not be reviewed.

The case of *Hudson v. Ukiah Water & Imp. Co.*, 177 Cal. 498, 171 P. 93, strongly relied upon by the appellants, may be mentioned. The facts, however, presented in that case are so dissimilar from those presented in the case at bar that it is not here controlling. In the *Hudson Case* an attempt was made to compel the delivery of more water than had been sold or agreed to be furnished. Nothing of the kind is before us in this action.

The remainder of the appellants' assignments of error may be considered together.

[2, 3] The record discloses that the appellants made no offer whatever to restore the plaintiffs to their rights and privileges, as provided for in the contract. Notice was simply given of cancellation, without anything further. To hold that this effected a cancellation of the contract and relieved the appellants from their obligations thereunder, while at the same time holding possession of the property agreed by the contract to be restored to the possession of the plaintiffs, would be inequitable and in violation of every principle of right dealing. The mere fact that the Consolidated Water Company, in carrying out its portion of the agreement, sunk the well now furnishing water on lot No. 32, at a distance of about 9 feet from the old well, and discontinued the use of the old well, does not change the ownership of the water, nor does it furnish a basis for the appellants in this action to effectuate a cancellation, simply by serving a written notice. We think the trial court properly held that the action of the appellants was not in accordance with the requirements of the contract, and did not work a cancellation thereof.

Again, if the appellants have placed themselves in a position where they cannot restore, it should be held to be their loss and

not the loss of the plaintiffs, who are not responsible for such actions. As said by the Supreme Court when this case was before it upon a former appeal: "The law provides a simple and just means by which a public utility may acquire the private property of others. * * * The cost of distributing plaintiffs' waters to their lands was definitely fixed by contract, and to raise the rate without their consent would impair the obligation of a contract, and, so far as the increase inured to the benefit of the public use by reason thereof, it would be the taking of private property for public use without compensation." We do not deem it necessary to cite authorities in support of what we have set forth. The statement of the equitable principles involved is sufficient, and the trial court correctly followed them in its decision.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

129 Cal.App. 196

PEOPLE v. BLAKE.

Cr. 1656.

District Court of Appeal, First District,
Division 1, California.

Jan. 25, 1933.

1. Criminal law ⇨366(2).

In assault prosecution, evidence that man assaulted had attempted several months before assault to rape defendant's mistress held properly excluded.

2. Witnesses ⇨405(1).

In assault prosecution, where man assaulted testified on cross-examination he did not attempt to rape defendant's mistress, evidence of attempted rape held properly excluded.

3. Criminal law ⇨721½(2).

In assault prosecution, court properly permitted district attorney to comment on defendant's failure to produce shoes worn at time of assault.

4. Criminal law ⇨808½.

Where instruction on flight is in language of statute, no other instruction on question is necessary, as statute expressly provides (Pen. Code, § 1127c).

5. Criminal law ⇨823(10).

Where other instructions told jury all questions of fact were for jury, there could be no misunderstanding that question of flight under instruction given in language of statute was for jury (Pen. Code, § 1127c).

6. Criminal law ☞822(1).

Instructions must be taken as a whole.

7. Criminal law ☞823(6).

In assault prosecution, instruction taking from jury possible apprehension of danger that defendant might have had *held* cured by instructions given on self-defense.

Instruction complained of was in substance that it would not justify assault on part of defendant if at some prior time man assaulted insulted or assaulted any other person out of the presence of defendant. In another instruction, court instructed jury that defendant was entitled to act on appearances, and, if language and conduct of man assaulted was such as to induce in mind of reasonable man belief that he was about to be attacked, it did not matter if danger was real or only apparent.

8. Criminal law ☞761(7).

Instruction if jury believed assault was made by means likely to produce great bodily injury, when made by means used, to find defendant guilty, *held* not erroneous because assuming fact.

Instruction was not erroneous under circumstances because evidence regarding means used was uncontradicted, and other instructions stated that questions of fact were for jury.

9. Assault and battery ☞29.

Jury could consider evidence of discrepancy in size between defendant and man assaulted in determining nature and character of assault (Pen. Code, § 245).

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Frank T. Blake was convicted of assault by means of force likely to produce great bodily injury, and he appeals.

Affirmed.

Philip B. Beggs, of Santa Cruz, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

BURROUGHS, Justice pro tem.

The defendant was convicted of the crime of assault by means of force likely to produce great bodily injury. This appeal is from the judgment upon the verdict and from an order of the court denying a motion for a new trial.

The evidence in support of the verdict is briefly and fairly epitomized in respondent's brief as follows:

"One Alexander Morgan was a fish peddler and on the morning of November 24, 1931, was proceeding from the city of Santa Cruz

towards the city of Capitola. * * * As he approached the residence of some Japanese people by the name of Kitahara he passed the appellant Blake, who was proceeding in the same direction in an automobile, accompanied by a woman by the name of Ann Thomas. Morgan drove into the driveway of the Kitahara residence and then backed out upon the main road. Blake, who had by this time come abreast of the driveway, signaled to Morgan to stop. Morgan backed his truck across the road to the opposite side. Blake meanwhile had stopped his car and walked over to Morgan's car and there engaged in conversation with him. The story of the prosecuting witness from this point to the time that he was struck down by the appellant * * * reads as follows:

"Mr. Blake came over to me and he told me he had \$500 on my head and that he wouldn't do anything himself because the position he was in, and everything, he couldn't—couldn't afford to; and I told him I was sorry to hear him say that because I hadn't had a chance to state my case before him, and everything; so he went on to ask me if I was afraid to face this,—no first he asked me if I would back down the road where we could discuss this thing more clearly. I said "No, if you want to discuss it with me you can come into town and see my attorneys, Mr. Rittenhouse and Snyder"; and he said no, it wasn't necessary to do that, and wanted to know then if I would come across and talk to Mrs. Thomas, and I said I sure would, and he said "You are not afraid to go over there?" I said "No, I have got nothing to be afraid of—why should I be afraid?" When I went over there I was standing at the machine, Mr. Blake was standing at one side, partially in back of me. I started to talk to Mrs. Milang or Mrs. Thomas—Miss Thomas, and we were conversing back and forward, and the next thing I knew I was down on the ground. While I was lying on the ground I saw a dark object coming—that is the last I remember until I came to at the hospital.

"Q. Mr. Morgan, when you crossed the street with Mr. Blake Mrs. Thomas was in the car, was she? A. Yes, sir.

"Q. Sitting in Mr. Blake's car? A. Yes sir."

"In the vicinity of this point on the highway at which this assault took place there were three residences other than the Kitahara residence; the Christie residence, the Pimental residence and the Antonelli residence. From the vicinity of the Kitahara residence the two young girls of the Kitahara residence saw some of the details of the assault.

"Mary Kitahara testified that she saw the two automobiles coming down the road and saw Mr. Morgan drive into the driveway of her home and back out and also saw Mr.

Blake get out of his car and go over to Morgan's car and there engage in a conversation with him. All this she saw from a window in the house. A few minutes later when she was out of the house she was attracted by a woman screaming and when she looked toward the automobile saw Blake kicking someone who was out on the ground.

"Little Alice Kitahara also stated that she was attracted by the screams of a woman and that when she looked towards the spot from whence the screaming came she saw the appellant kicking someone who was on the ground. Both these girls testified that the woman who had done the screaming tried to pull the appellant away but was pushed back by the appellant, who proceeded to kick the man who was on the ground. Both these girls thereafter went up to the scene of the assault and saw Morgan lying on the ground.

"Mrs. Christie testified that she was cleaning a turkey in her kitchen and was attracted by the screaming of a woman and when looking out of the window in the direction from whence the screaming came she saw a man kicking another one who was on the ground * * * not only kicking him, but jumping up and down on his face. She further stated that the woman who evidently was the one who had screamed tried to push the appellant away, but in turn was pushed away herself, whereupon the appellant continued to kick the man who was on the ground." She further testified that she saw him jump on the man's chest.

"Mrs. Pimental, who was out at the chicken pens in the back of her residence stated that she was attracted by a woman screaming and that she came down the alley and that when she got to the corner of her house she still heard the screams and looking towards from whence they came she saw a man and woman standing, seeming to be kicking something that was on the ground.

"Two other witnesses were also attracted by the woman screaming, they being Eugene Mersaroli and his father-in-law, Mr. Antonelli. These two men were working on a new addition to the Antonelli residence and upon hearing the screaming looked towards the point from whence it came and both saw the appellant Blake kicking a man who was on the ground. They ran to the road and by that time the appellant Blake, having gotten into his car, had arrived almost abreast of them. Mr. Antonelli shouted to him to stop and when the appellant refused to do so he hurled a stone through the windshield of the appellant's car. However, the appellant did not stop but continued on his way.

"Several of the witnesses who heard the woman screaming stated that she exclaimed: 'My God, you have killed him.' * * *

"Chas. C. Houck, a Justice of the Peace of
18 P.(2d)—26

the City of Santa Cruz, stated that at a time which would have been approximately immediately after the assault the appellant came into his office and stated that he had given a man whom he called Alec 'a good trimming' and had 'beaten him up,' and he wanted to pay his fine immediately. * * *

"The defense attempted to show a situation contrary to that testified to by the prosecuting witness and attempted to show that the assault was started by the prosecuting witness Morgan. The appellant himself stated that it was Morgan who had hailed him first and that he had not hailed Morgan. In general, Blake's testimony was to the effect that Morgan had commenced the assault and that in order to protect himself it was necessary to resist this assault and to strike Morgan several times, and also to kick him to free his legs from Morgan's grasp."

As a result of the assault, Morgan was not only beaten unconscious, but the injuries inflicted were extremely severe, many of them being permanent, and his face being permanently disfigured. In this regard the record shows that both the upper and lower jaws were fractured, the upper being fractured in two places; the bones forming part of the wall of the sinus, back of the nose, were also fractured; his nose was broken and completely flattened, the cartilage being knocked free from the bone, flattened, and more or less destroyed, so that transplantation of cartilage from other parts of the body will be necessary to restore it to normal shape; there was a contusion of the right ear, lacerations of the upper and lower lips, nose and the cheeks; an incised wound on the right ear; both eyes were contused and badly swollen; and there were hemorrhages from the ears and nostrils. In fact, as appears from the photograph inserted in the record which was taken shortly after the assault, Morgan's face was almost a solid mass of bruises, cuts, and contusions, and very badly swollen; so much so that the attending doctor, who had known him since boyhood, did not recognize him. Some of the wounds became infected, and on account of the infection and extreme swelling surgical treatment to reduce the fractures was impossible for some five weeks. He was confined in bed in a hospital for a month and then at his home for a month; and even at the time of trial which took place some three months after the assault he was unable to perform any kind of work.

[1] The evidence disclosed that the Ann Thomas referred to was the mistress or paramour of the defendant Blake, and it was claimed by Blake that the prosecuting witness Morgan had attempted, several months prior to the alleged assault with which Blake is charged, to commit the crime of rape upon her person. Appellant offered to prove the truth of these charges of attempted rape, but

the court refused to allow such proof. Appellant claims that the refusal to allow such evidence was prejudicial error. It is said in appellant's brief: "It is the theory of the defense that not only were these matters material, relevant and to be admitted in evidence upon the theory that they were part of the *res gestæ* to prove the state of mind existing between the parties, that is to say, as to their immediate apprehension of danger following along the theory in line of defense in that the act of defendant Blake was self-defense. * * *". In *People v. Wong Ark*, 96 Cal. 125, 30 P. 1115, it is said: "It is often difficult to determine what acts or declarations are part of the *res gestæ*. There is an apparent conflict in the authorities on the subject. Each case must be determined upon its own peculiar facts. Wharton says: 'The distinguishing feature of declarations of this class is that they should be necessary incidents of the litigated act; necessary in this sense; that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. * * *'. The rule before us, however, does not permit the introduction under the guise of *res gestæ* of a narrative of past events, made after the events are closed, by either the party injured or by the bystander.' * * *". This rule has been sustained in *People v. Fong Sing*, 38 Cal. App. 253, 175 P. 911; *Coryell v. Clifford F. Reid, Inc.*, 117 Cal. App. 534, 541, 4 P.(2d) 295; 8 Cal. Jur. p. 92, § 190 et seq. In the case at bar the offers of proof were of acts alleged to have occurred several months prior to the assault made by the defendant in this case, and were unconnected therewith; they could not under any theory furnish a justification for the assault made by the appellant. Whatever the state of mind of the parties may have been, such evidence could not furnish a justification for this assault.

[2] It is further contended that appellant should have been permitted to introduce in evidence proof of the alleged assaults, as a matter of impeachment of the prosecuting witness Morgan, because he had denied having committed such acts. We have already held that such charges were immaterial as evidence here and not germane to the case; therefore it would be an impeachment upon an immaterial matter, but beyond this, the truth or falsity of these acts were not brought out on direct examination, but on the cross-examination of the prosecuting witness. In 27 California Jurisprudence, p. 106, it is said: " * * * A party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules. Accordingly, a party may not cross-examine his adversary's witnesses upon irrelevant matters for the purpose of eliciting something to be contradicted; if he does this the answer of the witness is conclusive and may not be contradicted."

[3] The next assignment of error is that the court, over the objection of appellant, permitted the district attorney in his argument to the jury to comment on the failure of the defendant to introduce in evidence the shoes or moccasins that were worn by him at the time of the assault, and also the further statement of the district attorney to the jury that he could not compel the defendant to produce them. The defendant offered himself as a witness in his own behalf, and he testified in substance that at the time of the alleged assault he wore moccasins. Another witness testified that they were real moccasins and have no soles on them, but are made of heavy leather. It has been held that the district attorney may comment upon the failure of the defendant to produce material witnesses which would substantiate his story (*People v. Piero*, 79 Cal. App. 357, 249 P. 541); that it is not misconduct for the district attorney to refer in his argument to the fact that a codefendant was not called upon to testify on behalf of the defendant (*People v. Ye Foo*, 4 Cal. App. 730, 89 P. 450). Many other instances could be cited along similar lines, but we think the foregoing decisions are sufficient to sustain the ruling of the court in permitting the district attorney to comment on the failure of the defendant to produce the shoes or moccasins that were worn by him.

[4-9] The appellant complains of the action of the court in refusing to give certain instructions requested by him. The first complaint is based upon the refusal of the court to give an instruction requested by him on the question of flight, and in giving the instruction on that subject offered by the people. The instruction given is in the language of section 1127c of the Penal Code. It is also provided in that section that "no further instruction on the subject of flight need be given." It is claimed that the instruction given presupposes a question of fact as having been proved; that is, that the defendant did in fact flee from the scene of the crime, and that the instruction thus took from the jury the right to determine that question. We are of the opinion that, as the law specifically provides that no other instruction on the question of flight need be given, it is unnecessary to give any further instruction on that question. However, an examination of the other instructions given by the court discloses the fact that they placed before the jury in unmistakable language that all questions of fact were solely for the jury to determine. We do not think there could be any misunderstanding by the jury that the question of flight was one of fact within their province to determine.

It is a further complaint that the following instruction is erroneous because it takes from the jury the possible apprehension of danger that the defendant might have had at the time of the assault: "You are instructed that no man is entitled to avenge a real or

fancied insult or assault of another person occurring out of his presence and at another time or place. It would not justify an assault on the part of the defendant Frank T. Blake if at some time prior to the 24th day of November, 1931, A. Morgan insulted or assaulted any other person out of the presence of Frank T. Blake. By this instruction, the court does not even intimate or suggest that the defendant did or did not commit an assault, as that and all other matters are to be exclusively determined by you as triers of the facts." As previously stated, it is fundamental that the instructions must be taken as a whole. In another instruction the court instructed the jury that "the defendant was entitled to act upon appearances, and if the language and the conduct of Mr. Morgan was such as to induce in the mind of a reasonable man, under all the circumstances then existing and viewed from the standpoint of the defendant, a belief that he was about to be attacked by Morgan, it does not matter if such danger was real, or was only apparent; and if the defendant acted in self-defense from real and honest convictions as to the character of the danger, induced by the existence of reasonable circumstances, he should be acquitted, even though he was mistaken as to the extent of the danger." Again the court instructed the jury that, if they had a reasonable doubt as to whether the words and actions of the prosecuting witness constituted such an appearance as would cause a reasonable man in defendant's position to believe that he was in immediate danger of attack, they should resolve the doubt in favor of the defendant. The jury was also fully instructed on the question of self-defense. We think that these instructions cured any possible error in the instruction complained of. Another instruction was to the effect that, if the jury believed beyond a reasonable doubt that the defendant made an assault upon the person of the complaining witness, and that it was not in lawful and necessary self-defense, and if they further believed that the assault was made "by a means or force likely to produce great bodily injury when made in the manner and by the means used by the defendant," they should find the defendant guilty as charged. It is claimed that the part of the instruction above quoted assumes a question of fact as having been proved, and as such infringed upon the province of the jury. There is no contradiction in the evidence as to the means used by the defendant. He stated that he kicked the prosecuting witness several times, claiming that such kicking was necessary. Many eyewitnesses also testified that the assault was committed by means of kicking. The appellant testified that he also used his fists in striking the prosecuting witness. Therefore there is no conflict in the evidence upon this subject. Further, the instructions were so replete with statements that the court

had nothing to do with the determination of questions of fact, that the jury could not have misunderstood the instruction as given by the court. It is contended that two other instructions assume that any physical combat between two persons, if one should be larger than the other, necessarily comes within the purview of an assault as defined in section 245 of the Penal Code, and that the larger of the two men would be guilty of the crime as defined by that section. We cannot agree with counsel upon the effect of these two instructions. They merely inform the jury that the discrepancy in size between the defendant and the prosecuting witness was an element that could be taken into consideration in determining whether the means or force was reasonably calculated to produce great bodily injury. The jury had a right to consider such evidence in determining the nature and character of the assault. Therefore the instructions are not subject to the objection made.

The instructions are very voluminous and cover every phase of the case. The appellant was accorded a fair trial. The assault was brutal in the extreme, and, as stated, inflicted very serious injuries upon the complaining witness. There has been no miscarriage of justice, and the judgment and order denying the motion for a new trial should be affirmed. It is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

SECONDO v. SECONDO.*
Civ. 8722.

District Court of Appeal, First District,
Division 2, California.
Jan. 25, 1933.

Rehearing Denied Feb. 24, 1933.

Hearing Granted by Supreme Court March 24, 1933.

1. Divorce $\S$ 130.

Evidence that wife, in presence of others, charged defendant with acts of cruelty, and he made no denial, and wife's recital of acts, supported finding of cruelty.

2. Appeal and error $\S$ 1012(1).

That testimony was improbable, contradictory, and contradicted was for consideration of trier of facts, not for reviewing court.

3. Husband and wife $\S$ 272(5).

Husband collecting principal and interest on loan from community property was bound on divorce to account to wife.

4. Divorce $\S$ 252.

Court, making disposition of property incidental to granting divorce decree, is limited to property in court's hands for division.

5. Husband and wife ⇨265.

Statute does not authorize creation of lien on husband's separate property to secure payment to wife of share in community property (Civ. Code, § 140).

6. Divorce ⇨301.

Provision that divorced husband visit sons in presence of probation officer *held* not warranted by evidence.

7. Divorce ⇨188.

Finding awarding wife counsel fees in addition to amount theretofore allowed in divorce suit *held* improper, where no application for counsel fees remained undisposed of.

8. Divorce ⇨188.

Judgment ordering that costs be paid by defendant in divorce suit *held* not shown to be improper as double taxation.

Facts disclosed that there was no cost bill in record, and an examination of transcript disclosed several orders for payment of counsel fees and costs, but did not show how much was incurred for costs, and reviewing court had no means of separating the items.

9. Divorce ⇨111.

In divorce suit, wife offered to show that, when husband struck wife, he did not strike her with intention of putting her out of way so that she could not inherit property, *held* properly excluded.

Appeal from Superior Court, Santa Cruz County; S. L. Strother, Judge.

Action by Katherine Secondo against Mitchell Secondo, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed and remanded, with directions.

Wyckoff & Gardner, of Watsonville, for appellant.

John J. Batistich, of Oakland, for respondent.

STURTEVANT, J.

On July 11, 1927, the plaintiff commenced an action to obtain a divorce from the defendant, and in her complaint she charged him with extreme cruelty. He answered the complaint, and at the same time he filed a cross-complaint making the same charge against his wife. She answered the cross-complaint, and on the issues so framed a trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed, and has brought up typewritten transcripts. The record consists of nearly fifteen hundred pages, but references in the briefs to page or line in the

transcript are frequently omitted. Therefore we will confine ourselves to an investigation of that portion of the record to which references have been made.

[1, 2] The first finding is as follows:

"That prior to the commencement of this action, without provocation on part of plaintiff, without any cause, reason or justification, defendant had treated plaintiff with great and extreme cruelty and more particularly in that on the 3rd day of June, 1927, in the residence of plaintiff and defendant at 118 West Lake Avenue in the City of Watsonville, County of Santa Cruz, State of California, defendant repeatedly struck plaintiff upon the head with a blunt instrument, by reason whereof plaintiff sustained a depressed fracture of the skull, necessitating the removal of portions of the skull from the brain, and plaintiff's confinement in a hospital for a period of five weeks thereafter.

"That said act of defendant has caused plaintiff great and extreme anguish and mental and physical suffering, and has greatly undermined plaintiff's health and permanently impaired same."

Defendant claims that the only evidence of the truth of the allegations to which that finding is responsive is the uncorroborated testimony of the plaintiff. That claim may not be sustained. After the assault and injury complained of occurred, at different times the defendant, the plaintiff, and others were in the immediate presence and hearing of each other. On several of those occasions the plaintiff charged the defendant with having committed the acts complained of, and he made no denial.

As a witness in her own behalf, the plaintiff recited what she claimed to be the facts regarding the assault. The defendant asserts her testimony was improbable in its nature, contradictory in its terms, and was wholly contradicted by the defendant. All of those attacks were for the consideration of the trier of the facts, and are not properly for the consideration of a court of review.

[3, 4] The defendant attacks subdivisions 2, 3, 4, and 5 of finding No. II, which find certain funds to be community property. Before this action was commenced, and at least for a while thereafter, the defendant and his two brothers were partners engaged in conducting a packing house at Watsonville. In the transaction of that business they bought and sold crops of apples. The purchases amounted to thousands of dollars annually. During the same period of time the plaintiff and defendant were engaged in loaning their surplus earnings on promissory notes secured by mortgages. Some of those notes were paid after the commencement of the action. Finding No. II, so far as pertinent, is as follows:

"Plaintiff and defendant were, at the time

of the commencement of this action, ever since have been and now are, seized and possessed of certain community property described as follows:

"1. All of those certain lots, pieces or parcels of land situate, lying and being in the City of Watsonville, County of Santa Cruz, State of California, and particularly described as follows: (describing them).

"2. The sum of \$1200, together with interest thereon, collected by the defendant from Carrie Picanzo under and by virtue of that certain mortgage executed by Carrie Picanzo to Mitchell Secondo recorded in the office of the County Recorder of Santa Cruz County, State of California, in Volume 31 of Official Records, page 352.

"3. The sum of \$500, together with interest thereon, collected by the defendant from James A. Covell et ux., under and by virtue of certain mortgage executed by James A. Covell et ux. to Mitchell Secondo recorded in the office of the County Recorder of Santa Cruz County, State of California, in Volume 23 of Official Records, page 208.

"4. The sum of \$360.89 together with interest thereon, collected by the defendant from Edna S. Bingham et vir., under and by virtue of certain mortgage executed by Edna S. Bingham et vir. to Mitchell Secondo, recorded in the office of the County Recorder of Santa Cruz County, State of California, in Volume 23 of Official Records, page 374.

"5. The sum of \$9136 withdrawn by defendant in 1927 and 1928 from the partnership of Secondo Bros., City of Watsonville, County of Santa Cruz, State of California.

"6. All furniture, furnishings, fixtures, together with silverware and linens in the former residence of said plaintiff and said defendant at 118 West Lake Avenue in the City of Watsonville, County of Santa Cruz, State of California.

"All of the above described real and personal property was at the time of the commencement of this action, ever since has been, and now is community property of plaintiff and defendant."

In substance the defendant claims that the effect of subdivisions 2, 3, 4, and 5 was to find that the spouses owned, held, and possessed as community property the items mentioned in said subdivisions. He also claims that the items of interest are not supported by the evidence, and moreover are a false quantity. The proof does not show that any one of the loans carried interest. However, if it be inferred that they did, and we think the trial court was entitled so to infer, then it would follow that the defendant collected the principal and interest for which he was bound to account to the plaintiff. The defendant contends, and the plaintiff does not cite any portion of the record to the contrary, that there was no evidence as to the amount of the in-

terest collected. As to the principal, the defendant admitted he had collected the loan. However, he testified that he had spent the money. At that point the evidence stopped. As to the withdrawals from the partnership, the defendant admitted the amount, but testified he had spent the money. As to those expenditures, the evidence stopped. There is no evidence in the record that the defendant spent a dollar in fraud of the plaintiff's rights. There is evidence that, from the time the action was commenced down to the date of the trial, the defendant conducted his business as he had done before the action was commenced; that, after the commencement of the action, the defendant paid the plaintiff alimony and counsel fees. The order for alimony was \$250 per month. That order was made July 25, 1927, and commenced to run August 1, 1927. The findings were signed on August 31, 1929. The record, by inference, shows \$4,500 was paid by the defendant in compliance with said order. The amount paid in counsel fees is not clear, but was apparently in excess of \$1,000. Whether at the time the action was commenced the plaintiff and defendant had debts outstanding for which the moneys collected were disbursed does not appear. Whether, after the action was commenced, the defendant suffered losses in transacting his business, does not appear. Moreover, no effort was made at any time to show to the trial court the amount of personal property on hand and subject to division by the trial court. As the evidence did not show those items of property to be in the hands of the court, the claim is sound. Van Horst v. Van Horst, 96 Wash. 658, 165 P. 886. In that case, at page 888 of 105 P., 96 Wash. 658, the Supreme Court of Washington said: "If this were an action for an accounting between plaintiff and defendant, many elements might enter into the case that cannot properly be considered in a proceeding such as this. The court, in making a disposition of the property of the spouses incidental to granting a decree for divorce, is necessarily limited by the amount of property in the hands of the court for division. Palpably it cannot divide that which does not exist. In making provision for the wife in the way of alimony the court is also powerless to compel the husband to pay more than he is able to pay, no matter what his conduct may have been in wasting or dissipating property belonging to the wife."

[5] Having found the items in subdivisions 2, 3, 4, and 5 of finding No. II to be community property, the trial court added them together, and the total, \$11,206.89, was declared a lien on the real estate described in finding No. III and which the trial court found to be the defendant's separate property. The defendant contends that Civil Code, § 140, is not authority for the creation of a lien on the separate property of the husband to secure

the payment to the wife of a share in the community property. The contention is fully sustained by the ruling in *Mayberry v. Whittier*, 144 Cal. 322, 326, 78 P. 16.

[6] The trial court awarded the custody of the two minor sons to the mother. It made a finding that the defendant might visit said minors at least once a month and spend the day with them in the presence of a probation officer of San Francisco. The defendant claims the provision prescribing that the visit should be in the presence of a probation officer was erroneous. In reply, the plaintiff calls to our attention finding No. I quoted above. The record shows that at the time of that transaction the sons were not present and were not in any way whatever connected therewith. There is not a particle of evidence in the record that the defendant was otherwise than a kind and affectionate father. The limitation imposed was not, therefore, sustained by the record.

[7] The court made a finding awarding the plaintiff \$500 counsel fees in addition to amounts theretofore allowed. The defendant objects to the finding, and cites and relies on the rule stated in *Sheppard v. Sheppard*, 15 Cal. App. 614, 618, 115 P. 751; *Loveren v. Loveren*, 100 Cal. 493, 35 P. 87; *Stampfli v. Stampfli*, 53 Cal. App. 126, 132, 199 P. 829. The point is well founded. An examination of the record does not disclose that prior to the date of signing the findings and interlocutory decree any application for counsel fees remained undisposed of. The record showed no necessity for making the order at the time it was made.

[8] The judgment ordered that the costs be paid by the defendant. He asserts the order was in effect double taxation, because theretofore he had been ordered to pay the plaintiff \$250 for costs and counsel fees, and that it will be presumed he had made the payment. No cost bill is contained in the record. An examination of the transcript discloses several orders for the payment of counsel fees and costs. However, it does not show how much was incurred for costs, and we have no means of separating the items. Therefore the record does not support the contention.

[9] The defendant offered his will in evidence, but the objection of the plaintiff was sustained. The will was dated December 31, 1918, and by its terms all of defendant's property was to go, in the event of his death, to the plaintiff. The defendant claims the will was evidence to the effect that, when the defendant struck the plaintiff, as recited in finding No. I, on June 3, 1927, the striking was not with the intention of putting her out of the way so that she could not inherit his property. Under the facts, we think the court did not err in sustaining the objection to the

offer. *Estate of Anderson*, 185 Cal. 700, 718, 198 P. 407.

For the reasons indicated, the judgment is reversed and the action is remanded to the trial court, with directions that the issues of fact covered by findings II to XI, both numbers inclusive, be again tried, and that thereafter the trial court prepare and cause to be entered findings, conclusions of law, and a judgment not inconsistent with what has been said above.

We concur: NOURSE, P. J.; SPENCE, J.

129 Cal.App. 67

SROTH et al. v. LAGUENS et al.
Civ. 8721.

District Court of Appeal, First District, Division 2, California.

Jan. 20, 1933.

1. New trial $\Leftrightarrow \frac{1}{2}$.

Right to move for new trial is statutory, and remedy must be pursued in statutory manner (Code Civ. Proc. § 659).

2. New trial $\Leftrightarrow 117(1)$.

Notice of intention to move for new trial served and filed on June 10 held too late where notice of entry of judgment was received on May 28 (Code Civ. Proc. § 659).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Emma Sroth and another against Vincent P. Laguens, individually and as administrator of the estate of Vincent Laguens, also known as Vincent P. Laguens, deceased, and another. From an order granting plaintiffs' motion for a new trial after an adverse judgment, the defendants appeal.

Order reversed.

Joseph A. Brown, of San Francisco, for appellants.

Rudolph A. Rapsey, of San Bruno, for respondents.

SPENCE, J.

This is an appeal from an order granting a new trial.

The judgment was entered in favor of appellants on January 21, 1930. No written notice of entry of judgment was given to counsel for respondents until May 28, 1930, when a letter was received by him from counsel for appellants. This letter called attention to the judgment in the above-entitled cause and

stated counsel's contention that the judgment had become final despite the fact that no notice of entry of judgment had been theretofore given. On June 10, 1930, counsel for respondents served and filed his notice of intention to move for a new trial. Counsel for appellants filed written objections to the hearing of said motion on the ground that said notice of intention had not been filed within the time allowed by law, but the trial court made its order granting said motion on July 26, 1930.

[1, 2] Appellants have presented a brief urging several grounds for reversal. On the other hand, no brief has been filed on behalf of respondents, and counsel for respondents has communicated with this court saying, "I doubt very much whether a brief will be filed on behalf of respondents." In our opinion the order must be reversed and we need only consider one of the grounds urged by appellant. Section 659 of the Code of Civil Procedure provides: "The party intending to move for a new trial must, either before the entry of judgment or within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial. * * *" The right to move for a new trial is purely statutory and the remedy must be pursued in the manner prescribed. 20 Cal. Jur. 11. The letter received by counsel for respondent served to start the time running and the notice of intention to move for a new trial came too late as it was not served and filed within ten days after receipt of said letter.

The order granting a new trial is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

129 Cal.App. 222
CARLTON v. SEVIN-VINCENT SEED CO.
Civ. 8571.

District Court of Appeal, First District,
Division 1, California.

Jan. 26, 1933.

Rehearing Denied Feb. 25, 1933.

Hearing Denied by Supreme Court March 27, 1933.

1. Corporations ⇨82.

In action by discharged employee for price of corporate stock bought under employment contract, evidence supported finding that employee was discharged without justification (Civ. Code, § 1689, subd. 2).

2. Corporations ⇨82.

Corporation's breach of agreement to give stock purchaser continuing employment, in itself, warranted rescission, and recovery of money paid (Civ. Code, § 1689, subd. 2).

3. Corporations ⇨82.

Finding sustained judgment for discharged employee seeking price paid for stock, bought under agreement he would have continuing employment, under common count (Civ. Code, § 1689, subd. 2).

Court found that employee agreed to purchase stock under agreement that he would receive immediate and continuing employment with corporation, and that, if at any time employment ceased, corporation would return to him money he had paid for stock; that employee was given employment for 5 months, and was then wrongfully dismissed without cause; and that corporation thereafter refused to give him employment of any kind.

4. Corporations ⇨82.

Discharged employee seeking price paid for stock bought under agreement he would receive continuing employment, held entitled to interest from date of rescission (Civ. Code, § 1689, subd. 2).

Appeal from Superior Court, City and County of San Francisco; Victor R. McLucas, Judge.

Action by Sidney G. Carlton against the Sevin-Vincent Seed Company. From a judgment for plaintiff, defendant appeals.

Judgment modified and, as modified, affirmed.

Norman A. Eisner, of San Francisco, for appellant.

Dunne, Dunne & Cook, of San Francisco, and McClymonds & Wells, of Oakland, for respondent.

PER CURIAM.

Respondent purchased from the appellant corporation 4,500 shares of its preferred stock under an agreement which he claims was subsequently breached by the corporation; thereupon he rescinded the transaction and brought this action to recover the amount paid for the stock. Judgment was entered in his favor, and the corporation appeals.

The corporation was organized in June, 1928, for the purpose of acquiring a business operated by its president, J. R. Walsh. The latter's wife was the treasurer of the corporation, his brother was secretary; and the three constituted the board of directors. In June, 1929, the corporation advertised in a newspaper for a "bookkeeper for secretaryship." Continuing, the advertisement read: " * * * successful moderate-sized wholesale firm; invest \$5,000; salary \$225 and share profits. Reply in detail to Box 15,560. * * *" Respondent, being a man of some business experience, having been employed by another corporation for several years as book-

keeper and paymaster, and later for some ten years as representative on the Pacific Coast for the United States Shipping Board, responded to said advertisement, and after several conferences with Walsh, and in June, 1929, the corporation entered into the agreement with respondent, which is the basis of this action. With respect thereto the trial court found that respondent agreed to purchase from the corporation 4,500 shares of its preferred and 500 shares of its common stock for \$5,000, but that "as a condition precedent to and a further consideration for the purchase of said stock" it was agreed that respondent would be made a director and the secretary of the corporation and should "receive immediate and continuing employment" with the corporation, for which he was to be paid a monthly salary of \$225; that if at any time said employment should cease or be terminated said corporation would return to him the money he had paid for said stock. Continuing, the court found that in part performance of said agreement respondent paid to the corporation \$1,000 on July 3, 1929, and \$3,500 on July 9, 1929, for which he received 4,500 shares of preferred stock; that in partial compliance with said agreement the corporation employed respondent for a period of five months, and paid him therefor \$225 a month, but that at the end of said period of time, to wit, on December 9, 1929, "without reasonable or any cause, provocation or excuse," the corporation wrongfully dismissed respondent from its employ and thereafter refused to give him employment of any kind. Furthermore, the court found that respondent was not made a director or the secretary of said corporation, although respondent frequently requested that such action be taken, as agreed; that he offered and at all times was ready to pay the additional \$500 for the common stock, as agreed, but that such payment was waived by said corporation; that all of the other conditions respondent agreed to perform were performed by him. The court also found that upon the breach of said agreement by said corporation and on January 2, 1930, respondent tendered the corporation the stock theretofore delivered to him, together with the full amount of dividends received by him thereon from the date of the delivery of the stock to him, and made demand for the return to him of said sum of \$4,500; but that the corporation refused to accept the return of the stock or to repay to respondent any portion of said purchase money.

Appellant contends, as one ground for reversal, that the decision of the trial court is against law, in that the breach of the contract found by the trial court would give rise only to an action for damages. There is no merit in the point. The facts found bring the case clearly within the doctrine declared in *Brown v. National Electric Works*, 168 Cal. 336, 143 P. 606, which holds that, where an

agreement is made by a corporation in consideration of the purchase of certain of its shares of stock at a fixed price to employ the purchaser in its business at a stated salary, the unwarranted breach by the corporation of its agreement to so employ the purchaser entitles the latter, under subdivision 2 of section 1689 of the Civil Code, to rescind the contract for partial failure of consideration in a substantial part and to recover the purchase price paid for the stock, and that the purchaser is not limited to an action for damages for the breach of the contract.

[1] Appellant claims, however, that respondent was not discharged, that he quit voluntarily; furthermore, that "if he had been discharged, such discharge would have been justified." The evidence is sufficient to support the finding to the contrary. It appears therefrom that on the day respondent's services were terminated Walsh told him that he interfered with his plans and that he would have "to get out"; that respondent protested upon the ground that his money was "tied up" in the business; that Walsh then said that if respondent could raise an additional \$10,000 he could stay; and that when respondent replied that it was impossible for him to obtain any such amount Walsh told him he would "have to leave," which he did. In this connection also it was shown that in November, 1929, the month preceding the dismissal of respondent, the corporation, acting through Walsh, sought to hire another bookkeeper to replace respondent. And there was no evidence whatever introduced to prove that respondent's services were unsatisfactory. At the trial a few errors in bookkeeping were shown, but, as suggested by the trial court at the time, there is no such thing as a perfect bookkeeper; and the evidence affirmatively shows that during the entire period of respondent's employment no criticism whatever was made of the manner in which he performed his work.

[2] It is also claimed that the evidence does not support the finding to the effect that the appellant waived respondent's omission to invest the remaining \$500 in the stock of said corporation; and it is argued, therefore, that respondent could not put appellant in default so long as he himself was in default. The record discloses ample evidence to support the trial court's finding. The testimony given by respondent is legally sufficient in itself for such purpose. Further contention is made that the portion of the agreement to make respondent a director and the secretary was void. The consideration and determination of that question here is unnecessary, however, for the reason that even assuming such a promise is unenforceable, it was clearly severable from that portion of the agreement to give respondent "immediate and continuing employment," the breach of which, as above pointed out, was alone sufficient to

warrant a rescission and the recovery of the money paid for the stock. *Brown v. National Electric Works*, supra.

[3] Nor do we find any merit in appellant's contention that there is a fatal variance between the findings and the allegations of the complaint, and that the findings are inconsistent. The objections made in this behalf are, in our opinion, purely technical and based on a strained construction of the complaint and the findings. As already pointed out the action was based mainly upon the proposition that in consideration of the promise made by the corporation to give respondent immediate and continuing employment he would invest in a certain amount of the corporation's stock and that, if such employment were terminated, the corporation would take back its stock and return to respondent the money he had paid therefor. Such an agreement was in substance pleaded in the complaint and clearly established by the evidence; and an analysis of the allegations of the complaint and the findings discloses no substantial variance, nor any material inconsistency in this regard. Moreover, the complaint is in two counts. In the first the circumstances of the transaction are alleged, and appellant's objections are founded on the matters set forth in that count. The second is a common count. Even though it be assumed, therefore, that the findings relating to the first count are subject to criticism, they are as a whole amply sufficient to sustain a judgment in respondent's favor under the second count.

[4] The form of the judgment entered, however, is faulty and consequently requires correction. It reads as follows: " * * * It is now ordered, adjudged and decreed, that plaintiff have and recover of defendant the sum of Four Thousand Five Hundred Dollars (\$4,500), together with plaintiff's costs of suit in the sum of \$42.50 together with interest thereon at the legal rate, less all dividends received by plaintiff on any stock of defendant issued to plaintiff, with interest thereon at the legal rate, from the time said dividends were received by plaintiff, but without interest on any dividends not received by plaintiff, said deduction on account of dividends to be made only as to dividends received by plaintiff, and as to any dividends claimed to be received the same may be accounted for by the return of uncashed dividend checks; and it is further ordered, adjudged

and decreed, that all stock of defendant issued to plaintiff be, and the same is, hereby cancelled as of the date when issued, and it is ordered that plaintiff deliver up any certificates evidencing the same to defendant on demand." As will be noted, it provides that respondent shall receive interest at the legal rate on the money paid for the stock, but it fixes no date from which the interest shall run; furthermore it provides that from the sum found to be due respondent there shall be deducted all cash dividends received by him, and that all "uncashed dividend checks" shall be returned, but the amounts of said cash dividends and uncashed dividend checks are not stated, nor does the evidence or findings show the amounts thereof. However, the evidence and the findings do show that plaintiff rescinded the transaction on January 2, 1930, at which time he tendered to the corporation the stock and all dividends received thereon by him. We are of the opinion, therefore, that he was legally entitled to interest at the legal rate from the date of such rescission.

It is ordered, therefore, that the judgment be modified to read as follows: It is ordered, adjudged and decreed: (1) That the stock heretofore issued to plaintiff by defendant be and the same is hereby canceled as of the date when issued, and that plaintiff forthwith deliver to and deposit with the clerk, for and in behalf of defendant, all certificates covering the same; (2) that plaintiff do have and recover of and from the defendant the sum of \$4,500 with interest thereon at the legal rate from January 2, 1930, up to the date of the entry of judgment, together with his costs of suit amounting to \$42.50; (3) that immediately upon the entry of said judgment this court ascertain and determine the amount of cash dividends received by plaintiff on said stock and direct satisfaction of the judgment to the extent of the amount so received by him; (4) that plaintiff forthwith surrender to and deposit with the clerk of this court, for and on behalf of defendant, all uncashed checks received by him in payment of dividends on said stock, or upon his failure so to do that the amount thereof be ascertained and determined by the court and that the judgment in favor of plaintiff be further satisfied to the extent of the amount so ascertained and determined.

As thus modified the judgment will stand affirmed, respondent to recover his costs on appeal.

128 Cal.App. 651

Ex parte ALEXANDER.

Cr. 2292.

District Court of Appeal, Second District,
Division 2, California.

Jan. 13, 1933.

1. Municipal corporations ☞120.

In interpreting ordinance, court may inquire what evil was sought to be remedied.

2. Constitutional law ☞48.

Court must assume that Legislature had existing considerations of public health, safety, morals, or general welfare in mind as justifying regulation, provided enactment on its face shows semblance of endeavor to denounce evils sought to be cured.

3. Municipal corporations ☞615.

"Fake sale" ordinance *held* unconstitutional at least so far as attempting to punish those acting without fraudulent or guilty intent.

Ordinance, among other specifications, defined "fake sale" as sale or offering for sale of goods in limited quantity, or quantities of less than full amount of such merchandise owned or carried in stock by person offering goods for sale; as sale or offering for sale of goods of different quality or brand, "and/or" bearing different trade-mark, "as substitute" for merchandise previously advertised for sale; and as sale or offering for sale of any goods contingent upon concurrent purchase or sale of any other article.

4. Municipal corporations ☞615.

"Fake sale" ordinance, when invoked to support charge that defendant advertised and offered for sale certain merchandise in limited quantities of less than amount owned and carried in stock by him, *held* unconstitutional.

5. Municipal corporations ☞615.

"Fake sale" ordinance, when invoked to support charge that defendant advertised certain brand of soap for sale and offered other soap for sale as substitute, *held* unconstitutional.

Defendant was charged with advertising certain brand of soap for sale at two cents per bar, and offering for sale other brand at five cents per bar as substitute for soap advertised; other brand being of different quality and brand, and bearing different trade-mark from advertised soap.

6. Municipal corporations ☞615.

"Take sale" ordinance, when invoked to support charge that defendant offered for sale, and sold, dozen eggs contingent upon

concurrent purchase of other articles, *held* unconstitutional.

Proceeding on the application of S. H. Alexander for a writ of habeas corpus directed to the Chief of Police of the City of Los Angeles.

Petitioner discharged.

Goldstone & Garbus, of Los Angeles, for petitioner.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., C. N. Perkins, Deputy City Atty., Charles P. Johnson, City Prosecutor, and Joe W. Matherly and John Bland, Deputy City Prosecutors, all of Los Angeles, for respondent.

Peirson M. Hall, B. P. Calhoun, and Donnell G. Montgomery, all of Los Angeles, amici curiæ.

WORKS, P. J.

An ordinance of the city of Los Angeles denounces as criminal the acts of those who "conduct, maintain, operate or advertise at retail any fake sale of goods, wares or merchandise" within the municipality. The enactment, in section 2 thereof, defines a "fake" sale, among other specifications, thus:

"(2) The sale of goods, wares or merchandise, or the offering of goods, wares or merchandise for sale in limited quantity or quantities of less than the full amount of such merchandise, owned or carried in stock by the person * * * offering the same for sale.

"(3) The sale or offering for sale of goods, wares or merchandise of a different quality, or brand, and/or bearing a different trade mark as a substitute for merchandise previously advertised for sale. * * *

"(5) The sale or offering for sale of any goods, wares or merchandise which is contingent upon the concurrent purchase or sale of any other article."

Petitioner is detained by the chief of police of the city of Los Angeles under and by virtue of a warrant issued out of the municipal court charging him with a violation of each of these subdivisions of section 2 of the ordinance, which have behind them the provision that it is unlawful to conduct, maintain, etc., a "fake" sale as defined by them. He contends that it is unconstitutional to denounce as a public offense any of the acts catalogued in the defining subdivisions. To our minds a perfunctory reading of the ordinance leads to a belief that this claim of unconstitutionality is well founded, but to justify this statement let us first examine each of the branches of the definition of a "fake" sale. We shall follow that examination by remarks pertinent to the subject. Hereafter we shall

often designate each of the subdivisions merely by its number.

Under (2) a merchant cannot sell or offer to sell a limited quantity (and this is without restriction as to how or where the limit shall be placed) of any particular kind of merchandise he may have in stock. Specifically, if one possesses a thousand cakes of soap of a certain brand he may not sell or offer nine hundred of them, thus leaving one hundred for later coming families who habitually patronize him, or even hoarding a few cakes for the use of his own family and relatives. Indeed, he could not sell or offer any but the thousand cakes, for he may not dispose, etc., of a quantity or of quantities "less than the full amount of such merchandise, owned or carried in stock by" him. This subdivision may have the effect to outlaw the business of retailing merchandise. Every concern may be made by it, if it were constitutional, a wholesaler, and not only so, but a wholesaler who must dispose of his entire stock of each kind of his goods or wares to the first comer who asks it. And this, irrespective of his desire to satisfy the needs of other regular patrons, his desire to hold for a reasonable time a part of his stock for a better market, his desire, indeed, to continue in business, for if one comer may take all of his Ivory soap another may take all his peanuts, and so on to the end.

Under (3) a merchant may not offer or sell to a patron a kind of baking powder which he has not advertised for sale as a "substitute," whatever that word may mean as employed in the ordinance, for a baking powder which he has advertised. Apparently, if a grocer advertises one kind of baking powder he must advertise all kinds he has in stock, or suffer possible pain under the ordinance. And consider for a moment, also, the possible fate of the poor merchant under (3), and pursuant to certain circumstances. If a customer expresses a desire to purchase a particular brand of baking powder which a grocer has not advertised, others having thus been offered by him to the public, he is punishable if he stoops to satisfy this apparently reasonable request. This possibility, it is true, depends upon the meaning of the word "substitute," as it appears in (3). The paragraph does not inhibit the sale of one thing to a particular person who has asked for a thing previously advertised.

If we look to (5) we observe that a merchant may not say to a customer, however much his offer may redound to the benefit of the latter, "I will sell you a pound of onions for" so much "if you will take a pound of beets for" so much. Indeed, scan with care the last four words of (5), if the wife of the grocer has at home in apartments above his store a partially worn and wholly unneeded electric flatiron, the merchant may not say to a customer who requires such an imple-

ment, "I will sell you our old flat iron for" so much "if you will buy a can of sardines at" so much. And observe, especially, that (5) contains nothing as to the price of articles sold together, whether too much or too little is charged for both or whether too much is charged for one and too little for the other. It thus clearly appears that (5), if constitutional, makes it unlawful to sell two articles together, where a price fair to both seller and buyer is fixed as to each. Also, under (5), who is to make the combination of sales "contingent," the seller or the buyer?

[1] As this ordinance has been so peculiarly drawn—is so skeletal and general in form—it becomes proper to inquire what was the evil sought to be remedied by it, for as early an authority as Blackstone has said in his "Commentaries on the Laws of England" that such an inquiry is proper whenever it is sought to interpret any statute. In pursuit of this quest we quote somewhat liberally from the briefs.

Upon this subject we find only these generalities in the brief of respondent: "Merely because a dealer in merchandise is prohibited by law from engaging in certain business practices which are tinged with fraud or assume the character of fraudulent transactions is not per se a prevention of his right to acquire, possess or protect his property. There is no arbitrary curtailment of a citizen's right to carry on business and trade relations by the enactment of an ordinance which prohibits unfair and fraudulent transactions. Such legislation is in fact a protection to property rights guaranteed by the Fourteenth Amendment to the Constitution of the United States rather than a violation of that property right. The freedom of contract is subject to a variety of restraints, and the exercise of legislative authority to abridge it can be justified by the existence of exceptional circumstances."

The friends of the court, who align themselves with respondent, become more specific:

"The practice of securing trade in retail stores through the use of fake sales, as defined by this ordinance, has grown to the place where it has become a menace that is recognized and being discussed and considered throughout the nation. The ill effects of this practice are manifold. It strikes at the purchaser who takes the "bargain bait," at all legitimate retailers, at banks and landlords, at wholesalers, jobbers and producers of raw materials, at employees of all of these groups, and finally at the general public composed of all retailers, purchasers, jobbers, wholesalers, producers, employers and employees, landlords and tenants. Space will only permit of setting forth a few of these evils, as follows:

"(1) It is conceded that retail merchants

are in business to sell at a profit and not just to sell standard articles at a loss and to thus have so-called profitless-prosperity. Limited sales are used because they enable a retailer to attract purchasers with sales of standard, well-known articles, with a known value and quality, at prices which are unreasonably low but under conditions where the retailer can limit his loss on these articles by selling only enough to each customer to serve as customer attraction or bargain bait. Of course it stands to reason that if A sells White King Soap at a loss, for example, of 1¢ a cake, he must make up that loss by sale of other articles which are not branded and hence the value and quality are not easily ascertainable by the purchaser, or by articles with brands which do not represent a known or given standard, at prices which make up to the pricecutter his loss on the bargain bait—or he must make up that loss by passing the loss along to the landlord by reduced rents—or to his employees by reduced pay—or to the producer by reduced prices for his goods, who in turn must continue the vicious circle of absorbing his loss by passing it on. Consequently it is clear that the bargain-hunter generally does not secure a bargain in the long run; however, this opportunity for fraud by kiting the prices of 'blind articles' (articles on which it is not easy for the purchaser to compare prices and quality) is the smallest evil connected with this practice.

"(2) The practice of price-cutting of standard articles which is made possible through limited sales, contingent sales, or brand substitutions, does material damage to manufacturers and to their products with consequent losses to all parties employed by or dealing with the manufacturers. For example, a manufacturer develops his business by making a dependable, standard article with a set quality, to be sold at a fair profit; he spends money to advertise the article and build up in the public mind confidence that in purchasing that given brand they will secure a meritorious product; he nurses his business through its early stages by taking small profits or absorbing losses, by making small shipments, by taking credit losses and what not. In the development of this business he makes capital investments, he buys or leases buildings and equipment, secures employees whose livelihood is dependent upon the continuation of his business. He incurs liabilities with banks, landlords and producers of raw materials. These in turn incur liabilities and make investments, relying upon the fulfillment of his contracts to enable them to fulfil theirs, and so on, creating a condition conducive of the general welfare of the community. He sells his product to retailers upon the representation that he is advertising the article for sale at a price which gives the retailer a fair opportunity to profit on his investment. Now, along comes some greedy retailer with a group of fake sale schemes, as

defined in this ordinance, and, taking advantage of the demand created by the manufacturer for his article by maintaining a standard and by advertising, buys up a quantity of the article and sells it under some limited sale plan at cost or less than cost—and what happens? The general buying public is no longer willing to pay a fair price for the article because they can now get it cheaper. Other retailers who have stocked the article in good faith must sell it out at a loss or allow it to become a dead investment on their shelves. The manufacturer has lost his territory, for his product will no longer sell for a profit in that territory—merchants will not stock it or, if they do, will only handle as little as they can—they will be forced to push other brands which carry a profit with them. Consequently the manufacturer cannot keep up his volume so he must lay off men, he must cancel orders for raw material, and he very likely will be enabled to keep up his credit obligations. This begins a series of retrenchments with everyone he deals with. The losers are the competing retailer, his employees, creditors and landlord; the manufacturer, his employees, creditors and landlord; the producer of raw material, his employees and creditors. Continued repetition of these practices commonly causes the bankruptcy of both the manufacturer and the retailer, the loss of employment by the employees of both, and finally the loss is spread to the taxpayer, who must care for the unemployed and who must also absorb the loss of tax income from properties vacated by the retailer and the manufacturer."

[2] We are not prepared to doubt the existence of the evils portrayed in these quotations from the briefs. If they do exist it is our duty to see in their prevalence the basis upon which the city council of Los Angeles has founded the enactment of the ordinance before us, and to uphold it if we can. "The courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which could have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation." *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 385, 38 A. L. R. 1479.

[3] The law as stated in the case cited can only refer to a legislative enactment which on its face shows at least the semblance of an endeavor to denounce the evils which it is sought to cure. We think the ordinance here in question cannot be placed in such a category, for it inhibits acts which may be entirely innocent as well as those which may be guilty. It is certainly unconstitutional,

on several grounds, in so far as it attempts to wreak the vengeance of the law upon those who commit acts innocent in themselves because performed without fraudulent or guilty intent. Whether under the ordinance an indictment or information could so be drawn as to show a guilty act or acts we leave to the experts on criminal pleading. Certainly the three charges here made are not of that character.

[4] It was alleged, as charged in the petition, that petitioner violated the provisions of (2) by "advertising the sale of, and offering for sale, sugar and White King soap and Crystal soap in limited quantities of less than the full amount of such sugar and White King soap and Crystal soap then owned and carried in stock" by him. This charge is the veriest conclusion of the pleader, but it is as good as (2) itself. Why was not the advertisement set forth? Did petitioner carry a ton of sugar and offer all but ten pounds of it? Did he have a thousand bars each of White King soap and Crystal soap and offer all but five of each? Indeed, to what extent was the amount of each of the products limited as compared with the amount on hand? It will be observed that if under the denouncement of (2) itself petitioner had carried a ton of potatoes in stock and had offered all but a pound of them for sale he would have been subject to punishment.

[5] The charge under (3), according to the petition, is that petitioner was guilty of "advertising White King soap for sale at 2¢ per bar and offering for sale Ivory soap at 5¢ per bar as a substitute for White King soap, the said Ivory soap then and there being of a different quality and brand and bearing a different trade-mark from the White King soap so advertised for sale." This charge is a fair illustration of the defects apparent on the face of (3), as it is couched practically in the language of the enactment. It is not alleged that the prices fixed for the soaps were not fair, nor that the alleged "substitute" was offered to one who had desired the advertised product, nor that the offer was not made to one who came to buy some other and perhaps unadvertised product; coffee, for instance. The pleading is possibly susceptible of the construction that the word "substitute" is used in the sense that petitioner offered an unadvertised article and not one which had been advertised, to whatever person and under whatever circumstances. Here, however, it is to be observed that there is not even an allegation that the Ivory soap had not itself been advertised for sale. The mind becomes weary in unraveling the difficulties manifest in this charge and in the portion of the ordinance upon which it was based.

[6] It is alleged in the petition that petitioner violated the terms of (5) by "offering

for sale, and selling, 1 dozen eggs U. S. Extra Large Size, said offering of said eggs for sale, and the sale of said eggs, being then and there contingent upon the concurrent purchase of other articles of merchandise by the purchaser of said 1 dozen eggs." This charge is in the very spirit of (5) itself. Observe that not only did petitioner offer, but he sold. Was the price of each of the articles satisfactory to the buyer or not? Did the acquisition of the articles, or did they not, satisfy a want long felt by him? How was any one harmed by the transaction under the terms of the charge and under the terms of (5)? Who made the combination contingent? Did the buyer cry for it or did petitioner force it? This matter is left to doubt also by (5) itself. Did the purchaser desire to be a "concurrent" buyer or did he not? If he did, who was harmed, what fraud was committed, under the charge and under the denouncement culminated by (5)?

We determine that the ordinance, under the terms of (2), (3) and (5), when invoked to support such charges as the ones inveighed against here, is unconstitutional. The ordinance bears no reasonable or plausible relation to the evils sought to be remedied by it, as they are stated in the briefs.

Petitioner is discharged from custody.

We concur: CRAIG, J.; STEPHENS, J.

128 Cal.App. 743
JOINT HIGHWAY DIST. NO. 9 v. OCEAN
SHORE R. CO. et al.
Civ. 8134.

District Court of Appeal, First District, Division 2, California.

Jan. 18, 1933.

Hearing Denied by Supreme Court March 17, 1933.

1. Eminent domain $\S$ 136.

Market value of property condemned determines amount of award, not "value" of property in use (Code Civ. Proc. §§ 1248, 1249).

Term "value" is used in two different senses as meaning the utility of an object as satisfying directly or indirectly needs or desires of human beings, or "value in use"; term also means worth of object consisting in its power of purchasing other objects, which is called "value in exchange."

[Ed. Note.—For other definitions of "Value," see Words and Phrases.]

2. Eminent domain $\S$ 136.

"Market value," in condemnation proceeding, is highest sum which property is

worth to person generally purchasing in open market, in consideration of land's adaptability for any proven use.

[Ed. Note.—For other definitions of "Market Value," see Words and Phrases.]

3. Eminent domain ⇨136.

Demand essential to create market value for property sought to be condemned may be either active or potential.

4. Evidence ⇨555.

Experts may give opinions on market value of property condemned, based entirely on potential demand, where evidence shows reasonable probability of finding purchasers within reasonable time.

5. Evidence ⇨555.

Expert testimony as to value of right of way formerly used for railroad, based upon potential demand for strip for future railroad purposes, *held* competent under evidence, in proceeding to condemn strip for highway.

The evidence showed that a certain group had been working for many years upon a proposed railroad project over route in question, that vast sums of money had been spent in making surveys, obtaining options and procuring advice, that one of witnesses had contemplated toll-road project over the right of way, and that conditions would make practicable and feasible either railroad or toll-road project over the route.

6. Evidence ⇨474(18).

Witness having sufficient qualifications may give opinion on market value in condemnation proceedings, though he knows nothing of value of property except for its highest available use.

7. Eminent domain ⇨133.

When property sought to be condemned is improved so as to make it peculiarly adaptable for its highest available use, and market exists for property for such use, cost of reproduction of improvements becomes factor in determining market value.

8. Eminent domain ⇨134.

That strip would have to be supplemented by condemning additional property to make railroad feasible *held* not to prevent consideration of its availability for railroad purposes, in determining market value in highway condemnation proceeding.

9. Eminent domain ⇨262(4).

Judgment in condemnation proceeding fixing value of property at sum between varying estimates of witnesses for respective parties, *held* justified, though trial judge did not view premises.

10. Appeal and error ⇨1052(5).

Error, in admitting expert opinions of market value improperly arrived at, *held*

harmless where court made its own determination at amount below competent estimates.

11. Trial ⇨89.

Admission on direct examination of some of witnesses' testimony which should have been admitted only on cross-examination *held* not sufficient ground for striking all testimony of witnesses.

12. Eminent domain ⇨202(4).

Testimony as to strategic location of land and nature of improvements thereon, tending to show availability for particular purposes, *held* proper on direct examination in condemnation proceeding.

Appeal from Superior Court, San Mateo County; Maurice T. Dooling, Jr., Judge.

Condemnation proceeding by Joint Highway District No. 9 against the Ocean Shore Railroad Company and others. From the judgment, plaintiff appeals.

Affirmed.

Donald C. Young, Mary Schwab, and Henry Heidelberg, all of San Francisco (John R. Golden, of San Francisco, of counsel), for appellant.

Keyes & Erskine and Henry E. Monroe, all of San Francisco, and Ross & Ross, of Redwood City (J. Benton Tulley, of San Francisco, of counsel), for respondents.

SPENCE, J.

This is a proceeding in eminent domain. Upon a trial by the court sitting without a jury plaintiff had judgment against defendants Ocean Shore Railroad Company and McNee, condemning a right of way for highway purposes over the property of said defendants. In its findings the trial court determined that the "fair market value" of the property of the defendant Ocean Shore Railroad Company was \$95,000 and that the "fair market value" of the property of defendant McNee Company was \$17,000, and entered its judgment accordingly. From this judgment plaintiff appeals.

As the entire controversy on this appeal involves the evidence and findings relating to the market value of the property condemned, it is appropriate that said property be briefly described. It consists of a strip of land 60 to 100 feet in width and approximately five miles in length, located in San Mateo county near the Pacific Ocean. This is a continuous strip, except for a small gap in the center which is of no concern on this appeal, extending from a point north of Pedro Point to a point to the south thereof. It is a part of the right of way which was used for railroad purposes until 1920 by the Ocean Shore Railroad, and a large portion of the proper-

ty is located about 200 feet above the water on the steep bluffs overlooking the Pacific Ocean. It had been graded for the use of the Ocean Shore Railroad and was suitable for use for either railroad or highway purposes.

Pedro Point, above referred to, is on the shore line at the end of a spur which runs in a westerly direction to the sea from a range of hills. This range of hills stretches southerly from the southwestern part of San Francisco to a point near the town of Boulder Creek, in the Santa Cruz Mountains, practically paralleling the shore line of the ocean for most of that distance. These hills rise to a considerable height, being approximately 2500 feet above sea level at a point between Pescadero and Redwood City. There are heavily wooded watersheds on the westerly slopes of these hills where Pescadero, Butano, and Gasez creeks run down through fertile valleys to the ocean. Owing to the existence of this range of hills and the spur running to Pedro Point, it is practically impossible at the present time to enter the territory on the ocean side of the range and south of the spur from the territory on the north or east thereof without climbing over either the range or the spur. In order to afford transportation facilities into this territory the Ocean Shore Railroad Company many years ago acquired the strip around Pedro Point and made improvements on this right of way which need not be described in detail. Suffice it to say that the grading project, in making a shelf around the precipitous cliffs near Pedro Point, was a difficult one, involving the removal of 1,600,000 cubic yards of material, almost one-half of which was solid rock. For financial or other reasons the Ocean Shore Railroad was not built beyond Tunitas, but trains were run to that point for several years. The operation of the road was abandoned by the company in 1920 and its financial difficulties are now a matter of history. The rolling stock was sold and the tracks and ties were removed. All that remained was the roadbed, a portion of which is still owned by the company and is the subject of this litigation, together with that portion of the roadbed running across the McNee property. It is not disputed that the property here involved constitutes the only practical railway gateway into the territory referred to above and that the grading thereon constitutes 95 per cent. of the work necessary to complete a roadbed for either a railroad or a highway. Various estimates were given of the reproduction cost less depreciation, the lowest of which estimates was well in excess of \$600,000.

Upon the trial the parties asserted their respective claims regarding the market value of this property. Experts were called and the estimates of those produced by plaintiff were widely at variance with the estimates of those produced by defendants. Appel-

lant's witnesses saw no value in this strip of land other than its value as bare land located where "it was too steep to even raise goats," and they therefore found it to have only a nominal market value. They admittedly did not take into consideration its availability for railroad or highway purposes. On the other hand, respondents' witnesses did take into consideration the availability of the property for transportation purposes, and their estimates of the market value ran from \$250,000 to sums in excess of \$500,000. To the testimony of all of these witnesses for respondents, counsel for appellant entered repeated objections. Practically all of these objections were overruled and it was agreed that the testimony was admitted subject to a motion to strike. Such motion was thereafter made by appellant to "strike out all of that testimony of the witnesses, Archibald Baker, H. G. Butler, P. L. Burr, William James Ford, Harry G. Burrows, Hussey, Sutton, Middleton and Crosby, Lane and Wood." This motion was made upon the ground "that the testimony here introduced has not been testimony which showed *market value*, the testimony simply showing the *value* of the highest available use." (Italics ours.) There were other grounds stated for striking the testimony of certain witnesses, but as they are not urged on this appeal we will not discuss them. The motion to strike was taken under submission with the cause upon its merits, but no ruling upon the motion appears in the record. A memorandum opinion was filed by the trial court at the time of announcing its decision and thereafter the findings and judgment were entered as above indicated.

Before proceeding to a discussion of the merits of the appeal we may state that a review of the record shows that there was ample evidence to support the trial court's findings regarding the market value of the property. This is apparently conceded, but appellant contends that the "testimony of defendants' witnesses was incompetent" and that appellant's objections should have been sustained and appellant's motion to strike should have been granted. Although appellant devotes a great deal of space to attacking certain statements of the trial court in its memorandum opinion, we shall proceed to a consideration of the above contentions which are directed to those matters which are properly before us and which, we believe, are determinative of this appeal.

As appellant's motion to strike was directed at all of the testimony of all of respondents' witnesses who had testified as to market value, we should first inquire as to whether there was any competent evidence given by any of said witnesses on this subject. Our examination of the record convinces us that there was much of the testimony on this subject which was competent and was properly

admitted by the trial court. The qualifications of these witnesses are not disputed. They were highly trained men, most of whom had devoted many years of their lives to engineering work, with particular reference to railroad construction, maintenance, and valuation. In the opening brief counsel for appellant concedes that "they were all high-class experts" and we will not pause to state their respective qualifications. We further deem it unnecessary to set forth all of the voluminous testimony given by said witnesses, as counsel for appellant does not do so, being content with stating that "the testimony of one was the testimony of all, with certain variations unnecessary to notice." Counsel, however, then proceeds to cull from the record those portions of the testimony which are deemed most objectionable, dwelling chiefly upon the testimony of the witness Baker.

We will quote but a few examples of the testimony introduced which in our opinion was entirely competent. Mr. Butler, a man of wide experience, was asked:

"Q. Now, having in mind your examination of the ground and of the records, and your experience as an engineer, and valuation of the properties and grading, and so forth, can you state what, in your opinion, is the market value of this land and of the improvements thereon? * * * A. In my opinion the Ocean Shore section has a market value of \$500,000.00 and the McNee section \$60,000.00."

The following is found in the examination of Mr. Ford:

"Mr. Erskine. Q. Will you give the value, your statement—will you state then what you consider to be the value of—the market value of these two pieces?

"Mr. Heidelberg. For what purpose?

"Mr. Erskine. For any purpose for which they may be adapted.

"Mr. Heidelberg. That is all right, I have no objection to that question.

"A. The Ocean Shore part, \$532,620.00.

"Mr. Erskine. Q. And for the McNee? A. \$79,000.00 for the lower end."

On the examination of Mr. Burrows there was considerable argument by counsel as to the form of the questions relating to market value. We will not set forth the questions and answers propounded on direct examination, for on cross-examination the witness was asked the question of market value in the precise form insisted upon by counsel for appellant, as follows:

"Mr. Heidelberg. I am asking you, Mr. Burrows, what would be the fair market value of the Ocean Shore property and the McNee property, from an owner willing to sell to a buyer willing to buy, in terms of money, a reasonable time being allowed to consum-

mate the sale, having knowledge of all of its available uses and purposes? * * * A. I believe that the market value of the Ocean Shore property, with the railroad work on it, is \$420,000.00, and that the value of the McNee property, with the railroad work on it, is \$57,700.00."

Other evidence of a similar nature is found in the testimony of other witnesses. If such testimony was not based upon improper considerations the trial court properly denied the motion to strike as to the testimony hereinabove set forth and any similar testimony. Practically all of these witnesses for respondents freely conceded either that they did not know the value of the property for purposes other than transportation purposes or that they considered its value for other purposes purely nominal.

It is apparent from what has been said that the property involved in this litigation was far better adapted for use for railroad or highway purposes than for any other purpose and that its value in use for such purposes was far greater than its value in use for any other purpose. Its use for such purposes was, therefore, what has been termed its "highest available use." Under these circumstances the trial court was confronted with the problem of determining the proper amount of compensation to be awarded to the owners of the property taken.

The authorities covering the determination of the market value and the competency of testimony in such cases are numerous. Many of the leading cases on the subject are reviewed in *City of Stockton v. Ellingwood*, 96 Cal. App. 708, 275 P. 228, and *Sacramento, etc., R. R. Co. v. Heilbron*, 156 Cal. 408, 104 P. 979. It is difficult to reconcile the various decisions and the language employed, for even where the cases are in substantial accord on the definition of market value they are found to be at variance on the rules relating to the competency of evidence to prove the ultimate fact as thus defined. It is conceded by appellant that "there is some comfort in the language of the *Ellingwood* opinion for respondents' contentions." We would go further, for we believe that the authorities, including the decision as well as the language of the opinion in the case of *City of Stockton v. Ellingwood*, supra, sustain the admissibility of ample competent evidence in the present case to support the findings and judgment.

We do not propose to exhaustively review the numerous authorities cited by counsel in the present case. Many of these authorities have been treated at length in the decisions referred to above. But before considering more specifically some of appellant's contentions we desire to make certain general observations regarding the numerous decisions on the subject before us.

[1] In our opinion the difficulty encountered in reconciling the various decisions and the language used by the various courts is due in part to the fact that the word "value" is frequently used but it is often impossible to determine the sense in which that word is employed. Sections 1248 and 1249 of the Code of Civil Procedure used the terms "value" and "actual value." It has long been recognized that the word "value" may be used in different senses. In *Nichols on Eminent Domain* (2d Ed.) vol. 1, p. 661, it is said: "The conception that property has a market value distinct from its value for particular uses is an ancient one. It is referred to by Aristotle, and was recognized in colonial times, being then called 'the rule of common estimation.'" In *San Diego Land, etc., Co. v. Neale*, 78 Cal. 63, 20 P. 372, 3 L. R. A. 83, the court said at page 67 of 78 Cal., 20 P. 372, 374, 3 L. R. A. 83: "The word 'value' is used in different senses. Bouvier, in his definition, says: 'This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing goods with it. The first may be called the value in use; the latter, the value in exchange.' For the purposes of the law of eminent domain, however, the term has reference to the value in exchange or market value." Also, in *Black's Law Dictionary* we find the following: "Value. The utility of an object in satisfying, directly or indirectly, the needs or desires of human beings, called by economists 'value in use'; or its worth consisting in the power of purchasing other objects called 'value in exchange.'" The distinction between value in use and value in exchange or market value has been generally recognized by the courts and it is well settled that it is the market value which governs in proceedings in eminent domain and not the value in use to either the owner or condemnor. *Sacramento R. R. Co. v. Heilbron*, supra; *Central Pacific Ry. Co. v. Feldman*, 152 Cal. 303, 92 P. 849; *Santa Ana v. Harlin*, 99 Cal. 538, 34 P. 224; *Spring Valley W.-W. v. Drinkhouse*, 92 Cal. 531, 28 P. 681; *San Diego Land, etc. Co. v. Neale*, 88 Cal. 50, 25 P. 977, 11 L. R. A. 604; *San Diego Land, etc., Co. v. Neale*, 78 Cal. 63, 20 P. 372, 3 L. R. A. 83; *City of Stockton v. Ellingwood*, supra; 10 Cal. Juris. 338; *Lewis on Eminent Domain* (3d Ed.) vol. 2, p. 1227 et seq.; *Nichols on Eminent Domain* (2d Ed.) vol. 1, p. 658 et seq. But, while generally recognizing this distinction, the courts have frequently used the word value without any clear indication of whether it is used in a particular expression to indicate value in use or market value. Furthermore, we believe that the term market value has sometimes been employed in the sense of value in use.

By way of example we find the following language used in *City of Stockton v. Ellingwood*, supra, at pages 715 and 716 of 96 Cal. App., 275 P. 228, 231, "If the lands sought to be condemned are peculiarly valuable for

reservoir purposes, we think the following is a correct statement of the law as applied to the pending actions: What the land is worth in the market for reservoir purposes, not what it is worth to the condemnor for reservoir purposes, is the major factor to be considered by the court in making its award of damages. * * * While the qualifications of the witnesses may be inquired into with considerable minuteness upon direct examination, it does not appear that testimony as to the value of lands for any special purpose may be given by the witness in dollars and cents. The witness may be questioned as to every adaptability that would give value, but his opinion must not be expressed in the general terms of so much money as the market value." The words "market value" appearing at the end of the foregoing quotation must necessarily have been used by the court in the sense of value in use for a particular purpose, for the very subject upon which witnesses are permitted to give their opinions in dollars and cents is the market value of the land. It is a dollars and cents estimate of the value in use for a given purpose which is not permitted, at least on direct examination.

[2] We believe it perfectly clear that certain land may be of but small value in use for one purpose and of much greater value in use for another purpose. It may therefore be said to have a different value for one purpose than for another if the word value be understood as meaning its value in use. But a given piece of land has only one market value and not a certain market value for one purpose and a different market value for another purpose. This is true because by what has been termed the classic definition, "market value" is fixed as the "highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable." *Sacramento R. R. Co. v. Heilbron*, supra, page 409 of 156 Cal., 104 P. 979, 980. This market value may be greater or less than the value in use to either the owner or the condemnor, but in the eyes of the law it is a fixed amount determined by "the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use." *Sacramento R. R. Co. v. Heilbron*, supra, page 412 of 156 Cal., 104 P. 979, 981.

We further believe that the definition of market value first above quoted and often found in the decisions has itself brought about some confusion. It apparently contemplates the highest price which "a purchaser" will pay. This would seem to fix market value by the necessities or whims of a single purchaser rather than by the "highest sum which the property is worth to persons generally." It

frequently happens that a condemnor is willing to pay almost any price for a given piece of land, strategically located, rather than forego a contemplated project; but it is well settled by the authorities, above cited, that advantage may not be taken of the necessities of the condemnor. In other words, the price which a single prospective purchaser might be willing to pay does not establish market value, which market value must be determined, in the last analysis, by the "rule of common estimation."

The determination of market value is sometimes a simple matter, but is frequently most difficult. There is little difference of opinion, ordinarily, regarding the market value of certain securities and certain articles of commerce for which there is an active demand resulting in daily sales. When, however, an attempt is made to fix the market value of real property some little difficulty is encountered even when the property is located in a populous center where the sales of somewhat similar property are frequently made. The difficulty is even greater when the real property is located in a less populous area where there is little active demand and sales are less frequently made. When, as here, such property is located in an isolated area and is improved so as to make it peculiarly adaptable to a particular use and when there have been no sales at any time in that vicinity of similar property with like improvements, the problem of determining market value becomes a most perplexing one. In such cases it has been said that "there is no market value in the strict sense of the word," as there is no "general demand." *City of Stockton v. Ellingwood*, supra, page 734 of 96 Cal. App., 275 P. 228, 239. But in our opinion, with the possible exception of certain types of real property which, by reason of the peculiar nature of improvements actually in use thereon, have been said to be not marketable (*Nichols on Eminent Domain* [2d Ed.] vol. 1, p. 677), the test is always the market value of the land.

With the foregoing observations in mind we shall proceed to analyze more specifically some of the contentions found in appellant's brief, disregarding those which are merely directed at the trial court's statements in its memorandum opinion. This is somewhat difficult, as the headings found in the opening brief are practically all directed to the statements found in the memorandum opinion, while the headings in the reply brief are not only entirely different in form, but are somewhat different in substance.

[3-5] Appellant contends that "marketability must be shown before availability can be considered" and that "testimony on market value for a particular purpose cannot be given unless and until a market therefor has been proved." The main thought behind these contentions is, in the words of appellant, that "a market is essential to a market value." With

this last statement we can readily agree. It goes without saying that a demand is essential to create a market value, but in our opinion such demand may be either an active or a potential demand. Appellant seems to consider that there can be no market value unless there is an active demand, but such a rule would frequently result in depriving the owner of his property without awarding him just compensation. The mere fact that there is no one who is ready, willing, and able to purchase the property at the time in question does not mean that the property has no market value. In *Nichols on Eminent Domain* (2d Ed.) vol. 1, at page 661, it is said: "Market value is, essentially, based on assumption, not on fact. To establish market value it is not necessary to point out any designated person who is able and willing to buy the property at the price alleged, or at any price * * *." While it may be entirely proper on cross-examination to elicit facts to show that there is little or no active demand for the property, such testimony would not necessarily indicate the total absence of a potential demand therefor; and while the weight to be given to the testimony of witnesses on market value may be affected by the fact that they have not sufficiently considered the nature and extent of the demand, we believe that opinions on market value may be given by qualified experts based entirely upon a potential demand where the evidence tends to show a reasonable probability that purchasers for the property may be found within a reasonable time. In passing we may state that a "reasonable time" in cases like the present one is far greater than in cases involving ordinary land. *City of Stockton v. Ellingwood*, supra, page 714 of 96 Cal. App., 275 P. 228.

Counsel for appellant attempts to belittle the effect of the testimony introduced by respondents for the purpose of showing a demand for the land for transportation purposes. This testimony did fall short of showing that there was any one ready, willing, and able to purchase the land for such purposes, but, as above indicated, such showing was unnecessary. The testimony introduced showed that a group consisting of the witness Chamberlain and his associates had been working for many years upon a proposed railroad project over this route; that they had expended vast sums of money making surveys, obtaining options and procuring advice on the engineering, financial, and legal phases of their proposed project; that they had purchased an option on the property here involved, but their plans had been interrupted by litigation between the respondent Ocean Shore Railroad Company and the Spring Valley Water Company over another portion of the right of way; that when a decision was obtained in that litigation favorable to said respondent, said option was renewed and was actually in existence and the parties were still negotiat-

ing at the time that this proceeding was commenced. The testimony further showed that one of respondents' witnesses had contemplated a toll-road project over this right of way but had finally given up this idea when the then members of the board of supervisors of San Mateo county had indicated that they did not favor such a project. In addition to the foregoing testimony, experts, who were familiar with the strategic location of the property and its availability for transportation purposes, and who had studied the topography and resources and the territory to be served, testified that in their opinion the conditions would justify and would make practical and feasible either a railroad or a toll-road project over this route. Regardless of any actual dealings with prospective purchasers this last-mentioned testimony constituted some evidence of a potential demand for the property for transportation purposes. Such evidence was strengthened by the showing that certain individuals had been actually working on plans for a railroad project and had procured an option upon the property in question. In view of all of the evidence mentioned above the trial court could properly conclude that there was a reasonable probability of finding purchasers for the property for transportation purposes within a reasonable time. In other words, we believe that there was ample evidence to show a potential demand for the property for transportation purposes and that "marketability" for such purposes was thus established.

It does not follow from what has been said that the "value in use" for transportation purposes would be the "market value" of the property. The value in use for such purposes would be but one factor in determining the market value. The nature and extent of the demand, active or potential, for the property for transportation purposes would be at least an equally important factor in such determination. Where the demand is potential rather than active the honest opinions of well-qualified experts will differ greatly, as the problem of weighing the factor of demand with the other factors to be considered becomes a most difficult one. In such cases the widest latitude should be permitted in the cross-examination of the experts in order to test their opinions. But where it appears to the trial court or jury that there is a potential rather than an active demand for the property for its highest available use, then the opinions of those experts who either entirely ignore the effect of such potential demand upon the market value or, on the other hand, treat such potential demand as affecting the market value to the same extent as an active demand, should be weighed accordingly.

[6] Appellant further attacks the competency of respondents' evidence on market value upon the theory that such testimony was merely of "market value in itemized terms of

money for the property's highest available use." We have above indicated that in our opinion property has but one market value, and not a certain market value for one particular use and a different market value for another use. If, under the established rules, a witness is shown to have sufficient qualifications to give an opinion on market value, he may do so even though he knows nothing of the value in use of the property for uses other than its highest available use. As was said in *City of Stockton v. Ellingwood*, supra, at page 716 of 96 Cal. App., 275 P. 228, 231: "If a witness, by reason of his skill, learning or technical training, understands the adaptability of the lands in question for a particular purpose, and the demand for land for such purpose, he may state the market value of the land, although he may be entirely unacquainted with the other elements which would be considered by different buyers competing for the same property." We believe that if we may properly speak of the market value of the land for its highest available use, such market value must necessarily be the same as the market value of the land.

[7] Appellant further states that the market value "cannot be based on cost of reproduction, plus appreciation, less depreciation." There is some conflict of authority on the question of the admissibility of evidence to show such cost of reproduction, but we believe that when it appears that property is improved so as to make it peculiarly adaptable for its highest available use and there may be said to be a market for the property for such use, the cost of reproduction of such improvements becomes a factor in the determination of market value and to that extent the opinions of the witnesses may "be based on" such cost. This does not mean, however, that such cost of reproduction is the market value of the land, for other factors, including demand, enter into the ultimate determination of market value.

Appellant further contends that "testimony of strategic value for transportation uses cannot be given, because appellant had no competitor therefor." Here again appellant assumes that there was no demand for the land for transportation purposes other than the demand created by appellant. We have heretofore pointed out that there was sufficient evidence to show a potential demand and therefore potential competition for the property for such purposes and it cannot be said that appellant had no competitor. The situation here is not analogous to the one presented in *Gilmer v. Lime Point*, 19 Cal. 47, cited by appellant. The owner there attempted to prove the "value of the premises as a site for fortification." Such evidence was held inadmissible "because there was no market for land for such purposes, competition being essential to a market, and the Government being of necessity without a com-

petitor in purchases of land for purposes of fortification." Whenever there is potential competition for land for a particular use, its strategic location and the nature of the improvements thereon, if any, may be considered in determining its availability for such use and are factors in determining the market value. *Mississippi & R. R. Boom Company v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Lewis on Eminent Domain* (3d Ed.) § 707; 20 C. J. p. 776 et seq. Appellant's contention may seem to imply that testimony of "strategic value" was given in dollars and cents, but we find no such testimony in the record. Respondents' witnesses merely gave testimony regarding the strategic location of the land and further testimony regarding improvements, in order to show its availability for use for transportation purposes, and said witnesses properly considered these elements in arriving at their opinions on market value.

[8] A further contention made by appellant is that the "necessity of condemnation of many miles of lands owned by others negatives availability of this strip of land for railroad purposes." In support of this contention appellant cites and relies mainly upon *City of New York v. Sage*, 239 U. S. 57, 36 S. Ct. 25, 60 L. Ed. 143, and *City of Stockton v. Vote*, 76 Cal. App. 369, 244 P. 609. A careful reading of these decisions shows that this broad proposition stated by appellant cannot be sustained. These and other authorities on the subject are discussed in *City of Stockton v. Ellingwood*, supra, at page 726 of 96 Cal. App., 275 P. 228, and following, where the court reached a conclusion contrary to that contended for by appellant. The necessity of acquiring a right of way for railroad purposes over other lands might affect the market value of the strip in question, but it cannot be said that it absolutely "negatives availability of this strip of land for railroad purposes" unless the impracticability of uniting the several parcels of land appears from the record. *City of Stockton v. Ellingwood*, supra, p. 733 of 96 Cal. App., 275 P. 228.

Appellant attempted to show such impracticability. An effort was made to show that it was necessary, because of the topography of the country, to obtain a right of way through what is known as Sharp Park. Assuming that such necessity was shown, appellant now contends that "no right of way could be secured through Sharp Park, without which the strip of land was utterly valueless and useless for railroad purposes." It is unnecessary to deal with the other question embraced in this contention, for in our opinion appellant's claim that "no right of way could be secured through Sharp Park" cannot be sustained. That property, comprising a large tract of land, was conveyed to the city and county of San Francisco in

1917 in trust for park purposes with a reversionary clause applicable in the event that it was used for other purposes. At that time the Ocean Shore Railroad Company was actually operating its railroad line across said property and continued to so operate for several years thereafter. Furthermore, there were two public roads running across the land and the grant to the city and county of San Francisco for park purposes was made subject to the previous grants of rights of way for said public roads. The right of way previously used by the railroad company was within a few feet of one of these roads and practically paralleled the road across the property. As a railroad line was in actual operation across the property at the time of the grant for park purposes, appellant's contention that a grant of a right of way would be inconsistent with the use of the property for park purposes cannot be sustained. Those claiming under the reversionary clause could not successfully assert such claim. Appellant cites and relies upon *Hall v. Fairchild-Gilmore-Wilton Co.*, 66 Cal. App. 615, 227 P. 649; but the facts in that case readily distinguish it from the facts before us in the present case. In any event it was unnecessary to obtain a right of way for railroad purposes over that portion of the land granted for park purposes, for such railroad could have been run over the portion of the property previously granted for highway purposes as contemplated by subdivision 5 of section 465 of the Civil Code.

Appellant further contends that "the value, if any, of the stone quarry should be disregarded." While evidence of the value of the stone quarry was admitted, it does not appear that this evidence was considered by the trial court in fixing the market value of the property. In fact, the memorandum opinion filed by the trial court and set forth by appellant in its brief affirmatively shows that this evidence was disregarded by the court. Under these circumstances there is no showing that the error, if any, in admitting this evidence was prejudicial.

[9] Appellant further contends that "no view of the premises was taken by the trial judge, and therefore there is no basis for the compromise judgment." In this connection it is argued that as the trial judge did not view the premises and did not accept the testimony of either the witnesses for appellant or respondent in fixing the market value, the judgment is "totally unsupported by any evidence." We find no merit in this contention. The trial court is not bound by the opinions of the witnesses on market value, and the province of such testimony is only to aid the court in arriving at a conclusion. 10 Cal. Juris. 972. There is usually a sharp conflict in the evidence relating to market value in condemnation proceedings. The estimates given by the witnesses for the own-

ers are ordinarily found to be in excess of the estimates given by the witnesses for the condemnor. In such cases the trial court, after weighing all of the evidence, frequently fixes the market value at a sum between the varying estimates of the witnesses for the respective parties. This was done in *City of Stockton v. Ellingwood*, supra. On page 718 of the opinion in 96 Cal. App., 275 P. 228, 233, the court points out that the trial court fixed the market value at an average of \$80 per acre "although the witnesses for respondent gave their opinion of value as \$100 per acre, and the witnesses for the appellant, at an average of about \$25 per acre." On pages 742 and 743 of the opinion in 96 Cal. App., 275 P. 228, attention is called to the fact that the trial court was not bound by the testimony of the expert witnesses and that it was the province of the trial court to determine the weight to be given to such testimony. There, as here, the trial court no doubt believed that, in estimating the market value of the land, respondents' witnesses had not sufficiently considered the necessity of and the time and expense involved in combining the land with other lands in order to make the property fully available for its highest use. In the instant case the trial court no doubt reviewed all of the evidence and further believed that respondents' witnesses had given too much consideration to the reproduction cost of the improvements and too little consideration to the fact that the demand for the land for transportation purposes was more in the nature of a potential demand than an active demand. On the other hand, the trial court probably believed that the testimony of appellant's witnesses was entitled to but little weight, as they had entirely ignored the existence of any demand for the land for transportation purposes and the availability of the land for such purposes. The trial court was not obliged to blindly accept the estimate of any witness on market value, and properly made its own determination of the ultimate fact, aided by the testimony of the various witnesses weighed in the light of all of the evidence before the court. There was ample evidence to support the findings and judgment, and the fact that the trial court did not view the premises and did not fix the market value at a figure testified to by any witness is entirely immaterial.

In the reply brief appellant states the contention that "testimony evaluating remote, conjectural, speculative and hypothetical uses are inadmissible." If we correctly understand this contention we can readily agree that such testimony would be inadmissible. We might go further, for under the law of this state it is not proper on direct examination to give in terms of money the value in use of property for any purpose whatever. But we believe that if there is a demand for the

property for a given purpose it is entirely proper for a witness to give consideration to its value in use for such purpose as one of the factors in determining its market value. If, on the other hand, the possibility of the use of the land for a given purpose is so remote, conjectural, and speculative as to have no effect upon the minds of purchasers generally, its value in use for such purpose cannot then be a factor in determining its market value. We find no testimony in the record "evaluating" remote, conjectural, or speculative uses. We have above indicated that in our opinion there was ample evidence of a potential demand for the property for transportation purposes, and the testimony of respondents' witnesses was not inadmissible merely because said witnesses gave consideration to the value in use of such property for such purposes as a factor in arriving at their determination of market value. The evidence did more than show a mere remote, conjectural, or speculative possibility that the property would be used for transportation purposes. It was sufficient to show that there was a reasonable probability of finding purchasers for the property for transportation purposes within a reasonable time.

[10] In reviewing the voluminous record in the present case we do find testimony which in our opinion should have been stricken out. For example, the testimony of the witness Baker, upon which appellant dwells at length, affirmatively shows that said witness had no proper conception of the factors to be considered in determining market value. In giving his opinion on the market value of the property of the Ocean Shore Railroad Company this witness testified on direct examination:

"I presume the market value would be the cost of reproduction. * * * My conclusion as to market value is it would be in the neighborhood of \$620,000, it would cost in the neighborhood of that to reproduce that work, and anything, whether highway or railroad, that went in there would have to do that amount of work to get the thing into the shape that it is today.

"Q. Is that your conclusion then as to what the market value of it is? A. Yes, it is.

"Q. Now, what is your statement in the same respect regarding the McNee tract? A. That it would cost \$169,000.

"Q. And that is your idea of what you consider to be the market value of that tract of land to anybody who wanted to use it? A. It is what it would cost them to reproduce it."

This and other testimony of the witness showed that he believed that the term "market value" was synonymous with the term "cost of reproduction." Similar criticism can be made of the testimony of one or more of the remaining witnesses for respondents, but it cannot be applied to all of respondents' wit-

nesses. We may refer to the testimony of the witness Butler, who considered the cost of reproduction but arrived at a market value far below such cost of reproduction. It was entirely proper under the circumstances for said witness to give consideration to such cost as a factor in determining market value. Further, we believe the testimony of the witness Wood purporting to represent market value should have been stricken. This witness would not concede that the "possibility of sale" had any relation to market value and his opinion purports to be no more than his estimate of the value in use of the property for transportation purposes.

It may therefore be freely conceded that the above-mentioned evidence and other evidence in the record should have been stricken, but it does not necessarily follow that the action of the trial court in admitting such evidence and thereafter failing to strike the same constituted prejudicial error requiring a reversal. In *City of Stockton v. Ellingwood*, supra, at page 742 of 96 Cal. App., 275 P. 228, 243, the court quotes from *Conan v. Ely*, 91 Minn. 127, 97 N. W. 737, as follows: "Ordinarily, the admission or exclusion of opinion evidence, where it is not of a determinative character, is not regarded as sufficient to justify a reversal." This is more particularly true where, as in the present case, the cause was tried by the court sitting without a jury and it does not appear that the trial court's determination of market value was in any way influenced by the testimony erroneously admitted. While the objectionable testimony contained figures in excess of the highest estimates found in the competent testimony on market value, the trial court fixed the awards at figures far below the lowest estimates of market value found in any of the testimony, competent or incompetent, offered by respondents. It is quite apparent that the trial court made its own determination of the market value of the land, using the opinions on this subject merely as an aid for that purpose and giving to such opinions only the weight to which they appeared to be entitled. This was entirely proper and we find no prejudicial error in the admission of the incompetent testimony referred to or in the refusal to strike out said testimony.

Counsel for appellant have cited two recent decisions, namely, *Temescal Water Co. v. Marvin*, 121 Cal. App. 512, 9 P.(2d) 335, and *City of Los Angeles v. Deacon*, 119 Cal. App. 491, 7 P.(2d) 378, in which the decision in *City of Stockton v. Ellingwood*, supra, is discussed. We find nothing in the decisions mentioned in conflict with the views herein expressed.

[11, 12] Our attention is called to the fact that the testimony discussed in the opinion in *City of Stockton v. Ellingwood*, supra, was testimony elicited upon cross-examination

rather than upon direct examination. Counsel for appellant then makes the statement that unless the decision in that case sustains the rulings of the trial court in the present case a reversal must follow. We cannot accept this view of the situation. Here several qualified witnesses produced by respondents gave competent testimony on *market value* on direct examination. The fact that some of respondents' witnesses may have been permitted to give other testimony on direct examination, which testimony should have been permitted only on cross-examination, is not sufficient ground upon which to predicate a motion to strike all of the testimony of all of said witnesses. We are unable to see where any error found in the record has resulted in any prejudice to appellant. We believe that our conclusion in this regard is to some extent shared by counsel for appellant, for in the concluding portion of the reply brief it is stated: "The trial court correctly interpreted the law in refusing to consider estimates based on duplication costs, and being controlled entirely by what the land would bring in the open market for all purposes including railroad purposes." We may further state that much of the alleged objectionable testimony of these witnesses had to do with the strategic location of the land and the nature of the improvements thereon, tending to show its availability for transportation purposes. Under the circumstances in the present case we believe that such testimony was proper on direct examination. We have found no authority presenting facts on all fours with those before us, but the facts found in *North Shore R. Co. v. Pennsylvania Co.*, 251 Pa. 445, 96 A. 990, are somewhat similar. The decision in that case supports the view that testimony of the character referred to is admissible. Appellant insists that such testimony was inadmissible, but this argument, like many others advanced by appellant in the briefs, is based upon the premise that there was no market for the property for transportation purposes. This argument falls, for, as pointed out above, there was sufficient evidence to establish the marketability of the land for such purposes.

In conclusion we may state that with appellant's several contentions in mind we have carefully reviewed the entire record, including the evidence. The problem presented to the trial court of fixing the fair market value of the land was an exceedingly difficult one. We can conceive of no state of facts under which the honest opinions of experts on market value could differ more widely. The trial court appears to have considered all of the factors which might be properly considered in determining market value and to have fixed the "just compensation" accordingly. Our review of the entire record convinces us that no error is to be found which was

prejudicial to appellant or which has resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

129 Cal.App. 49

KLEINSASSER et al. v. McNAMARA et al.
Civ. 8301.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1933.

1. Appeal and error ⇨842(1).

Conclusions of law cannot be attacked on appeal as contrary to evidence.

2. Appeal and error ⇨854(2).

Erroneous conclusion of law constitutes no cause for reversal of right judgment.

3. Corporations ⇨316(1).

Contract with, sale of property to, or purchase thereof from, corporation by directors, acting for themselves as well as corporation, may be avoided by corporation or stockholders, without proof of fraud or injury to corporation.

4. Corporations ⇨316(1).

Transactions between corporation and directors are subject to rigid scrutiny, but will not be held void in absence of bad faith or fraud (Civ. Code, § 2230).

5. Corporations ⇨316(1).

Corporation directors' contract to sell corporation's oil properties to company also contracting to purchase directors' properties in vicinity held not voidable in absence of showing that transaction was unfair to corporation.

6. Appeal and error ⇨1010(1).

Contention that directors' contract, which trial court found on sufficient evidence was fair to corporation, should be set aside on slight showing of unfairness thereto, cannot be considered on appeal.

7. Appeal and error ⇨1071(6).

Court's failure to find whether plaintiffs, alleged to own stock in corporation solely to qualify them to maintain action to enjoin directors from contracting for sale of corporation's oil leases, were stockholders held not prejudicial error, in view of finding that other plaintiffs were stockholders.

8. Appeal and error ⇨173(6).

Plaintiffs, not alleging that contract, execution of which by corporation directors was sought to be enjoined, was never authorized

or ratified by board of directors, held precluded from urging point on appeal, in absence of showing that matter was made issue by parties' tacit consent and conduct.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Z. J. Kleinsasser and others against W. M. McNamara and others, individually and as directors of the Elberta Oil Company, a corporation, and such corporation. Judgment for defendants, and plaintiffs appeal.

Affirmed.

See, also (Cal. App.) 15 P.(2d) 788.

Walter M. Gleason, of Oakland, H. A. Savage, of Fresno, Morgan J. Doyle and J. L. Royle, both of Oakland (Henry W. Ballantine, of counsel), for appellants.

George W. Nilsson and Charles H. King, both of Los Angeles (M. F. McCormick, of Fresno, of counsel), for respondents.

TUTTLE, Justice pro tem.

This is an action brought by certain stockholders of Elberta Oil Company, a corporation, to enjoin that corporation and the directors thereof from entering into a proposed contract. Plaintiffs also pray that the board of directors be removed, and for other relief. The court found in favor of defendants, and judgment was entered accordingly. This appeal is taken from said judgment.

The trial of the action occupied some twelve days, and the record is quite voluminous, taking up several thousand pages. The principal attack of appellants is based upon the insufficiency of the findings to support the judgment.

At the time the proposed contract was entered into, and for several years prior thereto, defendant Elberta Oil Company (hereinafter referred to as defendant company) was in possession, under lease, of certain potential oil properties in San Luis Obispo county, known as the Johns lease, the Elberta lease, and the Leach lease. In the month of October, 1927, drilling operations disclosed live oil sands in a well upon the Elberta lease. Drilling operations were immediately suspended, and were not resumed until December 24, 1927, and were thereafter continued until the pumping of oil was commenced on January 8, 1928. Between the dates of October 27, 1927, and January 8, 1928, defendant directors personally acquired certain lands, options, and leases in the vicinity of the Elberta oil well, and one of which properties adjoined the Elberta lease. Thereupon, certain stockholders of defendant Elberta Oil Company commenced an action to

compel defendant directors to account for the properties so acquired, and to turn them over to the company, upon the theory that these directors had acquired confidential knowledge of the discovery of oil by virtue of their position as directors, and have used this information to benefit themselves. In respect to the latter phase of the matter, the trial court expressly finds that it does not intend to pass upon the merits and issues embraced in said action, which was, at the time of this trial, pending in the superior court of Kings county.

About the first day of February, 1928, respondent directors began to negotiate with a representative of Delaney Petroleum Corporation for the purpose of selling the said properties of Elberta Oil Company and the personal properties of said directors in the vicinity thereof. A preliminary agreement was entered into, whereby said corporation defendant and directors agreed to transfer said properties for certain considerations. Thereupon, this action was filed, and an order was secured from the superior court of Fresno county, temporarily restraining defendant directors from executing said contract. At the conclusion of this trial said order was dissolved, and the agreement was executed upon the furnishing of a bond in the sum of \$400,000.

The complaint occupies some thirty-five pages of the transcript. After reciting the facts heretofore set forth, and making numerous allegations which are evidentiary in character, we find the gist of the action to be embodied in the following paragraph:

"XII. That said defendant directors in order that they might relieve themselves from the burden and expense of paying the rentals and royalties on the properties they had acquired for their sole benefit, in direct violation of their fiduciary relationship, and contrary to the interests of the said Elberta Oil Company, and in order that they might be relieved from the drilling provisions on the said properties which they had acquired, and further, in order that they might be relieved from the burden and expense brought upon themselves by the aforesaid conspiracy and the acquisition of properties thereunder, as aforesaid, did, commencing on or about the 1st day of February, 1928, further conspire and agree together that they would combine all of their said properties so involved in litigation and legal entanglements with the said clear and marketable properties of the said Elberta Oil Company, including the valuable Elberta oil well, and make one combined sale of all of said properties, comprising approximately 1400 acres, more or less; and that said defendant directors by selling said valuable and uninvolved properties of said Elberta Oil Company would procure large sums of money, and would distribute said sums of money to themselves

in proportion to their holdings so involved, and would thereby sacrifice the said properties of the Elberta Oil Company for their own personal gain and to relieve themselves from the involvements and complications in which by reason of their violation of duty and conspiracy, as aforesaid, they found themselves then in.

"That thereupon said defendant directors did agree, and particularly said Fred Nelson, president of said Elberta Oil Company, did agree that they would only pay to said Elberta Oil Company such portion of the consideration to be received from the sale of the valuable properties of said Elberta Oil Company and their own properties so involved in litigation as they, the directors, and particularly said Fred Nelson, president, saw fit, and that said Elberta Oil Company would have to take and receive such payment as he, said Fred Nelson, as president of said Elberta Oil Company, saw fit to allow; and in this connection, plaintiffs are informed and believe and upon information and belief allege that said directors did agree among themselves that they would make and enter into such sale and would prorate to said Elberta Oil Company for all of its said property and said oil well, a sum proportionate to its said acreage."

The trial court found that each and all of the foregoing allegations were untrue, "except that the court finds that the oil properties owned by Elberta Oil Company were sold jointly with certain oil properties purchased by defendant directors and their associates, being the same properties hereinbefore referred to as being claimed by certain stockholders of Elberta Oil Company to be the property of Elberta Oil Company."

As a conclusion of law, the trial court found that "the agreements made and proposed to be made by Elberta Oil Company and said several defendants with the Delaney Petroleum Corporation hereinbefore referred to are, and each of them is, fair, honest and for the benefit of said corporation."

Judgment was accordingly entered that plaintiffs take nothing by the action.

Practically all of the 500 pages of appellants' briefs are devoted to an attack upon the findings and judgment. Their position is indicated by the following language:

"First: That the findings of fact and conclusions of law do not support the judgment in this case. The judgment for the defendants is obviously based upon the conclusions of law of the court to the effect that the Delaney deal was a fair, honest and beneficial transaction for the Elberta Oil Company; in other words, the judgment rests upon the theory that the transaction is invulnerable if fair, honest and beneficial to the corporation, notwithstanding that the Elberta directors were directly interested as individ-

uals in said transaction in a financial way and had an interest therein adverse to that of the corporation. We shall show that this theory or premise is not in accord with California law, which says that irrespective of the fairness of the transaction it is illegal if the directors had a personal interest therein adverse to that of the corporation.

"Second: That the conclusions of law to the effect that the Delaney deal was a fair, honest and beneficial transaction for the Elberta Oil Company are absolutely contrary to the undisputed evidence in this case, a large part of it being the evidence of the defendants themselves.

"Third: That while, as we will attempt to show hereinafter, certain of the findings of the court are contrary to the undisputed evidence, still the findings of fact as a whole are not inconsistent with the contentions of appellants; in other words, that appellants are entitled to the relief sought without disturbing the findings of fact made by the court."

[1, 2] Taking up the "Second" contention mentioned above, no legal ground for reversal is made therein. Conclusions of law cannot be attacked upon appeal upon the ground that they are contrary to the evidence. An erroneous conclusion of law constitutes no cause for reversal if the judgment is right. *Spencer v. Duncan*, 107 Cal. 423, 40 P. 549; *Morris v. Turley*, 94 Cal. App. 691, 271 P. 916. As aptly phrased by Baldwin, J., in the case of *Haffley v. Maier*, 13 Cal. 13, "we do not reverse for what we regard as *bad logic*, but for what we consider *bad law*." (Italics ours.)

Plaintiffs' position, as indicated from the foregoing quotations in their opening brief, would seem to indicate that they concede that the findings are supported by the evidence. It will be noted that their complaint charges specific acts of fraud upon the part of the directors in the management of the corporate property, the chief and principal charge being that, by the proposed contract and sale of its properties, defendant directors conspired to do an act which would not only be detrimental to the corporation, but would also be personally profitable to the individual directors. All such charges of fraud and mismanagement were found to be untrue by the trial court. In respect to the sufficiency of the evidence to support such findings, we have gone through the thousands of pages of the trial transcript, and are satisfied that such findings have adequate evidentiary support. A detailed discussion of the evidence thus adduced is not deemed necessary, and would unduly prolong this opinion.

Coming now to the final and principal attack made upon the findings, Do the facts

found support a judgment for defendants, or do they, as appellants contend, entitle them to judgment in their favor?

The facts relied upon by appellants are briefly as follows: The court found that defendant directors had acquired the title to a parcel of real property adjoining the Elberta property, and had also acquired oil leases upon certain properties in the vicinity of the Elberta property; that these individual properties of said directors were sold jointly with the oil properties of the said corporation, under the terms of the agreement now under attack, and that the sale of said individual properties and the corporate properties was embodied in separate instruments or agreements. It also appears, without dispute in the evidence, that the Delaney Company would not consummate the transaction unless the corporate properties were included therein. Or, as Mr. Delaney, president of the company, testified, "We wanted it all or none." It also appears that in thus disposing of their own properties the directors were motivated by personal interest of pecuniary advantage to them, arising, however, entirely out of their personal interest in their individual properties, and wholly unconnected and apart from any corporate interest.

[3] Appellants insist that, although the directors may have acted in good faith, and although the transaction may have been beneficial and for the best interests of the corporation, they nevertheless, by selling their own individual properties in the same transaction (though by separate instruments), placed themselves in a position where they were absolutely disqualified from making the corporate contract. Appellants argue that it is quite reasonable to suppose that the directors, in their zeal to dispose of their own properties, might have (though the court impliedly finds that they did not) been inclined to demand less consideration for the corporate properties. A corporate officer, they state, "is not even allowed to assume a position where *he might be tempted*." If the evidence shows that he assumed such a position, then there is no defense whatever available. Evidence of fairness, good faith, or advantage to the corporation must be excluded. It is the duty of the court to forthwith void the transaction. This has been denominated by some text-writers as the "inflexible" rule. Ballantine, in his admirable work, "Manual of Corporate Law and Practice (1930)," states that "this is the application of the 'prophylactic' principle in its most extreme form," and he adds that it "may seriously hamper honest corporate business."

Appellants contend that the foregoing facts bring the case within the rule relating to the conduct of corporate officers as laid down in *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 P. 496, 500: "It matters not

that the officer is entirely free from any intent to injure the corporation in the slightest degree, acting in fact in the highest good faith throughout, or that his actions really advantage the corporation. No inquiry may be made into such matter. The inquiry in this regard is stopped when the relation is disclosed." Respondents assert that the foregoing "inflexible" rule cannot be applied to the admitted facts stated; that under such facts the proposed contract is not void ab initio; that the door is open to questions of fairness and good faith and advantage and disadvantage flowing from the said corporate contract; and that the trial court having found for them under conflicting evidence upon those issues, the judgment cannot be disturbed.

It is undoubtedly the rule in California that under certain facts and circumstances, and where an officer of a corporation attempts to deal with the corporation, the courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the officer to show that the dealing was for the best interest of the corporation, but will set aside the transaction upon application of a stockholder. *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788; *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 78 P. 550, 554, 104 Am. St. Rep. 42; *Western States Life Ins. Co. v. Lockwood*, supra. In the *Wickersham* Case, the complaint charged defendants, while acting as officers of a corporation in which plaintiff was stockholder, with fraudulent misappropriation of corporate funds, and an injunction was prayed for. In other words, defendants were charged with fraud in the handling of corporate property. Upon the ground that the complaint showed an illegal appropriation of such property, and that the defendants acted without authority in the premises, the court overruled the demurrer. The court held that the facts brought the case within the rule stated.

In the *Pacific Vinegar Works* Case, an action was brought by a director of a corporation who, while president of the corporation, purchased its notes outright, and caused the corporation, by himself as president, to become indorser of the notes to himself, individually, as indorsee, and who brought suit against the corporation to obtain judgment upon said notes. Under the rule we have stated, it was held that no recovery could be had upon the notes. The court stated that: "It has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction."

In the *Lockwood* Case, the corporation entered into an agreement with a brokerage

firm to sell stock for certain remuneration. Immediately thereafter the president of the corporation went to the brokerage firm and secured from them a contract whereby he was to receive a share of the profits made from the sale of the stock. He collected \$40,500 as his share of such profits. Suit was brought by a stockholder to recover this amount, and judgment went for plaintiff. The court held the case to be within the rule that no inquiry could be made into the good faith of the officer, or any advantage to the corporation. The court held that the president, by so acting, became a *partner* with the brokers in the net profits received under their contract with the corporation. In other words, he had placed himself in a position where he was called upon to deal with himself in different capacities— as an individual and as a representative of the corporation— and upon these facts the contract was held void.

The first case merely held that an illegal act upon the part of a corporate officer would be enjoined at the instance of a stockholder. No question of evidence was before the court. An illegal diversion of corporate funds was alleged. There was no question presented where a person occupying a fiduciary relation was placed in a position where there would be a possible conflict of interest—personal and as the corporate representative. What was said by the court upon the question of excluding evidence as to the fairness or unfairness of the transaction was unnecessary in deciding that the complaint stated a cause of action. In the other two cases the "inflexible" rule was applied properly, because the facts showed that the corporate officer, while representing the corporation, made a contract with the corporation in which he was personally interested. Such dealings were voidable because of the fiduciary relationship existing between the officer and the corporation.

The circumstances under which proof of actual fraud or injury to the corporation are not necessary are stated as follows: "No principle in the law of corporations, therefore, is founded on sounder reasons, or more surely settled, than the principle that the directors, trustees, or other officers of a corporation, who are intrusted with its interests, and occupy a fiduciary relation towards it, will not be allowed to contract with the corporation, directly or indirectly, or to *sell property to it, or purchase property from it, where they act both for the corporation and for themselves*. In such a case the transaction is, at the least, voidable at the option of the corporation; and it may be avoided and set aside, or affirmed and any profits recovered, without proof of actual fraud, or of actual injury to the corporation." *Fletcher Cyc. Corporations*, vol. 4, § 2340. (Italics ours.)

An examination of the cases in California where the "inflexible" rule relating to the conduct of a corporate officer has been applied impels the conclusion that the factual structure of each involved the attempt by such officer to unite in the particular transaction his personal and representative capacity. In this respect it involves more than a possible conflict of personal and corporate interests. It is where the fiduciary places himself in a position where he has a divided allegiance; where he is sailing under two flags, so to speak. This is clearly indicated by the cases from foreign jurisdictions relied upon by appellants. They quote from *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456, 77 Am. Dec. 311, where the inflexible rule is applied in this language: "Remembering the weakness of humanity, its liability to be seduced, by self-interest, from the straight line of duty, the sages of the law inculcate and enjoin, a strict observance of the divine precept: 'Lead us not into temptation.'" *This case involved the purchase of corporate property by a director.* The case of *Scott v. Freeland*, [7 Smedes & M. (Miss.) 409], 45 Am. Dec. 310, involved the purchase by a trustee of trust property.

[4] In the instant case the defendant directors are not dealing with themselves. They are sellers of different property to a common buyer. They are not at all or in any manner interested in the buying company. They have no stock in that company and cannot possibly derive any profit from the transaction between it and their corporation. The purchasing company is opposed to them as it is to their corporation. The trial court has found the proposed transaction to be fair and without fraud. We believe the facts of this case call for the application of the rule laid down by this court in the case of *Todd v. Temple Hospital Ass'n*, 96 Cal. App. 42, 273 P. 595, 597. In that case an officer of a corporation was attempting to assert his rights as a creditor against such corporation. Refusing to apply the inflexible rule contended for here by appellants, the court proceeded to state the law in California upon this subject as follows: "The provisions of section 2230 of the Civil Code apply to directors and other officers of corporations, and they are forbidden to take part in any transaction concerning the trust in which they or those for whom they act have an interest adverse to the corporation; but it was not intended thereby to make a transaction between them and the corporation ipso facto void. Such transactions are subject to rigid scrutiny, and are voidable for fraud or any violation of the duties of the trust; but they will not be held void if shown to be in good faith and free from fraud. *Schnittger v. Old Home Con. M. Co.*, 144 Cal. 603, 78 P. 9; *Snediker v. Ayers*, 146

Cal. 407, 80 P. 511; *California & Arizona Land Co. v. Cuddeback*, 27 Cal. App. 450, 150 P. 379. Nor are such officers trustees of the property of the corporation in such sense as to disable them from purchasing and enforcing corporation indebtedness, unless the circumstances of the transaction make it inequitable for them to do so. *Sullivan v. Triunfo G. & S. Min. Co.*, 39 Cal. 459; *Schnittger v. Old Home Con. M. Co.*, supra; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Harts v. Brown*, 77 Ill. 226; *Forest Glen Brick, etc., Co. v. Gade*, 55 Ill. App. 181; *St. Louis, etc., R. R. Co. v. Chenault*, 36 Kan. 51, 12 P. 303; *Camden Safe Dep. Co. v. Citizens' Ice, etc., Co.*, 69 N. J. Eq. 718, 61 A. 529; *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365; *Inglehart v. Thousand Island Hotel Co.*, 32 Hun (N. Y.) 377; *Glenwood Mfg. Co. v. Syme*, 109 Wis. 355, 85 N. W. 432; *Martin v. Chambers* (C. O. A.) 214 F. 769. In the absence of fraud or inequitable circumstances the rule that it is a violation of his trust for an officer to deal with the corporation applies only where his conduct is in the nature of an attempt to unite his personal and representative characters in the same transaction and where his official connection is an essential part of the corporate action. *California & Arizona Land Co. v. Cuddeback*, supra. Within the above rule he is not compelled by the fact alone that he is a director to forego any of his rights as a creditor; and in bringing an adversary action against the corporation he is not in any way taking advantage of his position as a director, the right sought to be asserted being entirely independent of his fiduciary status." *Title Ins. & T. Co. v. California Development Co.*, 171 Cal. 173, 152 P. 542.

[5] Concluding this phase of the case, we are unable to agree with appellants in their contention that the facts found and the admitted facts justify the application of the inflexible rule for which they contend. Rather are we inclined to agree with the conclusions expressed in the "Manual of Corporation Law and Practice, Ballantine, Ed. 1930, at page 390, wherein the author says: "It would seem inadvisable to lay down any hard and fast rule as to the disqualifying effect of adverse interest or to make any legal yardstick. *Every case stands in its own bottom. The ultimate question is one of fact, was the bargain a good, fair and honest bargain?*" Accordingly, we are of the opinion that the point is without merit. (Italics ours.)

[6] It is next contended that the proposed contract should be set aside upon a *slight showing* of unfairness to the corporation. As the court found the contract to be fair, and that there was no fraud whatever upon the part of the directors, and there was suffi-

cient evidence to support those findings, this line of inquiry is foreclosed to us. The point is without merit.

[7] It is contended that the court erred in failing to find upon the issue as to whether or not certain parties plaintiff were stockholders in Elberta Oil Company. The court did find that a number of the plaintiffs were stockholders. This was sufficient to secure an adjudication of all the questions involved. It is quite clear that the allegations as to stock ownership were made for the sole purpose of qualifying such parties to maintain this action. The failure of the court to find upon such issues was not prejudicial error.

[8] It is next claimed that the proposed contract was never legally authorized or ratified by the board of directors of Elberta Oil Company. This ground for avoiding the contract was not mentioned in the complaint, and not as an issue presented by the pleadings. An examination of the record does not disclose that condition where it may be said that such matter was made an issue at the trial by the tacit consent and conduct of the parties. We therefore hold that appellants are precluded from urging the point at this stage of the proceedings.

It is charged that the trial court erred in ten instances in the admission and rejection of evidence. The record of over 4,000 pages indicates that the trial court was exceedingly liberal in its rulings in such matters. An examination of the assignments of error in this connection does not disclose any prejudicial rulings by the trial court.

Numerous other points are discussed by appellants in their voluminous briefs, but they are all ramifications of the main issues which we have undertaken to dispose of. A detailed discussion of each of them would lead to an unnecessary prolongation of an opinion which is already considerably extended.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

ARON v. LEAVY, Controller.*
Civ. 8727.

District Court of Appeal, First District, Division 2, California.
Jan. 21, 1933.

Rehearing Denied Feb. 20, 1933.

Hearing Granted by Supreme Court March 20, 1933.

1. Municipal corporations $\S$ 217(3).

Alien employees retained when city of San Francisco acquired water company's

properties held "appointed" within charter provision that all persons appointed to employment under city must be citizens (St. 1913, p. 1616, art. 16, § 2).

2. Municipal corporations $\S$ 217(3).

Provision in San Francisco charter that employees in operating service of public utility acquired by city shall be preferred for appointment held not to modify provision that all persons appointed to employment under city must be citizens (St. 1913, p. 1613, art. 13, § 11(B); p. 1616, art. 16, § 2).

3. Estoppel $\S$ 62(4).

That alien employees who failed to disclose their ineligibility were not discharged when city of San Francisco acquired water company's properties did not estop city to refuse payment for their services (St. 1913, p. 1616, art. 16, § 2).

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Maurice E. Aron against Leonard Leavy, Controller, the City and County of San Francisco, substituted for Benning Wentworth, deceased, auditor. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Frank L. Fenton, both of San Francisco (Vincent W. Hallinan, Michael Riordan, W. Earl Shafer, and C. K. Bonestell, all of San Francisco, of counsel), for appellant.

M. James McGranaghan, of San Francisco, for respondent.

SPENCE, J.

Plaintiff, a taxpayer, sought to enjoin the defendant auditor from allowing the demands of certain persons against the city and county of San Francisco. From a judgment in favor of plaintiff, defendant appeals.

From the agreed statement of facts it appears that on March 3, 1930, said city and county of San Francisco acquired all of the operative properties of the Spring Valley Water Company; that at said time the persons referred to were in the employ of said Spring Valley Water Company; that upon taking over the properties of said company said persons were taken into the employ of said city and county of San Francisco and continued in said employment during the period in question; and that said persons were not and are not citizens of the United States.

The question here presented arises under the provisions of article 16, § 2, of the Charter of San Francisco, as amended in 1913 (Stats. 1913, pp. 1602, 1616). We quote only the following pertinent portion: "All persons

$\S$ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 19 P.(2d) 251. Superseded by opinion 27 P.(2d) 377.

appointed to office, position or employment under the city and county must be citizens of the United States. * * *

[1, 2] Appellant contends that said charter provision had no application to the persons named in the complaint as said persons were not "appointed" to any employment under the said city and county. In our opinion this contention is without merit. The obvious purpose of the section was to prohibit the employment of aliens by the city and county. The retention of said persons in their former employment was in effect an appointment within the meaning of the section and the city and county could not do indirectly that which it could not do directly. Appellant urges that the charter should be considered as a whole and refers to article 13, § 11, subd. B thereof (St. 1913, p. 1613), reading: "The following persons securing standing on the eligible list in examinations shall be preferred for appointment: * * * 2. Persons employed in the operating service of any public utility acquired by the city. * * *" But the last-quoted portion of the charter does not in any way purport to modify the provisions of article 16, § 2, and cannot be construed to have that effect.

[3] Appellant further contends that as said persons were not discharged, the city and county was estopped to refuse payment for their services. We believe that this contention is likewise without merit. The aliens formerly employed by the water company could not claim the benefit of the doctrine of estoppel by failing to disclose their ineligibility and continuing in the employment.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

128 Cal.App. 404

LEJEUNE v. GENERAL PETROLEUM CORPORATION OF CALIFORNIA.

Civ. 8325.

District Court of Appeal, First District,
Division 1, California.

Dec. 28, 1932.

Hearing Denied by Supreme Court Feb. 24, 1933.

1. Appeal and error ⇨221.

Point that damages were excessive cannot be raised for first time on appeal.

2. Seamen ⇨29(5).

Allegations regarding employer's negligence where anchor chain, while being hauled in, suddenly reversed and injured seaman, did not show specific manner in which accident occurred so as to prevent application of

res ipsa loquitur doctrine (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

Complaint alleged that while plaintiff seaman was engaged in stowing away anchor chain in performance of his duties, officers and employees of shipowner so carelessly and negligently operated winch and its appliances used to haul in anchor and stow anchor chain, and such winch and its appliances and said anchor chain were, by reason of negligence of defendants, so defective and insufficient that anchor chain suddenly reversed direction, and seaman was thereby violently thrown against some portion of chain locker.

3. Seamen ⇨29(1).

It was duty of officers of ship, toward seaman sustaining injuries when anchor was being hauled in, to take precautions against results which might accompany heaving in of anchor on heavy swell of sea (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

4. Negligence ⇨24.

In determining question of negligence, there must be considered facts known to person, or which, by use of proper diligence, would have been known to prudent man in his place.

5. Seamen ⇨29(4).

Seaman does not assume risk of negligent acts of those in charge of ship, or their failure to take reasonable precautions (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

6. Seamen ⇨29(4).

Seaman does not assume risk, even though danger is obvious to him (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act § 1 [45 USCA § 51]).

7. Appeal and error ⇨1002.

Jury's conclusion on conflicting evidence could not be disturbed on appeal.

8. Negligence ⇨121(2).

While res ipsa loquitur doctrine does not shift burden of proof, plaintiff still having burden of proving defendant's negligence by preponderance of evidence, inference arising from accident cannot be disregarded.

9. Appeal and error ⇨1001(1).

Although different inferences might reasonably be drawn from evidence, where facts tend to support negligence of defendant, jury's conclusion that defendant was negligent cannot be disturbed on appeal.

10. Evidence ⇨594.

Although jury may not arbitrarily disregard unimpeached testimony, witnesses may be impeached by methods other than direct contradiction, such as manner of testifying

and character of testimony or their motives (Code Civ. Proc. § 1847).

11. Trial ⇨140(2).

Where witnesses were not wholly disinterested, determination of their credibility and weight to be given their testimony *held* for jury (Code Civ. Proc. § 1847).

12. Seamen ⇨29(5).

Res ipsa loquitur doctrine *held* applicable where seaman stowing anchor chain in chain locker was injured when anchor suddenly reversed direction and injured seaman (Jones Act 1920, § 33 [46 USCA § 688]; Federal Employers' Liability Act, § 1 [45 USCA § 51]).

Evidence disclosed that plaintiff seaman and his companion were in chain locker and could observe nothing but chain coming through steel pipe from winch above and could not observe manner in which winch was operated or manner in which other members of crew were performing their respective duties; that the machinery was under the immediate direction and control of officers of ship; that plaintiff could not know whether pawl or forelock was in proper position, or whether compressor brake was being watched as it should be, but was compelled to rely on proper operation of machinery by his superiors and agents of his employer.

13. Seamen ⇨29(5).

In seaman's action for injuries caused by defective winch, evidence that witness told officers that winch was not working properly *held* admissible to show notice to employer of defective machinery.

Evidence admitted was in substance that seaman who was with plaintiff in chain locker when anchor suddenly reversed direction and injured plaintiff had conversations with former first mate of vessel and with man who was serving as chief mate at time of accident, in which witness stated to such officers that winch was not working properly and that they replied that they knew it.

14. Appeal and error ⇨237(2).

Where part of conversation was admissible against defendant, and defendant sought to exclude whole conversation, and made no motion to strike objectionable parts, error could not be predicated on admission of conversation.

15. Appeal and error ⇨1050(1).

In seaman's action for injuries, admission of conversation between witness and officers of vessel wherein officers stated they knew winch was not working properly *held* harmless in view of other evidence.

16. Appeal and error ⇨1066.

Correct instruction, inapplicable to issues, does not constitute reversible error unless it is clear that jury was misled.

17. Appeal and error ⇨1066.

Giving instruction regarding aggravation of pre-existing condition where no pre-existing injuries were involved *held* harmless where jury was properly instructed as to measure of damages.

18. Damages ⇨159(3).

Allegation that because of plaintiff's injuries he was unable to engage in any occupation since accident and that injuries would be permanent, *held* sufficient to admit evidence of loss of earning power.

19. Appeal and error ⇨1066.

Trial ⇨251(9).

Instruction that jury could consider injured seaman's loss of wages and impairment of earning power, if any, *held* not erroneous or prejudicial where amount of wages lost was established by evidence although not alleged.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Frank M. Lejeune against the General Petroleum Corporation of California. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior Opinion, 13 P.(2d) 1057.

A. L. Weil, of San Francisco, W. L. Appleford, of Los Angeles, and Martin J. Weil, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

BY THE COURT.

With certain exceptions and additional observations which will hereinafter appear, the court adopts the opinion of Justice pro tem. Lamberson originally filed in this case:

The plaintiff was employed as an able seaman on the tank steamer Lebec, owned and operated by the defendant. Because of injuries received while the ship was weighing anchor off of the town of Davenport, Santa Cruz county, this action for the recovery of damages has been brought against defendant under the provisions of the Jones Act (46 USCA § 688), which reads as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. * * *" The Federal Employers' Liability Act, to which reference is made in the preceding act (45 USCA § 51), reads in part as follows: "* * * For such injury * * * result-

ing in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

For about two weeks prior to the date of the incident, which is the subject of the action, the plaintiff had been employed on the *Lebec*. The ship, about February 15, 1931, and after a general overhauling, at San Pedro loaded with fuel oil and proceeded to Davenport, where it was the custom and was necessary to anchor in the open sea about one mile from shore, where the ship picked up a pipe line leading to tanks on shore, which were used for storage, and to discharge its cargo through such pipe line. The ship was moored to three buoys, and had out the port and starboard anchors. For the performance of the task of hoisting anchor, two men, one of whom was the plaintiff, were assigned to the chain locker for the purpose of stowing the anchor chain as it came in. The chain locker was a compartment located in the fore-castle head immediately below the winch, hereafter described, and was about 12 feet by 5 feet in dimensions, and 15 feet in depth. The anchor chain consists of links each about 14 inches long, 7 inches wide, and weighing about 25 pounds. It was hoisted by means of a winch, to which was affixed a device known as a "wild cat," which operated on the principle of a friction clutch, and which, when meshed with the revolving part of the winch, drew the chain in by means of "dogs," which engaged the open space in the links of the anchor chain. The motive power which operated the winch was steam. From the winch the chain fell through a pipe into the chain locker. As a safety device, there was first a pawl or forelock built into the deck between the winch and the opening in the ship's side through which the anchor chain was drawn. The forelock was so designed that in the event of reversal of the chain, the "dog" on the forelock would fall into the open part of the link and prevent the chain from running further.

Because of the manner in which the chain was constructed it was agreed that about 20 inches of the chain might run out before the pawl would engage. As an additional safety factor, there was upon the winch a band or compressor brake which was operated by means of a handle, and which was designed for use in the event of failure of the hoisting machinery or of the forelock to engage the chain while running out.

On the day of the accident, the boatswain was assigned to the duty of turning the steam into the winch and off, that is, attending the throttle. An able seaman was stationed at the starboard compressor brake for the purpose of applying it in the event of an emer-

gency, while the first mate stood in the fore-castle head in front of the winch and superintended the operation, watching at the same time the slackening away of the port anchor chain which was being slowly payed out, as the starboard anchor was being drawn in. The master of the ship was on the bridge about 175 feet away from the winch.

A heavy sea had been running during all of the morning and part of the preceding day, causing the lightened ship to rise as much as 8 to 12 feet with the swell. During the process of hoisting the anchor, and after the larger part of the chain had been drawn in, the ship rose with the swell, and the chain suddenly stopped running in, and reversed its direction. At that time the chain had been stowed to a height of about 4 feet below the top of the locker room, and there was a space left between the pile of chain and the walls. The plaintiff and his companion, who testified that he was about 3 feet from plaintiff, were standing on the pile of chain, it being necessary to stoop over in order to work, and the plaintiff was shoving the chain over with his shoulder. As the chain suddenly ceased coming in, plaintiff's companion jumped to safety, but the plaintiff remained where he was, and by the reversal of the chain was thrown some distance from the pile, his head striking against some obstacle in the locker room. No serious injury was immediately apparent, although there was some bleeding from the nose, and the plaintiff, with the assistance of the boatswain, stowed the remainder of the chain. He continued with his various duties, although complaining of pains in his head, until after his arrival in San Pedro the following day. After some persuasion he went to a hospital, and later a paralysis of certain members on the left side of his body developed, resulting from damage to the brain. Plaintiff also claimed that his left eye and ear were injured.

After the boatswain had taken the place of the seaman who had been assisting the plaintiff, the work of hoisting the anchor was resumed, and it developed that the flukes of the anchor had been broken off, presumably because the anchor had become engaged with or had fouled boulders on the ocean floor. The anchor weighed approximately 9,600 pounds. The chain had been payed out to about 540 feet, and the ship, when unloaded, weighed approximately 10,200 dead weight tons. The starboard anchor was lying at a depth of between 45 and 50 feet. The pilot, who had been taking the ships in, and mooring and unmooring them during the period of two years, said that he could put the ship within 40 feet of the same place each time, and that this was the first occasion on which an anchor had fouled.

The jury returned a verdict in favor of plaintiff for \$20,000. No motion for a new trial was made, and the appeal is from the

judgment of the court entered upon the verdict.

[1] Defendant bases its appeal upon the following grounds: That there was no evidence of negligence upon its part, but that the injury sustained by plaintiff was due entirely to the fouling of the anchor, and the heavy swell of the sea; that the court erred in admitting statements alleged to have been made to the seaman Morris, who had assisted plaintiff in the chain locker, at unspecified times prior to the accident, as to some unspecified defect in the winch; that the court erred in instructing the jury as to the doctrine of *res ipsa loquitur*, the defendant contending that the doctrine is not applicable to the case; and also that the court erred in instructing the jury as to the measure of damages and matters not in issue; and, lastly, upon the ground that the damages were excessive. This last point cannot be considered by this court for the well-established reason that such point cannot be raised for the first time on appeal, but must be presented to the lower court on motion for a new trial. *Bate v. Jolin*, 206 Cal. 504, 274 P. 971.

The question as to the sufficiency of the evidence to support the verdict goes hand in hand with the question of the applicability of the doctrine of *res ipsa loquitur*. The testimony of the seaman Forrester, who was attending the starboard compressor brake, was that while the crew were heaving in the anchor "it slipped down, stopped, and surged out"; that he immediately put on the brake "which is the thing naturally to do." There is considerable conflict of testimony as to the distance which the chain traveled out of the locker room and over the winch toward the sea. The seaman Morris, who was with plaintiff in the locker room, said that the chain stopped falling down to them; that he immediately jumped away, and as he jumped, the chain ran out 6 to 12 feet. Witnesses on behalf of defendant testified that it ran back 18 to 20 inches. The court gave the following instruction: "There is a rule of law known as *res ipsa loquitur* which, translated literally, means 'the thing speaks for itself.' This rule defined declares that when the thing which causes injury is shown to be under the management and control of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the management and control use proper care, it affords reasonable evidence, in the absence of explanation from the defendant, that the accident arose from a want of ordinary care."

And at the request of the defendant, the court gave a further instruction as follows: "I instruct you that the doctrine of *res ipsa loquitur*, meaning 'the thing speaks for itself,' to which I have referred in a previous instruction, applies only to the case where the injury was proximately caused by a thing under the control of the defendant, and defendant offers

no evidence showing a lack of negligence. This doctrine, however, does not shift the ultimate burden of proof of negligence from plaintiff to defendant. The defendant need not satisfy you by a preponderance of evidence that it was not negligent, but defendant is merely required to make a showing of want of negligence on its part as to leave the jury unsatisfied whether or not there was negligence on the part of the defendant. When such evidence is offered by the defendant, then if the plaintiff fails to prove to you by a preponderance of evidence that the accident was proximately caused by the negligence of the defendant, your verdict should be against the plaintiff and in favor of the defendant, even though the defendant has merely made such a showing as to want of negligence on its part as to leave the jury unsatisfied whether the defendant's negligence was the cause of the injury or not."

[2] During the course of the trial, plaintiff was permitted to amend his complaint, and by his amendment alleged "that while plaintiff was engaged in stowing away the anchor chain, in the performance of his duties as aforesaid, the officers, servants and employees of said defendant herein, and each of them, so carelessly and negligently operated a certain winch and its appliances, used to haul in said anchor and to stow said anchor chain, and said winch and its appliances and said anchor chain were, by reason of the negligence of defendants, and each of them, so defective and insufficient that said anchor chain, while the same was being hauled in by defendant, its officers, agents and employees as aforesaid, and stowed by plaintiff and another employee in the 'star board' chain locker on said steamer 'Lebec', suddenly reversed and violently proceeded in the opposite direction, and plaintiff was thereby violently thrown from his feet, against some portion of said chain locker, and as a proximate result thereof plaintiff sustained great bodily injury," etc.

These allegations do not attempt to explain or set out the cause of the accident, or the specific manner in which it occurred, but are nothing more than general allegations of negligence. *Vertson v. City of Los Angeles*, 116 Cal. App. 114, 2 P.(2d) 411; *Soto v. Spring Valley Water Co.*, 39 Cal. App. 187, 178 P. 305; *Lippert v. Pacific Sugar Corporation*, 33 Cal. App. 198, 164 P. 810; *Burke v. Dillingham*, 84 Cal. App. 736, 258 P. 627; *Seney v. Pickwick Stages*, 82 Cal. App. 226, 255 P. 279; *Atkinson v. United Railroads of S. F.*, 71 Cal. App. 82, 234 P. 863.

In the case of *Cochran v. Pittsburgh & L. E. R. Co.* (D. C.) 31 F.(2d) 769, the court, in holding that the doctrine of *res ipsa loquitur* applies in a case governed by the Federal Employers' Liability Act (45 USCA §§ 51-59) and Safety Appliance Act (45 USCA § 1 et seq.), said [page 771 of 31 F.(2d)]: " * * * The

res doctrine is a rule of evidence. It is a rule which permits or requires an inference of negligence to be drawn from the fact of an accident plus the circumstances which characterize the accident. It is an evidential inference, which will carry a case to the jury, but is not binding upon the jury; indeed, the weight of the inference is oftentimes for the jury, and a court might not be justified in setting aside a contrary verdict, if the jury did not deem the inference sufficient to warrant a verdict in plaintiff's favor. * * *

In the case of *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480, the Supreme Court said (page 607 of 203 Cal., 265 P. 238, 239, 59 A. L. R. 480): "It is elementary that the maxim, '*Res ipsa loquitur*,' translated means simply, 'The thing, or affair, speaks for itself.' The courts of this state have long since adopted the rule as expressed in 1 *Shearman and Redfield on Negligence* (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.' *O'Connor v. Mennie*, 169 Cal. 217, 223, 146 P. 674; *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 538, 91 P. 481; *McCurrie v. Southern P. Co.*, 122 Cal. 558, 561, 55 P. 324; *Judson v. Glant Powder Co.*, 107 Cal. 549, 556, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 P. 1020; *Dixon v. Pluns*, 98 Cal. 384, 388, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 P. 268. Of course, to justify the application of this doctrine in any case the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. * * * One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of *res ipsa loquitur*, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's *prima facie* case."

In the case before the court, the evidence does not disclose any fault on the part of the plaintiff. He and his companion were in an almost completely inclosed compartment, and could observe nothing but the chain coming through the steel pipe from the winch above, the steam escaping from the cylinder of the engine operating the winch, and the noise of the revolving winch. They were unable to see or observe the manner in which the winch was operated, or the manner in which

the other members of the crew were performing their respective duties. The hoisting of the anchor was being done under the immediate direction and supervision of the captain, first mate, and boatswain. The machinery was under the immediate direction and control of the officers of the ship. The mooring place was determined by the pilot, and was under the control of defendant. The plaintiff could not know whether the pawl or forelock was in proper position, or whether the compressor brake was being watched as it should be. He was compelled to rely upon the proper operation of the machinery by his superiors and the agents of his employer. The hoisting of the anchor was one of the simplest and most common incidents involved in the operation of a ship operating in the trade in which the *Lebec* was being used. The port captain of the defendant, who piloted the *Lebec* to its mooring, testified that he had been present when the moorings were first laid; that he had been piloting the ship to that anchorage, mooring it and unmooring it for a period of two years.

[3] Objection has been made by defendant that the accident was due to the intervention of agencies over which it had no control; in other words, that the direct cause of the reversal of the anchor chain was the fouling of the anchor in a rocky reef, coupled with the heavy swell of the sea. The contention is not sound. The anchorage, as heretofore pointed out, was well known to the agents of the defendant, and in the absence of docking facilities, it was the duty of the defendant to be thoroughly informed as to the anchorage. The heavy swell, which was on at the time of weighing anchor, had been on for many hours before the accident, and was nothing of extraordinary character. No extraordinary results followed it in any way. It was an ordinary, natural incident, such as might have been contemplated and anticipated in an open roadstead like the anchorage at Davenport. It was the duty of the officers of the ship to take precautions against the results which might accompany the heaving in of the anchor under such conditions. There appears no intimation on their part that the swell which had been running created hazardous conditions, or that it imperiled the vessel in any way. The action of the sea and the effect of the heavy swell were not beyond the foresight of the ship's officers, although such conditions might have called for the exercise of more diligent care on their part.

[4] Negligence is opposed to diligence or carefulness, and is never absolute or intrinsic, but is always relative to some circumstance of time, place or person. *Smith v. Whittier*, 95 Cal. 279, 30 P. 529. There must be taken into consideration in determining the question of negligence those facts which were known to the person against whom complaint is made, or which, by use of proper dili-

gence, would have been known to a prudent man in his place.

[5, 6] A seaman in the performance of tasks connected with his employment, does not assume the risk of negligent acts of those in charge of his ship, or their failure to take reasonable precautions. *States S. S. Co. v. Berglann* (C. C. A.) 41 F.(2d) 456. The relationship of master and seaman is intimate and peculiar. *Masjulis v. United States, etc., Corp'n* (C. C. A.) 31 F.(2d) 284, 285. He is bound to obey, and there is no assumption of risk, even though the danger may have been obvious to him. *United States v. Boykin* (C. C. A.) 49 F.(2d) 762; *Panama R. Co. v. Johnson* (C. C. A.) 289 F. 964; *Wychgel v. States S. S. Co.*, 135 Or. 475, 296 P. 863.

[7] Defendant offered no explanation of the reversal of the chain, or of the failure of the winch to hold the chain, or the failure of its employee to apply the brake in time to prevent the running of the chain. The application of the brake, so far as the evidence discloses, appears to have stopped the chain immediately. The jury had the duty of determining whether the explanation offered by the defendant was satisfactory, and in view of the conflict in the evidence, its conclusion cannot be disturbed. In the language of the court in the case of *Soto v. Spring Valley Water Co.*, supra (page 190 of 39 Cal. App., 178 P. 305, 306): "No reasonable inference seems possible, except that this apparatus, had it been properly operated, would have been safe, and that its improper operation was due to the negligence of somebody or to some defect in the machinery, undisclosed to and undiscoverable by the deceased, and known, if known to anybody, to the defendant's employees."

As stated, defendant claims that the nature of the accident was not such as to exclude the inference that its cause was the fouling of the anchor, an occurrence which it could not prevent, and that consequently the doctrine does not apply.

[8, 9] It has been said that the doctrine is to be applied only when the nature of the accident itself not only supports the inference of defendant's negligence "but excludes all others." In *Carlsen v. Diehl*, 57 Cal. App. 731, 208 P. 150, such a rule appears to have been adopted as one of the grounds for the decision. In other cases, namely, *Olson v. Whitthorne & Swan*, 203 Cal. 206, 263 P. 518, 58 A. L. R. 129, *White v. Spreckels*, 10 Cal. App. 287, 101 P. 920, *Scellars v. Universal Service Everywhere*, 68 Cal. App. 252, 228 P. 879, and *Rosenbaum v. Luce*, 96 Cal. App. 149, 273 P. 862, the above was referred to as the rule; but in each of these cases the instrumentality causing the injury was shown not to have been under the exclusive control of the defendant. The application of such a rule was unnecessary to these decisions. It was

held in *Re Estate of Wallace*, 64 Cal. App. 107, 220 P. 682, 683, that "an inference cannot be said to be established by circumstantial evidence, either in a civil or a criminal case, unless the circumstances relied upon are of such a nature and so related to each other that it is the only inference which can fairly or reasonably be drawn from them. If other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it." In denying a hearing the Supreme Court disapproved this portion of the decision and referred to several cases decided by that court, one being *Mah See v. North American Accident Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123, where it was held that, even though all the facts are admitted or uncontradicted, if it appears that either of two inferences may reasonably be drawn from those facts, it still remains in the case a question of fact to be determined by the jury, and the verdict thereon cannot be set aside upon the ground that it is not sustained, and the evidence must be regarded in the light most favorable to the prevailing party. And such is the general rule. *Hotaling v. Hotaling*, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734; *Miller & Lux, Inc., v. Secara*, 193 Cal. 755, 227 P. 171. It has been held in several cases involving the doctrine in question that the inference of negligence may arise regardless of the fact that the injury might have been caused by some other agency; and that, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury was the negligence of the defendant, the question is one to be determined by the jury from all the evidence in the case. *Connor v. A. T. & S. F. Ry. Co.*, 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; *O'Connor v. Mennie*, supra; *Michener v. Hutton*, supra; *Zerbe v. United Railroad*, 56 Cal. App. 583, 205 P. 887; *Brown v. Davis*, 84 Cal. App. 180, 257 P. 877; *Ireland v. Marsden*, 108 Cal. App. 632, 291 P. 912. While the doctrine does not shift the burden of proof, it still being incumbent upon the plaintiff to prove defendant's negligence by a preponderance of evidence (*Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 P. 481), the inference arising from the accident cannot be disregarded (*Bush v. Barnett*, 96 Cal. 202, 31 P. 2; *Housel v. Pac. Elec. Ry. Co.*, 167 Cal. 245, 139 P. 73, 51 L. R. A. [N. S.] 1105, Ann. Cas. 1915C, 665); and it is clear from the foregoing cases that, even if different inferences might reasonably be drawn from the evidence, where the facts tend to support that of negligence on the part of the defendant, the conclusion reached by the jury cannot be disturbed on appeal (2 Cal. Jur., Appeal and Error, § 549, p. 934).

[10, 11] Nor does the fact that there was no contradiction of testimony that the machinery was in good order change the rule. While the jury may not arbitrarily disregard the unimpeached testimony of a witness

(Hynes v. White, 47 Cal. App. 549, 190 P. 836), the presumption being that he speaks the truth, witnesses may be impeached by methods other than direct contradiction, namely, by the manner in which they testify and the character of their testimony or their motives (Code Civ. Proc. § 1847). Here the witnesses were not wholly disinterested, and the determination of their credibility and the weight to be given their testimony was for the jury. Davis v. Judson, 159 Cal. 121, 113 P. 147; Caldwell v. Weiner, 203 Cal. 543, 264 P. 1100; Staples v. Hawthorne, 208 Cal. 578, 283 P. 67.

[12] It is our conclusion that the doctrine was applicable to the facts of this case, and that the trial court properly gave the two instructions of which complaint is made.

[13-15] There was received in evidence the deposition of seaman Morris, who was with plaintiff in the chain locker at the time of the accident. Objection was made to testimony contained in such deposition as to conversations between a former first mate of the vessel and Morris, and between Morris and the man who was serving as chief mate at the time of the accident. The witness testified in substance that he stated to these officers that the winch was not working properly and that they replied that they knew it. This testimony was offered and was admissible for the purpose of showing notice to the defendant that the machinery was defective. Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann. Cas. 1913D, 908. While it may be said that defendant was not bound by the replies of its servants, this did not render the testimony of the fact of notice inadmissible. Defendant, however, sought to exclude the whole conversation, and no motion to strike the parts of the answers claimed to be objectionable was made. Under such circumstances a motion to strike was proper (People v. Cole, 141 Cal. 88, 74 P. 547; 26 R. C. L., Trial, § 56, pp. 1047, 1048; Wigmore on Evidence, § 18), and we cannot say that the court erred in admitting the answers in evidence. Moreover, in view of the other evidence in the case, it is not likely that the verdict of the jury turned thereon, and we feel justified in concluding that the ruling resulted in no miscarriage of justice. Nor did this evidence affect the applicability of the doctrine of *res ipsa loquitur*, as it referred to no particular defect in the machinery and left the ultimate cause of the injury still doubtful.

[16, 17] Defendant objected to the following instruction given at the request of the plaintiff: "If you believe from the evidence that at the time of the accident in question plaintiff was suffering from any then existing physical impairment, you are entitled to consider the effect of the injuries sustained in

the accident, if any, in aggravation, if any, of the pre-existing condition, and award plaintiff damages in an amount compensating him for any additional physical or mental disability, if any, occasioned plaintiff by the accident in question."

The instruction would have been proper under other circumstances (Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 P. 624; White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318), but pre-existing injuries were not involved in the present case. Defendant asked plaintiff certain questions regarding claims for former injuries while working on other vessels. The apparent purpose of these questions was to show that plaintiff was a person who was in the habit of making such claims and also a malingerer, and the giving of the instructions may reasonably be ascribed to misapprehension of defendant's object in asking these questions, or to an excess of zeal on the part of plaintiff's counsel. An instruction correct in law but not applicable to the issues involved does not constitute reversible error unless it is clear that the jury was thereby misled. People v. Cochran, 61 Cal. 548; Bosqui v. Sutro R. R. Co., 131 Cal. 390, 63 P. 682; In re Estate of Clark, 180 Cal. 395, 181 P. 639. The jury was elsewhere properly instructed as to the measure of damages, and we are of the opinion that the error complained of was not prejudicial.

[18, 19] The court also instructed that the jury, in arriving at the amount of damage, might consider plaintiff's loss of wages and the impairment of his earning power, if any. Defendant contends that the pleadings make no reference to a loss of wages or earning power, and that the instruction was therefore improper. The complaint alleged that by reason of his injuries plaintiff had been unable to engage in any occupation since the accident, and that his injuries would be permanent. These allegations were sufficient to admit evidence of loss of earning power. Worden v. Central, etc., Bldg. Co., 172 Cal. 94, 155 P. 839. Plaintiff testified without objection to the wages paid him by defendant, and that due to his injuries he had not since been employed. The purpose of special allegations respecting damages is to advise the adverse party of such consequences resulting from the injury alleged as are peculiar to the circumstances and conditions of the injured party; and where, as here, it is evident that no prejudice was suffered by the failure to allege the amount of wages lost, and that this fact was established by the evidence, the instruction cannot be said to have been erroneous or prejudicial.

We have examined all the other instructions complained of, and find no error which justifies a reversal of the judgment.

The judgment is affirmed.

129 Cal.App. 22

HARRISON v. HARTER (two cases).

Civ. 4712.

District Court of Appeal, Third District,
California.

Jan. 19, 1933.

Rehearing Denied Feb. 18, 1933.

Hearing Denied by Supreme Court March 20,
1933.**1. Automobiles** ⇨245(67).

That plaintiffs, in recess between driver's cab and exterior portion of truck bed, carried auxiliary fuel supply can containing gasoline which exploded by force of collision with defendant's automobile, *held* not as matter of law to render plaintiffs contributorily negligent.

Facts disclosed that truck was equipped with flat bed which extended from driver's cab to rear; that between driver's cab and exterior portion of truck bed there was built up a little nook or recess in which plaintiffs were carrying, preceding and at time of collision, a 5-gallon can containing about 3½ gallons of gasoline; that can was securely fastened against driver's cab so that it could not become loose; that there were about 6 inches between outside of can and line of front edge of truck bed; and that force of collision caused gasoline to explode or by some means to become ignited, and burning gasoline was thrown over plaintiffs' persons, injuring them.

2. Evidence ⇨5(1).

Appellate court must take knowledge of common experience.

3. Evidence ⇨5(2).

Common experience teaches that practically every automobile uses, as propelling power, gasoline carried in tank in some place on automobile.

4. Explosives ⇨7.

Person handling inflammable or explosive substance, though held to high care, is not ipso facto deemed contributorily negligent.

Law simply requires that degree of care which substance handled requires in order to protect life and property, and does not deprive one who has such substance in charge of remedy if another negligently, carelessly, and in violation of law produces the injury.

5. Explosives ⇨7.

One negligently instituting cause which in continuous sequence results in ultimate injury is liable for damages ensuing, though injured person without negligence was handling explosive substance.

6. Automobiles ⇨2.

Statute relating to carrying explosives on vehicles carrying passengers for hire *held*

inapplicable to truck carrying gasoline can which exploded in collision with automobile (Gen. Laws 1931, Act 2432, § 14).

7. Appeal and error ⇨207.

Alleged misconduct of plaintiffs' counsel, raised for first time on appeal, *held* unavailable as ground for reversal; misconduct not being irremediable in trial court (Code Civ. Proc. § 657, subd. 1).

8. Damages ⇨132(1).

\$23,000 verdict for 17 year old boy, for severe burns and other injuries *held* not excessive.

There was evidence that plaintiff's entire body was burned by burning gasoline, two-thirds of burns being "third degree" burns; that hair was burned from his head; that hands were burned so severely that flesh fell from bones, and finger nails dropped from fingers; that muscles, cords, nerves, and blood vessels in both legs were impaired to great extent; that there was total loss of use of left leg; that 50 per cent. loss followed in use and strength of left hand, together with partial loss of right hand and arm; that burns permanently destroyed two-thirds of perspiratory glands; that heart action was dangerously increased, heart enlarged at apex, and defective mitral valve developed; that scar tissue destroyed on burned area of body would continue to contract and grow worse, particularly on left leg; that kidneys were affected; that plaintiff could go about only on crutches; that changes in climatic conditions caused him constant suffering; that defects were permanent and tended to become worse; that ability to perform physical labor was permanently destroyed; and that physical injuries impaired mental ability.

9. Automobiles ⇨246(60).

In action for automobile collision, instruction defendant had burden to prove plaintiffs' negligence was the proximate cause of injuries *held* not technically correct.

10. Negligence ⇨80.

If plaintiffs' acts were negligent contributing cause of injuries, coincident with defendant's negligence, recovery is barred.

11. Trial ⇨296(7).

In action for automobile collision, instruction defendant had burden of proving plaintiffs' negligence was the proximate cause of injury *held* not prejudicial when coupled with other favorable instruction.

It was unquestioned on appeal that collision was caused by defendant's negligence, and plaintiffs' mere carrying of gasoline can as additional fuel supply was, under circumstances of case, not cause of accident.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Two actions, consolidated for trial, by W. W. Harrison and by Wallace R. Harrison, a minor, by and through his guardian ad litem, Frances Harrison, against C. B. Harter. From judgments in favor of plaintiffs, defendant appeals.

Affirmed.

William V. Cowan, of Yreka, M. J. Cheatham, of Red Bluff, and Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

L. C. Smith, of Redding, and Fred C. Pugh, of Red Bluff, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The above-named cases were consolidated for trial and are presented upon this appeal on one transcript. The appeal in both cases is from the judgment entered in favor of the respective plaintiffs.

The record shows that on or about the 7th day of April, 1931, the plaintiffs were operating a Ford truck, driving northerly on the state highway in the county of Tehama; that the defendant was driving a Buick automobile in a southerly direction on the same highway. At about the hour of 7:45 p. m. a collision occurred between the two automobiles, in which the plaintiffs suffered damages; the plaintiff W. W. Harrison suffered injuries not of an essentially serious nature, while the plaintiff W. R. Harrison suffered injuries of an extremely serious and probably permanent nature.

The paved highway at the point of the collision is 15 feet in width, with shoulders on each side giving some additional driving space. At the time of the collision the Ford was equipped with two headlights, one tail-light, and two clearance lights. The clearance lights were located on the extreme outer corners on the left side of the truck, one in front and one in the rear. The front clearance light was bluish-green; the rear clearance light was red. The outside measurement of the truck bed was 96 inches. The truck was equipped with a flat bed which extended from the driver's cab to the rear. Between the driver's cab and the exterior portion of the truck bed there was built up a little nook or recess in which the plaintiffs were carrying, preceding and at the time of the collision, a 5-gallon can of gasoline containing about 3½ gallons. This can was securely fastened against the driver's cab so that it could not become loose. There were about 6 inches between the outside of the can and the line of the front edge of the truck bed. Just preceding and at the time of the collision the truck was traveling in a northerly direction, with the right front and rear

wheels off the pavement and over on the shoulders to the extent of about 2 feet.

There is sufficient testimony in the record to support the conclusion that just preceding and at the time of the collision the appellant was driving his Buick automobile in a southerly direction and occupying about two-thirds of the paved portion of the highway. There is some testimony that the appellant was driving his automobile at a speed of 60 miles per hour. The appellant's own testimony is to the effect that before he reached the town of Red Bluff, which is some little distance north of the place of collision, he had been driving his car at a speed of between 60 and 65 miles per hour, but that after passing through the town of Red Bluff, on his course southerly, he had slackened his speed to some 30 or 35 miles per hour. The left front wheel of the Buick automobile struck the left front side of the Ford. The force of the collision caused the can of gasoline to explode, or by some means become ignited, and the burning gasoline was thrown over the persons of the plaintiffs, injuring the plaintiff W. W. Harrison to some extent and, as we have said, seriously injuring the plaintiff W. R. Harrison.

After the collision the Buick car proceeded on its course, veering to the left, and stopped only when it came in contact with a fence along the northerly side of the highway, at a distance of 197 feet from the point of collision. The force with which the Buick car struck this fence was sufficient to jerk three posts from the ground which had been firmly set, and also to tear loose the wires from several other posts. The Ford truck stopped at a point 61 feet from the collision. The photographs introduced in evidence show the left front wheel of the Buick automobile was completely demolished, and the fact that the Buick car traveled 197 feet after the collision, with one front wheel gone, and still had a striking force when it reached the fence sufficient to tear out three theretofore firmly set posts, gave the jury sufficient grounds to reach the conclusion that the defendant had not materially slackened the speed at which he was traveling after passing through the town of Red Bluff.

Upon this appeal it is not contended that the record does not amply support the conclusion that the collision occurred by reason of the defendant's negligence. Without questioning this fact four grounds of reversal are presented: (1) That the plaintiffs were guilty of contributory negligence, as a matter of law, in keeping and transporting gasoline on the exterior of their truck, and are thereby barred from recovery; (2) plaintiff's counsel was guilty of prejudicial misconduct, whereby appellant was denied a fair trial; (3) the damage awarded to the plaintiff Wallace R. Harrison, in the sum of \$23,000, was excessive as a matter of law; (4) the court erred

in instructing the jury that the defense of contributory negligence failed, unless the defendant and appellant proved that such negligence was the proximate cause of the injuries.

[1-3] While the appellant bases his first contention on the fact that the plaintiffs were guilty of contributory negligence in transporting gasoline on the exterior of their truck, an examination of the record discloses that the gasoline was not carried on the exterior portion of the truck. It was not upon the running board beside the cab, nor was it carried at a location outside of any exterior portion of the truck. This eliminates all questions as to the carrying of the gasoline in an exposed location.

The record shows that the Buick automobile collided with the side of the truck, tearing away the rear left wheel thereof. In addition to the can containing $3\frac{1}{2}$ gallons of gasoline, there was upon the truck bed an empty gasoline tank, tools, mattress, and other articles not necessary to mention. The $3\frac{1}{2}$ gallons of gasoline appear to have been carried as an auxiliary fuel supply. Upon this record we are asked to hold that the plaintiffs were guilty of contributory negligence as a matter of law, barring recovery.

As stated by the trial court in its instructions to the jury, there is no statute prohibiting the carrying of a can of gasoline as an extra fuel supply upon a truck, nor have we been cited to any case, nor has our search of the authorities disclosed any case where the carrying of gasoline, as was done in the instant case, constituted negligence as a matter of law. Common experience, of which we must take knowledge, teaches us that practically every automobile uses gasoline as a propelling power. This gasoline is carried in the tanks. On some automobiles the tank is in the rear; on some, the tank is underneath the driver's seat and on others, it is under the cowl in front of the driver; and the fact that fires follow automobile collisions, and the occupants in many instances burned to death, is brought to our attention with extreme frequency. Time and again courts have reiterated the statement that gasoline is a highly inflammable substance, of which every person is charged with knowledge, but its use has become such an essential element in the industrial world, and in transportation activities, that the mere presence of gasoline without any other attending circumstances, precludes holding its carrying on the highway, contributory negligence as a matter of law. Whether an ordinary gasoline tank on an automobile would explode when struck by another automobile traveling at the rate of 60 miles an hour is not touched upon in the transcript, and all that we can conclude is that gasoline will explode when the container in which it is carried is struck by a sufficient force.

None of the cases cited by appellant to support its contention that the carrying of a can of gasoline in this instance amounted to contributory negligence deal with collisions.

In the case of *Feeny v. Standard Oil Co.*, 58 Cal. App. 387, 209 P. 85, the record shows that a deliveryman, in delivering gasoline at a filling station, spilled considerable of the liquid adjoining the container being filled, and did not take any steps to remove the spilled gasoline, and in a few minutes after having spilled the gasoline, threw a lighted match down upon the floor where the gasoline had been spilled. A fire followed, burning the filling station. Under such circumstances the act of the agent of the defendant was held negligence. The evidence in that case did disclose that the plaintiff was aware of the fact that the gasoline had been spilled, but the court held that such knowledge on the part of the plaintiff did not remove the duty of the defendant's agent to remove the same, nor excuse him for throwing a lighted match on the floor of the garage. Knowledge of the inflammable nature of the gasoline was held known by the deliveryman, as a matter of law.

In the case of *Smith v. Associated Oil Co.*, 53 Cal. App. 142, 199 P. 879, relied upon by appellant, the facts are so dissimilar as to furnish no precedent for a ruling herein. In the *Smith Case* an employee of the Associated Oil Company, in filling a tank close to the plaintiff's dwelling, with distillate, permitted a quantity of the fluid to overflow the tank and spread out upon the ground. The plaintiff, familiar with distillate and knowing that it was volatile, explosive, and highly inflammable, proceeded to light his pipe with a match, and in throwing the lighted match away, set fire to the distillate, following which his dwelling house was consumed. The court held that under such circumstances the plaintiff was not entitled to recover damages. His own act of negligence in lighting his pipe and throwing the lighted match on the ground so as to come in contact with the distillate was the proximate cause of the fire.

In *Standard Oil Co. v. Evans*, 154 Miss. 475, 122 So. 735, where the employee at a filling station overflowed the gasoline tank of a customer he was serving, and failed to wipe up the gasoline, the overflowing gasoline came in contact with a heated portion of the automobile, caught fire and produced the damages sought to be recovered in the action. The court held that gasoline was inflammable, and the attendant at the filling station was chargeable with knowledge thereof, and his failure to wipe up the spilled gasoline was held negligence, and constituted a basis for recovery of damages.

In *Fredericks v. Atlantic Refining Co.*, 282 Pa. 8, 127 A. 615, 617, 38 A. L. R. 666, the Supreme Court of Pennsylvania decided that one handling gasoline in close proximity to

an acetylene light was guilty of negligence. In that case, however, the court did use language which is applicable to the circumstances presented in the case under consideration, and supports the judgment assailed in this action. In the *Fredericks* Case the court said: "Plaintiff assumed only the usual and ordinary risks, and not the risks which became extraordinary through negligence. It does not lie in the mouth of one at fault to complain of another's lack of care when the care in question is made necessary only because of the former's wrongful act, and would not be needed under ordinary circumstances. Plaintiff cannot be charged with negligence simply because he failed to anticipate negligence on the part of another which resulted in injury. [Citing *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. 449, 15 A. 865; *Wagner v. P. R. T. Co.*, 252 Pa. 354, 97 A. 471.]" Thus, applied to the present case, the plaintiffs cannot be charged with negligence simply because they failed to anticipate that the defendant would come down the highway at an excessive rate of speed, fail to keep his automobile on the right-hand side of the highway, and come into collision with the truck upon which they were carrying a small quantity of gasoline. It cannot be held, if the *Pennsylvania* case is followed, that the plaintiffs were guilty of negligence in carrying the can of gasoline, where no injury or evil results would have followed, save and except through the violation of the *California Vehicle Law* (St. 1923, p. 517, as amended) by some one who chanced to be driving in an opposite direction.

In *Gust v. Muskegon Co-op. Oil Co.*, 226 Mich. 532, 198 N. W. 175, 33 A. L. R. 772, the Supreme Court of Michigan held that one holding a lighted lantern near spilled gasoline, which was thereby ignited, was thereby guilty of contributory negligence, on the ground of the known inflammability of the fluid. Though cited as an authority by the appellant, we find no similarity of conditions between that case and the facts presented upon this appeal.

[4-6] That a higher degree of care must be exercised in handling a dangerous agency than is required in other instances, does not charge one with contributory negligence as a matter of law, simply because the substance handled or dealt with is of an inflammable or explosive character. The law simply requires that degree of care which the substance handled requires in order to protect life and property. It does not mean that the one who has such substance in charge is without remedy if another negligently, carelessly, and in violation of law produces the injury. It is true that in the present instance, without the gasoline, there would have been no fire, but without the collision there would have been no fire, regardless of where the gasoline was carried. In other words, it was not the carry-

ing of the gasoline that caused the trouble; it was the collision following the reckless driving of the appellant. If this is not true, then in the instances which we have heretofore cited of cars being upset by collisions followed by fire and the burning of the inmates of the overturned car, the injured would likewise be without remedy, on the assumption that it was the fire that caused the injury of the inmates of the car and not the collision which overturned the car. The reasonable rule we hold to be that the one who negligently institutes the cause which in continuous sequence results in the ultimate injury, is liable for whatever damages ensue. Section 14 of the act of the Legislature, Act 2432, *California General Laws of 1931*, relates only to the carrying of explosives, etc., on vehicles carrying passengers for hire, and has no application here.

In *Grimes v. Richfield Oil Co.*, 106 Cal. App. 416, 289 P. 245, 251, the court definitely answers the contention of the appellant herein, that the plaintiff should have anticipated the negligence of the defendant. It is there said: "It is the rule in California that every person has a right to presume that every other person will perform his duty and obey the law, and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person, provided, of course, that such person himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time. *Harris v. Johnson*, 174 Cal. 55, Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 P. 1155; *Swartz v. Feddershon*, 92 Cal. App. 285, 268 P. 430; *Barton v. Studebaker Corp. of America*, 46 Cal. App. 707, 189 P. 1025; *McPherson v. Walling*, 58 Cal. App. 563, 209 P. 209. The appellant, in the instant case, concedes that the respondent was driving at a lawful rate of speed, that his brakes were in good working condition, and that his lights complied, in every respect, with the provisions of the *California Vehicle Act*."

Appellant's first assignment of error must be held as not well taken.

[7] The second assignment of error set forth in the appellant's brief is based upon the prejudicial conduct of counsel for the plaintiffs. The conduct complained of resulted when one of the witnesses for the defendant made some derogatory remark concerning plaintiff's counsel, and which related to a controversy which apparently took place between the witness, who was the proprietor of a hospital wherein Wallace R. Harrison was placed and kept for a number of weeks, and the parents of Wallace R. Harrison, who desired to remove their minor son therefrom. A reading of the transcript discloses that the appellant permitted practically all of the controversy between the witness and counsel

to go into the record without making any objection thereto, and that whenever any objection was made by counsel for the appellant the trial court sustained the same. The conduct of counsel for the plaintiffs was not assigned as error or as prejudicial at the time of its occurrence, nor did the appellant ask that the court direct the jury to disregard the same, but apparently sat acquiescent and failed to tender the issue of such conduct to the trial court.

We have carefully read all that portion of the transcript presented to the trial court upon motion for new trial, and fail to find that such issue was there presented for determination. The motion for new trial does not tender the question of misconduct of counsel. These are the questions presented: That the evidence is insufficient to justify the verdict, and that it is against the law; errors in law which occurred at the trial of said cases, and were excepted to by defendants; misconduct of the jury; newly discovered evidence material to the defendant which could not, with reasonable diligence, have been discovered and produced at the trial; and, finally, excessive damages.

No attempt was made to set forth an assignment by which the trial court would have had its attention directed to subdivision 1 of section 657, Code of Civil Procedure, concerning irregularities of the adverse party preventing the appellant from having a fair trial. Misconduct of the jury is separate and distinct from misconduct of counsel.

We have likewise read the argument in behalf of the appellant upon his motion for new trial, as made to the trial court, and fail to find any reference whatever to any alleged misconduct.

Under such a state of the record it has been held many times that an appellant cannot raise such issue for the first time upon appeal unless in those rare instances where the misconduct is of such a grave character as not to be susceptible of remedy in the trial court.

In *Aydlott v. Key System Transit Co.*, 104 Cal. App. 621, 286 P. 456, 459, we find language which we think controlling here, as follows: "The remarks in question were not assigned as misconduct at the time they were made, nor was the court requested to instruct the jury to disregard any of them. As the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give the court an opportunity to so act in the premises, if possible, to correct the error and avoid a mistrial. Where the action of the court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect. It is only the most extreme case where an instruction to the jury,

if given, would not remove the effect of improper remarks. *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 23, 89 P. 1097; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 26, 204 P. 393; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 368, 12 A. L. R. 1007, 184 P. 672. A party should not be permitted to remain quiet and take the chance of a favorable verdict, and then, if the verdict is unfavorable, raise the objection on appeal. Moreover, appellant presented this matter to the trial court in support of its motion for a new trial. The motion was denied. A trial judge is in a better position than an appellate court to determine whether a verdict is probably due wholly or in part to misconduct of counsel, and its conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. *La-fargue v. United Railroads*, 183 Cal. 720, 192 P. 538."

In *Loggie v. Interstate Transit Co.*, 108 Cal. App. 165, 291 P. 618, this court held that the granting of a new trial on account of misconduct of counsel was largely within the discretion of the trial court, and would not be interfered with upon appeal.

The authorities cited in the opinion in the *Aydlott* Case sufficiently support the rule which we have stated, and obviate further citations.

Not having called the attention of the trial court to any irregularities of counsel during the trial of the case, not having asked for any instructions to the jury relative thereto, and not having tendered such issue upon motion for a new trial, we deem it too late to raise such issue upon appeal. As stated in one of the cases cited, a party cannot sit idly by, take no steps to protect his alleged rights, depend upon chances of victory, and then complain for the first time upon appeal if the decision is adverse.

[8] Are the damages awarded *Wallace R. Harrison* excessive? A short résumé of the testimony answers this issue. The entire body of the boy was burned, two-thirds were described as "third degree" burns; the hair was burned from his head; his hands were burned to such an extent that the flesh fell from the bones, and his finger nails dropped from his fingers; the muscles, cords, nerves, and blood vessels in both legs were impaired to a great extent; his left leg was burned until there is now a total loss of its use. This, many months after the injury. The burns forming scar tissue, causing the left leg to draw towards the thigh to the extent that he can only put his big toe to the ground. A 50 per cent. loss has followed in the use and strength of his left hand, together with the partial loss of his right hand and arm; the burns permanently destroyed two-thirds of the perspiratory glands, the functions of those glands being to expel the poisons of the body, thus warding off disease; his heart action is said to be dangerously increased; his

heart is enlarged at the apex; a murmur or defective valve has developed, which is known as the "mitral" valve. These defects are permanent and have a tendency to become worse; his ability to perform physical labor is permanently destroyed; there is a running sore on the left leg which cannot be healed; the scar tissue destroyed on the burned area of his body will continue to contract and grow worse, particularly on his left leg; his kidneys are affected from the pus that developed in the burned tissues of his body; the physical injuries have impaired his mental ability; he can only get around by the use of crutches; changes in climatic conditions cause him constant suffering. At the time of his injury Wallace R. Harrison was 17 years of age, in robust health, and in all respects a normal boy.

While there is some conflict in the testimony as to what we have just stated, there is ample evidence in the transcript to justify the conclusion of the jury that the injuries which we have scheduled were all suffered by the plaintiff Wallace R. Harrison.

As no reasonable person would suffer the injuries which we have set forth for the sum of \$23,000, we cannot hold that the jury was actuated by either prejudice or passion.

[9-11] It is finally urged that the court committed prejudicial error in its instructions to the jury. At the request of the plaintiffs the court gave the following instructions: "You are further instructed, in connection with the other instructions, that in pleading contributory negligence, the burden is on the defendant to prove two things: First, that the plaintiffs were negligent; that such negligence was the proximate cause of the injuries complained of. If they fail to prove either of these two things, this entire defense fails." The court likewise told the jury that there is no statute prohibiting the transportation of gasoline on trucks. The instruction which we have set forth is not technically correct. If the acts of the plaintiffs contributed to their injury, and were a negligent contributing cause at and coincident with the negligence of the defendant, then of course no recovery could be had. But if, as we have shown, the mere carrying of gasoline under the circumstances disclosed in this case, was not the cause of the accident, the instruction complained of could not possibly have worked any injury to the appellant. The court, however, did give the following instruction, which was

all that the appellant could ask in this case: "Before you can determine whether ordinary care was used or not, you must first determine the facts and what were the circumstances and conditions surrounding the collision and injuries alleged. If, however, you find from the evidence in this case, guided by the instructions, that plaintiffs did not use ordinary care in the three particulars specified by the defendant, or in any one of them, to-wit: transportation of inflammable gasoline upon the truck, in the manner alleged, or failing to drive upon the right-hand side of the highway, but over and along the middle of the highway, as alleged, or failing to carry lights upon said truck on the extreme left-hand side thereof, as alleged, and if * * * you find also that such acts or omissions on their part, or any of them, contributed proximately to the collision or injuries complained of, if any, you may determine these acts and omissions, or acts or omissions so found by you to be contributory negligence on the part of the plaintiffs, and if you do so determine that contributory negligence is established in this case * * * your verdict should be for the defendant. You are instructed that the burden of establishing the defense of contributory negligence by a preponderance of the evidence is upon the defendant, unless the same is proven or can be inferred from the evidence of the plaintiffs."

With the unquestioned fact upon this appeal that the collision was caused by the negligent driving of the defendant, it is inconceivable as to how the jury could be influenced prejudicially by any technical error in the use of the articles "a" or "the" in an instruction; or as to how the incorrect use of the words "contributory" or "proximately" resulted in any prejudicial disadvantage to the appellant.

The appellant, in concluding his brief, again asserts that there was evidence before the jury that the can in which the gasoline was transported by the plaintiffs extended beyond the line of the hub caps on the left side of the truck. Neither the testimony nor the photographs submitted for our inspection appear to support this claim. There is no question, however, that the truck bed which we have described extended a number of inches beyond the exterior line of the gasoline can.

The judgments are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

129 Cal.App. 78

PEOPLE v. SUSOEFF et al.

Cr. 2261.

District Court of Appeal, Second District, Division 2, California.

Jan. 21, 1933.

1. Burglary $\S$ 41(2).

Evidence in second degree burglary prosecution *held* sufficient to establish corpus delicti.

2. Burglary $\S$ 41(1).

Evidence *held* sufficient to support conviction for second degree burglary.

3. Conspiracy $\S$ 47.

Conspiracy may be established by circumstantial evidence as well as by direct proof of agreement to commit unlawful act.

4. Criminal law $\S$ 791.

Evidence of conspiracy in burglary prosecution *held* sufficient to justify conspiracy instruction.

5. Criminal law $\S$ 809.

Requested instruction that defendant's statement read into record was not to be taken as true with respect to its contents, but only as accusation directed to codefendant to which "he would reply when accused," *held* properly refused; quoted part being unintelligible and confusing.

6. Criminal law $\S$ 407(1).

Defendant's accusatory statement *held* admissible against codefendant in connection with and as basis for showing that codefendant, when accusatory statement was read to him, remained silent.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Alex Susoeff, William Kudenoff, and another were convicted of burglary of the second degree, and the named defendants appeal.

Affirmed.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Buron Flitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

WORKS, P. J.

Defendants were charged jointly, in three counts, with the commission of as many burglaries in Pasadena on one and the same day. Susoeff and Kudenoff, who only are before us on appeal, were both acquitted under the first and second counts and convicted of second degree burglary under the third. The appeal is from the judgment and from an order of the

trial court denying the motion of appellants for a new trial.

[1] Appellants contend that the corpus delicti was not proven. The crime in question, laying aside the point whether appellants were guilty of its commission, consisted in a breaking into an automobile agency in Pasadena, forcing open a safe in the office of the concern, and abstracting money therefrom. There was evidence, according to the statement of facts contained in the brief of appellants, that when the complaining witness returned to his office immediately after the date fixed in the information he found that "the hatchway leading to the roof of the building had been torn off," that "the combination of the safe in the office had been knocked off," and that "the safe lock had been driven in and the contents of the safe were strewn over the office floor." The burglary was committed on an Easter Sunday. The brief of appellants informs us that an employee of the automobile concern, on Saturday evening, "put the cash box of the company containing about \$77.00 in cash and several checks in the safe and locked it"; that on arriving at the office of the agency at about 8:30 on Monday morning "she made a search for the money and checks, which she had previously left in the safe, and found that the money was missing." There was of course evidence, and this is stated in appellants' brief, that no permission had been given appellants to enter the building or the safe. Appellants themselves thus certify to us the proof that a crime had been committed. Such proof is sufficient to establish the corpus delicti. *People v. Rodway*, 77 Cal. App. 738, 247 P. 532; *People v. Locurto*, 97 Cal. App. 185, 275 P. 462.

The first point actually stated by appellants is that the evidence was insufficient to justify the verdict. It is as a part of this point that question is raised concerning proof of the corpus delicti. Having disposed of that subpoint, we now proceed to determine whether the evidence is sufficient to show the agency of appellants in the commission of the crime. In stating the evidence, it will be understood, in the absence of specific assertion to a different effect, that the testimony refers to the Sunday on which the offense was perpetrated. Following the method employed in respondent's brief, we shall first state separately the testimony directed against each appellant.

We shall begin with Susoeff. One Spalding testified that at about 4 o'clock in the afternoon, from the fire escape of a building adjoining the automobile agency building, he saw Susoeff on the roof of the latter, which was known as the Don Lee Building.

"Q. What was Susoeff * * * doing at the time? A. He was just—just when he was going into the building, when he first went across the roof; I just saw his head going

over the roof, walking, so I didn't recognize him at that time.

"Q. Later did you have occasion to see this defendant? A. Yes, I saw him when he came out of the Don Lee Building, on top of the roof again.

"Q. Where was he when you first saw him the second time? A. The second time, just coming out of the trapdoor in the roof; he just came out of the door and was going back to the back end of the building and going down a tree which was his means of getting off from the roof.

"Q. Did you see anything at that time in the hands of Mr. Susoeff? A. There seem to be a roll of clothing or a bag of some kind.

"Q. After the defendant Susoeff got on the roof and on the tree, what did he do at that time? * * * A. Just as he was going down the detectives arrived at the front of the building and started to run him down; I had called them in the meantime.

"Q. What did Mr. Susoeff do at that time? A. Well, he was just going over the roof to the tree when I started; I climbed down the fire-escape and motioned to the police officers that he was going behind the back of the building, to run, that they would have to run around on El Molino and Green to get back of the building. I motioned them to go that way, which they did.

"Q. How close were you to Susoeff at that time? A. I was just a little above; I was on the fire-escape * * * right up to the roof of the —

"Q. About how many feet were you from him? A. I would say 8 or 10 feet above and 3 or 4 feet off, just sort of an angle.

"Q. What did Mr. Susoeff do at that time? * * * When he got to the tree; when he was in the tree what did he do? A. He just started down the tree when I came down the fire-escape and I lost his view then."

On cross-examination the witness said:

He did not see the man on the roof open the trap door, but "he was closing it, just as he was coming out. * * *

"Q. You saw him come out of the trap door? A. Well, not just then; in the act of closing it."

He also said that the Don Lee Building is a one-story structure.

Charles E. Ewing, a police officer, saw Susoeff at about 4:40 in the afternoon. "I saw him first when he came out of a semi-alley back of the Don Lee Building. * * *

"Q. Who was with Mr. Susoeff, or was he alone at that time? A. At the time John Dobrinin, the other defendant.

"Q. What was Mr. Susoeff doing at that time? A. He came out of the alley; he was coming on Green street in the same direction that I was coming, and at that time he turn-

ed and ran and jumped the fence. * * * After he jumped the fence he disappeared in back of the house.

"Q. Did you see him again? A. Not that day."

Frank Katzenberger, a police officer, testified that he had a conversation with Susoeff after his arrest, during which the latter said that he was not in Pasadena on Sunday afternoon, but that he was at the beach.

It now becomes proper to state the testimony pointed directly at Kudenoff. Officer Ewing testified that he saw this appellant "on Green street, opposite the Don Lee Building" at "approximately 4:30 in the afternoon," and that Kudenoff was walking along that thoroughfare. This was about five or ten minutes after the witness had seen Susoeff come out of an alley and run and jump a fence, as related above. Either immediately before or immediately after Ewing saw Kudenoff—the evidence is not clear which—the officer saw a yellow car standing at the curb on a street just off Green street and a block from the Don Lee Building. This car was the property of Kudenoff. Ewing saw it at the same place half an hour after first observing it, but when he visited the place two hours later it was gone. It was the theory of the prosecution that this vehicle was the "get-away" car for the three defendants, and this theory finds some support in the evidence—that which has already been recited and that which is now to be noticed.

Kudenoff was arrested a few days after the burglaries in Pasadena had been committed. Soon after the arrest, Officer Katzenberger and other police officers had a conversation with Kudenoff. Katzenberger said that the conversation was "with regard to money taken out of the several burglaries in Pasadena," and that he said to Kudenoff, "We would like to recover * * * all the money out of the particular jobs that were committed in Pasadena." He then immediately referred to a loss of about \$500 which had been suffered by the complaining witness under one of the counts of the triple charge not in question on this appeal. Immediately after that reference he said to Kudenoff, "I know that you got it, Bill; you got it ditched some place, or cached some place; we want to get it and return it to Pasadena." He also said to Kudenoff that Dobrinin had told him that "he [Kudenoff] had money" at his place of abode and that "he [Katzenberger] was going out to get it." After a conversation which "lasted quite a while," Katzenberger remarked, "Well, let's go." Kudenoff said, "Let's go where?" The officer responded, "Down to the house," and Kudenoff said, "All right;" that appellant, Katzenberger and two other police officers then proceeded to the prisoner's home. Katzenberger testified that "the Dobrinin boy [this defendant was a minor] told us, in fact, where the money was supposed to be; it was

back of the bed in a trunk; and another trunk sat in front of it." Search was made when the quartet reached Kudenoff's home, but the officers found only a small purse containing about \$13. Katzenberger remarked, "That is not all the stuff, that is not all the dough." Kudenoff responded, "Well, it is stuck underneath this tray," but when the officer examined the place indicated he found nothing. Kudenoff then said, "Well, somebody beat us to it."

It will at once be observed that this item of evidence did not relate, by specific statement, to money which was the avails of the burglary committed at the Don Lee building. Katzenberger did say to the jury, however, that the conversation which occurred prior to the trip to Kudenoff's home related "to money taken out of the several burglaries in Pasadena," and he referred to the "particular jobs" committed in Pasadena. There were three of these, as the jury well knew, and the trial body was not only justified in inferring, but could hardly have avoided inferring from the officer's statements, that all that Kudenoff said and did during and after the conversation had a bearing upon the possibility of his guilt under the Don Lee building charge, as well as under the other two. Katzenberger's reference to the \$500 lost in one of the other burglaries could not alter this situation. No attempt was made during the cross-examination of Katzenberger to show that the conversation and Kudenoff's conduct following it had no reference to the charge under count 3.

F. M. Hoeflen, who operated a service station in Pasadena, testified that he saw Kudenoff near his place of business between 1 and 3 o'clock in the afternoon of the Easter Sunday upon which the burglaries were committed, and that Kudenoff was then taking a drink of water from a drinking fountain.

Despite the testimony to the contrary, Kudenoff told police officers that he was not in Pasadena on the day of the burglaries, but that he was at the beach.

[2] We are convinced that the evidence was sufficient to support the verdict against each appellant, so much so that we find it unnecessary further to discuss the point. It is to be observed that the evidence pointed either at Susoeff or at Kudenoff was, respectively, admissible against the other under the law of conspiracy, and the jury was so instructed. There is also to be considered the attitude of Dobrinin when the accusatory statement of Dobrinin, hereafter referred to, was presented to him.

[3, 4] The trial judge read to the jury several instructions upon the law of conspiracy. Exception is taken to the giving of each of these, but solely upon the ground that the evidence failed to show the existence of a conspiracy. It is well settled that such an illicit combination may be shown by circumstantial

evidence as well as by direct proof of an agreement between two or more persons to commit an unlawful act. In the present case we are unable to perceive how the jury, with eye and ear attentive to the proper discharge of duty, could have found otherwise than that a conspiracy between the three defendants was in existence.

[5] Exception is taken to the refusal of the trial judge to give the following proffered instruction: "You are instructed that the statement of Wm. [sic] Dobrinin read into the record as an accusatory statement is not to be taken by you as true with respect to its contents but only as an accusation directed to the defendant William Kudenoff to which he would reply when accused." It is obvious that in the part of this language following the words "but only" the draughtsman did not say what he intended. He surely did not purpose having the judge tell the jury positively and finally that Kudenoff "would reply"—it were better if he had said "would have replied"—to the accusatory statement; yet that is just what is imported by the words he employed. No mortal man, and especially a judge speaking to a jury, could properly and truly have said whether or not Kudenoff would have replied to the statement if it were presented to him. Indeed, it is shown by the testimony that he was silent when that event actually occurred. The latter part of the instruction asked was wrong, was in fact unintelligible and confusing to the jury, especially as that body had listened to the testimony as to what Kudenoff really did when the accusatory statement was read to him. The request for the instruction as a whole was, then, improper, and the proffer was on that ground alone rightly refused, although respondent makes additional and effective objection to it. At the close of the evidence, on an afternoon, counsel for appellants stipulated that on that day "your honor may read all the instructions to the jury with the exception of one instruction; that instruction, as to reasonable doubt, to be given in the morning." Thereupon the judge read all instructions which had been presented to him and allowed—the one now under examination not being among them—except the instruction on reasonable doubt. The proffered instruction as to the accusatory statement was presented "in the morning." The instruction on reasonable doubt was then given. Other objections are also made by respondent to the proffered instruction.

[6] The so-called accusatory statement of Dobrinin was admitted in evidence as to Kudenoff, together with testimony concerning the latter's attitude upon the presentation of the statement to him. Appellant Kudenoff contends that the admission of the statement was improper. There was testimony that, when the paper was read to him, Kudenoff said "not a thing," "just said nothing," "never said anything." The statement was prop-

erly admitted in connection with the showing as to Kudenoff's silence, and as a basis for the showing. *People v. Gordon*, 61 Cal. App. 98, 214 P. 276; *People v. Bringham*, 192 Cal. 748, 221 P. 897.

Some other points are made by appellants, but they are either answered by what we have said or they do not merit a separate consideration.

Judgment and order affirmed.

We concur: CRAIG, J.; STEPHENS, J.

LANGLEY et ux. v. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited.*
Civ. 4682.

District Court of Appeal, Third District, California.

Jan. 16, 1933.

Rehearing Denied Feb. 15, 1933.

Hearing Granted by Supreme Court March 16, 1933.

1. Evidence ⇨252.

In action against tort-feasor's liability insurer, based on judgment against tort-feasor, latter's statement that he received letter containing copy of summons and complaint, incorrectly addressed, *held* admissible (St. 1919, p. 776; Code Civ. Proc. § 1851).

Copies of summons and complaint were mailed to W. H. Holland, painter, Los Angeles general delivery, and evidence was sought to be introduced to prove that W. T. Holland, the person intended to be sued, had in fact received copy of the summons and complaint in the action, which by mistake designated him by wrong middle initial.

2. Process ⇨96(4).

Affidavit for publication, which merely showed defendant was living in Los Angeles and receiving mail addressed to general delivery there, *held* insufficient to sustain judgment, for failure to show diligence (Civ. Code, § 1163).

The affidavit showed attempts to locate defendant in other places and recited that letters had been received from him from Los Angeles, stating that he was living there, and directing that mail be forwarded to him to Los Angeles, in care of general delivery, and that mail had been so forwarded and none of it had been returned. On this showing affiant averred that defendant was concealing himself to avoid the service of summons, but no facts were alleged to show any attempt to locate defendant at Los Angeles, either

through post office or otherwise, aside from inquiries made to his fraternal organization and union, and name or address of lodge and union were omitted.

3. Evidence ⇨23(1).

It may be judicially recognized that there is but one place for general delivery of mail.

4. Process ⇨97.

Trial court does not have arbitrary power to determine sufficiency of affidavit for publication (Civ. Code, § 1163).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by J. B. Langley and wife against the Zurich General Accident & Liability Insurance Company, Limited. Judgment for plaintiffs, and defendant appeals.

Reversed.

Wakefield & Hansen, of Fresno, and J. Hampton Hoge, of San Francisco, for appellant.

Edward Bickmore, of Merced, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

The case has been before this court once before and a report thereof may be found under the same title in 97 Cal. App. 434, 275 P. 963, 966. The facts have not changed in any substantial degree; therefore it becomes unnecessary to detail the case other than by reference.

Pursuant to the judgment of reversal the case went back for another trial. Agreeable to the law of the case as announced, the only issue on the second trial, now being reviewed, arose from the following language contained in the decision of this court, viz.:

"It may be that, on a retrial of this case, respondent will be able to produce evidence that in fact W. T. Holland received the complaint and summons which was mailed to W. H. Holland, painter, at Los Angeles, Cal., general delivery. * * * The production of this evidence would be in line with the" authorities cited.

Accordingly, respondents introduced evidence showing that W. T. Holland, the identical person insured by appellant, was in truth and in fact the same person who had been sued under the name of W. H. Holland and against whom the original judgment had been rendered. On this point there remains no doubt whatever.

[1] Next respondents sought to show that W. T. Holland had received the copy of complaint and summons mailed to W. H. Holland, painter, addressed to the latter at Los An-

geles. The only evidence offered on the point was testimony of the attorney for respondents that he had seen and talked with W. T. Holland at a time almost a year after the rendition of the original judgment against Holland. The testimony is that about this time Holland was brought into the superior court of Ventura county on proceedings supplemental to execution in another case arising out of the same accident. The attorney for respondents here met Holland and discussed with him the matter of the receipt of the summons and complaint in the respondents' case. On this occasion W. T. Holland stated that he had received a letter addressed to W. H. Holland, painter, in the city of Los Angeles, which letter contained a copy of the summons and complaint in the said action of Langley v. W. H. Holland. Upon this testimony the trial court found that W. T. Holland had so received the letter referred to containing copy of said summons and complaint. Appellant here urges most strenuously that the finding lacks evidentiary support, for the reason that the evidence offered was incompetent, hearsay, and in no wise binding upon appellant here.

The argument is that by reason of the defect noted the evidence was inadmissible and should have been stricken out and that the action of the trial court in denying appellant's motion to strike was error. Somewhat as a corollary it is concluded that regardless of whether the evidence remains in or is stricken it is insufficient, by reason of its incompetency, to establish any fact. It was conceded that at the time of the conversation wherein Holland's statement was made, no one representing appellant was present.

Appellant has not offered any other than some general rules of evidence in support of its contention. It goes without saying that we recognize the rule that hearsay evidence is not admissible and should be excluded. But as to when evidence is hearsay or original is another question. In determining the nature of evidence we must always look to the issue. If the issue were whether or not a party had made a certain statement, by way of admission or against interest, then it seems clear that the testimony of witnesses who heard the statement would be original evidence of the fact of the statement having been made, rather than mere hearsay. Sections 1850 and 1870, Code Civ. Proc. The precise fact in dispute was the receipt of the copy of summons and complaint. The admitted fact is that W. T. Holland was a painter and that he was in Los Angeles; that a letter addressed to W. H. Holland, painter, coming from the territory of the former residence of W. T. Holland, was mailed to Los Angeles. It might be conceded that if the letter had been registered and a return receipt were offered little question would arise as to its admissibility. Yet the return card as against

appellant would be as much hearsay as the evidence objected to here. In both cases the evidence would be as to a statement of Holland, one written and the other oral.

The main controversy, of which the present issue is an incident, is the validity of the judgment against Holland, the insured. The strength of the judgment rests upon proof of receipt of the copy of summons and complaint. At all times it must be borne in mind that we are concerned with a judgment against Holland. If the present action were against Holland on the judgment it is obvious that his own admission would be competent. And on that issue, wheresoever it might arise, we are of the opinion that the admission would always retain its character of original evidence of the fact in dispute. Dismissing any question of limitation, let us assume that the instant case is reversed. Respondent could proceed against Holland on the judgment. Assuming then that Holland contested the validity of the judgment and raised this issue it would not be seriously disputed that the evidence of admission would be sufficient to sustain a finding against Holland. The liability of appellant rests upon the primary liability of its insured. It is admitted that the provisions of the policy and the provisions of the law (Stats. 1919, c. 367, p. 776) require that a judgment be had against the assured, making the loss certain, before an action can be maintained against the indemnity company. Section 1851 of the Code of Civil Procedure reads: "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties."

Here the dispute was primarily as to the obligation of Holland. This obligation rested upon a judgment, the binding effect of which was denied on the ground that Holland had not received the letter in question. The proof of the obligation rested upon the issue thus raised and evidence admissible against Holland was admissible as against appellant. We hold the evidence to have been properly received and retained.

[2, 3] The appellant raises a second point not raised upon the former appeal. It contends that the judgment against Holland, the insured, is void upon the face of the judgment roll. The summons was served by publication and the point is that the affidavit upon which the service of summons was ordered is insufficient. We may disregard the nature of the attack upon the judgment, whether direct or collateral, and come directly to the matter to be decided, namely, the sufficiency of the affidavit.

The said affidavit may be now considered in detail. It shows that a cause of action exists against defendant and likewise contains averments that there has not been filed on behalf of defendant in the county where

the action is brought and where it is pending the certificate of residence required by section 1163 of the Civil Code. The main attack upon the affidavit centers on the question of the showing of diligence. It appears from said affidavit that when the cause of action arose the defendant was a resident of Merced county and that he thereafter moved to San Rafael, in Marin county; that when the action was filed defendant was employed as a painters' foreman by one John Nelson at a given address in San Rafael; that attempt was made to secure personal service on defendant, but that on the day the process server visited San Rafael the defendant was away and that immediately thereafter the defendant left San Rafael and took up his residence in Los Angeles, his exact address in the latter city being unknown to affiant; that summons and complaint have been forwarded to the sheriff of Marin county and the return made that defendant cannot be found in Marin county; that affiant has made inquiries of John Nelson, the former employer, and by him was informed that defendant had departed from San Rafael and that his present whereabouts are unknown; that affiant has made inquiries through fraternal organizations of which defendant is a member and has also inquired through the Painters' Union to which defendant belongs, but has been unable to secure any *data* to locate the defendant. The location of the fraternal organizations or of the union does not appear. In addition to the foregoing, the affidavit shows that the attorney for plaintiff made inquiry of a fellow employee of defendant, the name of said fellow employee being unknown to plaintiff or his attorney and that said fellow employee informed said attorney that defendant had left San Rafael and that the fellow employee had received letters from defendant from Los Angeles stating that defendant was living in Los Angeles, but giving no street address and directing that mail for defendant be forwarded to Los Angeles, care of general delivery; that said fellow employee had so forwarded said mail to Los Angeles and that none of said mail had been returned. Affiant from the showing avers that defendant cannot be found either at his former residence in Merced or San Rafael or at his *present residence* at the city of Los Angeles, or elsewhere, and that he is concealing himself to avoid service of the summons and complaint upon him. On this affidavit the court below found that defendant could not, after due diligence, be found *within the state* and that he is concealing himself to avoid service.

We have read and re-read the affidavit and are forced to the conclusion that there was and is no showing of diligence sufficient to support the order for publication of summons. The affidavit, it is true, shows diligence not only in attempting to locate defendant, but

in actually locating him. In three different places the distinct averment is made that defendant had taken up his residence in Los Angeles, Cal. It was shown that defendant had left a forwarding address to general delivery in Los Angeles and had received mail forwarded and had written to friends in San Rafael from Los Angeles. Yet there is not a single fact which would show any attempt, let alone any diligence, to locate defendant in Los Angeles. The affidavit states that inquiry was made to fraternal organizations, not named, to which defendant belonged and through the Painters' Union to which defendant belongs and that such inquiry did not disclose *any data sufficient to locate defendant* nor was *any data* secured. Accepting diligence as a relative term, the affidavit discloses within itself means of locating defendant, namely, through the post office at Los Angeles. It may be judicially recognized that there is but one place for general delivery of mail and that one receiving mail from this source would or could be thus traceable. At least some chance of discovery would be apparent.

If an order for publication of summons can be upheld on the bald statement that inquiry was made of a fraternal organization and of a union, which query resulted in failure to secure data on defendant's whereabouts, when the affidavit discloses the defendant to be in the state, then we may as well dispense with the necessity of an affidavit or other showing and allow service by publication as a matter of course in lieu of personal service in all cases. And particularly true is this where the name or address of the lodge or union is omitted, and no reference as to whether defendant is a member of the particular organization to which addressed. We have viewed the affidavit and the judgment from every viewpoint and have attempted to raise presumptions in favor of the regularity of the proceedings, but look in vain for any support for the presumption. We have endeavored to find conflicting allegations in the affidavit, one of which might support the order of publication. But the affidavit leaves but one conclusion, namely, that defendant was residing in Los Angeles.

[4] Granting the power in the court below to determine the sufficiency of the affidavit, yet this power is not arbitrary. In *Rue v. Quinn*, 137 Cal. 651, 66 P. 216, 217, 70 P. 732, the court says: "In making the order for the service by publication, the judge acts judicially upon the evidence which the Code requires to be presented to him for that purpose, and can act upon no other evidence than such as is prescribed by the Code." And, quoting from *Wilson v. Leo*, 19 Cal. App. 793, 795, 127 P. 1043, this evidence "must be presented in the form of an affidavit, stating the fact upon which the court bases its con-

clusion that the party cannot be found, or conceals himself."

It is true that much discretion is vested in the trial judge where the facts have a legal tendency to show due diligence, but this much is absolutely essential. But here there is nothing that can be, even by the widest stretch of the term, classed as having a legal tendency to show due or any diligence after defendant had been located. Many of the decisions have gone to great lengths to uphold judgments based upon a constructive service, but to uphold the sufficiency of the affidavit here under scrutiny would be to them to open the door too wide. From the affidavit as noted we find defendant living and residing in Los Angeles, to which all avenues lead. And there he still may be for aught the record shows.

All parties concede that the case must be reversed if the affidavit is held insufficient.

Much is said, as is usual in such cases, on justice in the abstract. Let us consider the case from that standpoint. The record indicates that shortly after the judgment was entered the respondents had no difficulty in finding Holland to make personal service of the findings in the companion case. Also the record indicates that Holland was insured by appellant, upon whom would fall the liability of discharging the judgment. How easy it would be to encourage insured people to default or to move about from place to place in order that a publication of summons might supplant a personal service, where the latter mode might result in a contest. We mention these possibilities merely to illustrate the danger of too great laxity.

The judgment is reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

217 Cal. 374

**ERLIN v. NATIONAL UNION FIRE INS.
CO.**

S. F. 14351.

Supreme Court of California.

Jan. 31, 1933.

Rehearing Denied March 2, 1933.

1. Insurance ⇨84(2).

Where company notified insurer that no insurance would be placed if broker theretofore negotiating for company received any commission, whereupon negotiations were discontinued, and insurance was subsequently placed direct, insurer was not liable to broker for commission.

2. Insurance ⇨84(6).

Insurance broker who alleged placing of insurance that entitled him to commission cannot recover on ground that placing of insurance was prevented by fraud of insurer and insured.

3. Insurance ⇨84(2).

Insurer, acting in good faith, cannot be held liable for broker's commission solely on ground that broker's client acted in bad faith to prevent placing of insurance by broker.

PRESTON and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. B. Landis, Judge.

Action by George E. Erlin against National Union Fire Insurance Company. From judgment for plaintiff, defendant appeals.

Reversed.

Rehearing denied; CURTIS, J., dissenting.

Courtney L. Moore and John J. Dailey, both of San Francisco, for appellant.

Harry I. Stafford and Edward A. Cunha, both of San Francisco (Daniel R. Shoemaker, of San Francisco, of counsel), for respondent.

PER CURIAM.

This is an appeal from a judgment for the plaintiff in an action to recover insurance commissions alleged to have been earned by the plaintiff and for an accounting. At the close of the trial, the accounting was had, and judgment for the plaintiff was entered in the sum of \$13,842.27.

In January, 1926, the plaintiff learned that West American Finance Company, hereinafter called the finance company, was about to change its insurance carrier. He approached the officers of that company, and offered to obtain a new insurance carrier for them in their automobile financing operations. That company gave its consent to the plaintiff to go into the insurance market and obtain a proposition for it. Accordingly, about January 21, 1926, the plaintiff called on W. R. Cole, an officer of the defendant National Union Fire Insurance Company, a Pennsylvania corporation duly licensed to do business in this state. On that day W. R. Cole gave to the plaintiff a typewritten proposition addressed to and which was submitted to the finance company. That communication set out certain percentages, ranging from 25 to 40, as the commissions payable to the finance company on premiums for various types of insurance written at the instance of that company. The plaintiff was also given a paper by Mr. Cole on which were stated certain gross percentages, which, on some types of insurance, were from 5 to 10 per cent. in excess of the percentages stated in the letter of January 21st to the finance company. It was the evident purpose of the second paper to submit to the plaintiff certain overriding commissions, which would be paid to him on business coming from the finance company. During the same period, the finance company was contemplating the establishment of an insurance department, and the plaintiff had been offered, and was considering, a position at a salary of \$6,000 per annum to manage that department. When Mr. Haines, the general manager of the finance company, learned that the plaintiff was also negotiating with the defendant for

an overriding commission, he objected to the same on the ground that the plaintiff could not well serve both companies at the same time. Further negotiations led to further dissatisfaction. Mr. Haines then notified the defendant that his company would place no insurance with the defendant if the plaintiff were to receive any commission thereon. Whereupon the negotiations were at an end so far as the plaintiff was concerned.

Later on, under date of April 1, 1926, a contract was entered into between the finance company and the defendant calling for percentages payable to the finance company in substantially the same amounts as originally submitted to it by the defendant and pursuant to which the defendant issued policies at the instance of the finance company from the date of the contract until November 1, 1926. In connection with this business, the finance company designated one Barry, an insurance broker, as the one to whom any overriding commissions should be paid. The commissions payable to the finance company and to Barry were paid to them, respectively, on all policies written under the contract of April 1, 1926.

There is no substantial conflict in the evidence, and the facts hereinabove stated are without dispute. It may be said that the agreement alleged by the plaintiff, and it is not seriously disputed that the only agreement proved, is that the plaintiff should be entitled to overriding commissions from the defendant only in the event that he bring about the contract between the defendant and the finance company as the agent or broker in the transaction recognized as such by both parties to the contract. The evidence adduced fairly supports no other conclusion.

[1-3] It was alleged in the complaint that the plaintiff brought about and consummated the agreement between the defendant and the finance company under which the latter company agreed to place its insurance with, and which was thereafter placed with, the defendant. There is no evidence in the record sufficient to support this allegation. Performance was not proved, but, as an excuse for nonperformance, the court found that the plaintiff had performed all things by him to be performed under the agreement between the plaintiff and the defendant, "and the court finds that such performance was attempted to be prevented by the sham, fraud and pretense of the defendant individually and in conjunction with the West American Finance Company in an attempt to deprive the plaintiff of his right to commissions that would accrue to plaintiff under the agreement between plaintiff and defendant." The issues of sham, fraud, and pretense were not tendered by the plaintiff, and there is nothing in the pleadings to suggest them, and the findings of the court thereon constitute the only support for the conclusion of law and the judgment. Furthermore, there is no

evidence in the record to support the findings thereon. This is certainly true so far as the defendant is concerned, and, in so far as the finding applies to the finance company, it is based on conjecture and surmise to the effect that the finance company acted in bad faith in refusing without sufficient cause to authorize or permit the plaintiff to consummate the transaction. Assuming that the conduct of the finance company amounted to bad faith, such bad faith on its part alone would not justify a judgment against this defendant on that ground.

It is an admitted fact that the plaintiff did not, at all the times involved in the controversy, possess an insurance broker's license as required by section 633a et seq. of the Political Code, and that during the negotiations in January, 1926, and until May 10, 1926, he did not have a license to act as the agent of the defendant company. There is much argument in the briefs as to whether, under these facts, the plaintiff was entitled to sue. These questions it is unnecessary to determine, because, on the merits, the plaintiff is not entitled to recover.

The judgment is reversed.

We dissent: PRESTON, J.; CURTIS, J.

217 Cal. 231

**ALAMEDA COUNTY HOME INV. CO. v.
WHITAKER et al.**

S. F. 14617.

Supreme Court of California.

Jan. 16, 1933.

Rehearing Denied Feb. 14, 1933.

1. Parties ☞58.

Whether action against mortgagor for possession should continue in name of purchaser under junior mortgage or whether purchaser at subsequent sale under senior mortgage should be substituted as plaintiff was discretionary with trial court (Code Civ. Proc. §§ 385, 1161a).

2. Appeal and error ☞173(9).

Contention that mortgagee waived default by acceptance of payment after notice of breach will not be noticed when first made on appeal, especially in absence of finding concerning application of payment.

3. Mortgages ☞357.

Where notice of trustee's sale under trust deed was duly published and posted, postponements of sale by proclamation at time and

place fixed therefor did not invalidate sale, where trust deed empowered trustee to postpone (Civ. Code, § 2924; Code Civ. Proc. § 692).

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Alameda County Home Investment Company against W. A. Whitaker and others. From judgment for plaintiff, defendants appeal.

Affirmed.

Fred W. Lake, of Los Angeles, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondent.

PER CURIAM.

This is an appeal from a judgment for the plaintiff in an action to recover possession from the defendants of certain real property pursuant to the provisions of section 1161a of the Code of Civil Procedure.

The defendant W. A. Whitaker was the owner of an apartment house called the Whitaker Arms in Berkeley and of a dwelling house adjacent thereto, also divided into apartments, both of which were rented by said defendant for income purposes. On July 12, 1927, Whitaker executed a first deed of trust on the apartment house to American Securities Company, as trustee, to secure repayment of a loan of \$60,000 made by Fidelity Mortgage Securities of California. This loan was due in one year. It was subsequently transferred to Fidelity Guaranty Building & Loan Association. At the same time Whitaker executed a deed of trust of the dwelling house to secure a loan of \$7,000, on similar terms, from Fidelity Guaranty Building & Loan Association. On October 1, 1928, Whitaker executed a second deed of trust on the apartment house to American Trust Company, as trustee, to secure a note to the plaintiff for \$10,924.93, due in one year, and providing for monthly payments of \$200 on the principal. All of the notes and deeds of trust contained the usual acceleration clauses. The deeds of trust provided that the defendant Whitaker should pay all fire insurance premiums, taxes, assessments, etc.

It was alleged in the complaint that on January 3, 1930, the whole of the principal of said note for \$10,924.93 remained due and payable and unpaid with accrued interest, and that certain taxes remained unpaid; that on said last-named date the plaintiff caused a notice of breach and election to sell to be executed and recorded; that the trustee under said second deed of trust pursuant to said recorded notice duly published and posted notice of sale and sold at public auction said

Whitaker Arms apartment property subject to said first deed of trust to the plaintiff, who was the highest bidder for cash at said sale; that on June 10, 1930, said trustee executed to the plaintiff its trustee's deed of said real property, and that by virtue of said sale the plaintiff is the owner, subject only to said first deed of trust, and entitled to the possession of said property. The plaintiff also based its right to recovery of possession upon a chattel mortgage and assignment of rentals, made a part of the complaint, which was executed by the defendant Whitaker as further security for all three of said loans in consideration of the plaintiff's extending the maturity date of said second deed of trust. The complaint contained allegations of the defendant Whitaker's breach of the provisions of said second deed of trust and of said chattel mortgage and assignment of rentals, and of other matters upon which it also sought and obtained the appointment of a receiver. The defendants' answer denied generally the allegations of the complaint. The trial court found for the plaintiff on all the issues, and rendered judgment accordingly.

[1] The defendants make numerous points on this appeal. First it is contended that, because of the stipulation and admission of the plaintiff in open court that by virtue of the sale, since the commencement of the action and before trial, of the apartment property under the first deed of trust to Fidelity Guaranty Building & Loan Association, the latter was and is the sole owner of said real property, the plaintiff has failed to prove title and ownership in itself. The defendants' motion to bring in the party succeeding to the plaintiff's interest was denied by the trial court. This ruling was not error. Section 385 of the Code of Civil Procedure provides that in the case of any transfer of interest other than that caused by the death or disability of a party the action may be continued in the name of the original party, or the court may allow the person who succeeds to the interest to be substituted in the action. That section must be deemed to control the defendants' contention. Discretion rested with the trial court to allow the action to continue in the name of the plaintiff.

[2] The next contention of the defendants is that the agreement for the extension of the maturity date of the loan was an agreement for an absolute extension to January 12, 1930, and that the sale under the second deed of trust was therefore premature and void. There is no evidence in the record which supports this contention. The evidence to the contrary fully supports the trial court's finding that the agreement included the provision that the extension was conditioned upon the terms thereof being complied with by the defendant Whitaker, and that upon the lat-

ter's default the acceleration provisions of the deed of trust would be in effect. No serious contention is or can be made that Whitaker did not default in payment of rentals and otherwise under the terms of the agreement which provided for cancellation of a previous notice of breach theretofore filed and reinstatement and extension of the loans, and of the deed of trust. Nor can we consider seriously the contention apparently made here for the first time, that the plaintiff waived the defendant's default by accepting a payment of \$400 made by him on January 9, 1930, after notice of breach had been given and recorded, especially in the absence of a finding or ruling in the record respecting the application of said payment upon which an assignment of error could be based.

[3] The main contention made by the defendants is that the notice of sale under said second deed of trust was not published or posted in accordance with law. The record shows that notice of trustee's sale, designating the time and place of sale, viz., May 22, 1930, at the Center street entrance of the Merchants' Bank building, 2080 Center street, Berkeley, Cal., and otherwise conforming to legal requirements, was posted on April 29, 1930, in three of the most public places in the city of Berkeley, and on the property described in the notice. The notice was also duly published. The complaint alleges, and the court found, that at the time and place fixed for the sale the trustee by proclamation duly and regularly continued the sale to May 29, 1930, at the same hour and place. Subsequently, at the last-mentioned time, the sale was similarly continued until June 5, 1930, and again until June 10, 1930, at the hour of 2 o'clock, when the sale, without any further posting or publication of notice, actually took place. The deed of trust provided that the "trustee may, from time to time, postpone any sale" to such time as it may elect by proclamation made at the time and place previously appointed for such sale.

Since 1917 the Civil Code, § 2924, with respect to sales under a deed of trust, has provided for notice of the time and place of sale in the manner and for a time not less than that required by law for sales of real property under execution. Section 692 of the Code of Civil Procedure prescribes those requirements. The power of the officer conducting the sale to postpone the sale by public proclamation (see 10 R. C. L. p. 1302; 41 C. J. 966, 967; Freeman on Executions, vol. 2, p. 1666), appears to have been recognized in the case of Bertschman v. Covell, 205 Cal. 707, 272 P. 571. No cogent reasoning nor any authority is presented by the defendants to support their contention that, where the borrower has agreed to the postponement in the manner provided by the trust deed, either his constitutional rights or the policy of the law

as to notice have been infringed or violated. In this case the original notice giving the trustee jurisdiction to act was published and posted as provided by law and the terms of the deed of trust, and no abuse of the power in the conduct of the sale by the trustee is or can be shown from the record before us.

The further point that the evidence does not show that the notices remained posted for twenty days preceding the day noticed for the sale may not be made in this proceeding. Notwithstanding the provision of the deed of trust that the recitals in the trustee's deed of any facts relating to the validity of the latter instrument shall be conclusive proof of the facts recited, we find in the evidence proof of the required posting of notice.

It will be unnecessary to discuss other contentions made by the defendants. The allegations in the complaint were sufficient, there is no valid objection to the granting of relief on the ground that other lending companies were not joined in the action, and the findings are supported by the evidence and in turn support the judgment.

The judgment is affirmed.

217 Cal. 289

DUNHAM v. REICHLIN.

EICHEN v. SAME.

Sac. 4703, 4704.

Supreme Court of California.

Jan. 27, 1933.

1. Jury ⇨25(2).

Defendant, not having made timely demand for jury trial, waived right thereto, and could not rely on plaintiff's timely demand (Code Civ. Proc. § 631, subd. 4).

2. Damages ⇨132(3).

\$5,500 for injuries, including concussion of brain, two fractured ribs, injuries to eye and ear, resulting in deafness and double vision, held not excessive.

Evidence disclosed that plaintiff received numerous cuts and abrasions and bruises about the head, shoulders, chest, and legs, concussion of the brain, two broken ribs, and injuries to left ear and right eye; that injuries to ear consisted of rupture of eardrum and obstruction of bones of ear, resulting in permanent and total deafness in that ear; that injuries to eye consisted of hemorrhage under retina, leaving blood clot, and causing double vision.

In Bank.

Appeals from Superior Court, Mendocino County; H. L. Preston, Judge.

Separate actions by Oscar Dunham, and by Ernest Eichen, against Joseph A. Reichlin, consolidated and tried together. From separate judgments in favor of the plaintiffs, the defendant appeals.

Judgments affirmed.

Prior opinion, 8 P.(2d) 922.

J. Hampton Hoge, of San Francisco, and Len H. Honey, of Stockton (A. Dal Thomson, of San Francisco, of counsel), for appellant.

M. H. Iversen and Frank W. Taft, both of Ukiah, for respondents.

SHENK, J.

These appeals are from judgments for the plaintiffs in consolidated actions. Both causes of action arose out of a collision between an automobile driven by Lorenz Eichen in which the plaintiff Dunham was riding, and an automobile driven by the defendant. Dunham suffered personal injuries, and in one action sued to recover damages therefor. Lorenz Eichen was killed, and the other action was brought by his father to recover damages for alleged wrongful death. The actions were consolidated for trial, and were tried by the court sitting without a jury. Judgment for the plaintiff Dunham was entered for \$5,844, and for the plaintiff Eichen in the sum of \$6,000.

On August 15, 1930, the cases were first put upon the trial calendar. At that time a trial by jury was demanded by the plaintiffs. No demand for a jury was then made by the defendant. The plaintiffs at no time deposited jury fees. The causes were set down for trial on October 6, 1930. Three days prior thereto the defendant made the deposit of jury fees. When the cases were called for trial, there was no jury in attendance, owing to the fact that counsel for the plaintiffs had notified the court some time prior thereto that the plaintiffs had abandoned their right to a trial by jury. Counsel for the defendant then announced that the defendant had paid the jury fees three days prior thereto and requested a jury trial. The request was denied.

Two contentions are made on this appeal: (1) That the court erred in refusing the defendant's demand for a jury trial; and (2) that the amount of damages awarded to the plaintiff Dunham is grossly excessive.

[1] As bearing upon the first point, it is undisputed that on August 15, 1930, the cases were first set upon the trial calendar to be tried on October 6, 1930; that on August 20, 1930, and again on September 2, 1930, the defendant was notified of the date of trial.

He therefore had ample time and opportunity to demand a jury, had he so desired. Section 631 of the Code of Civil Procedure provides as follows: "Trial by jury may be waived * * * 4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation."

The defendant contends, however, that where, as here, one party to the litigation has demanded a jury, it becomes unnecessary for the other party to do so, and that he may rely upon the demand of his adversary. But the provisions of the Code above quoted are unqualified, unambiguous, and certain. Stern v. Hillman, 115 Cal. App. 156, 300 P. 972. It is reasonable to assume that, if an exception to the requirements laid down by the Code were to be effective, the Legislature would have inserted it. We conclude that there was no error in denying the defendant's request under the record here presented.

[2] As to the second point, we adopt that portion of the opinion of the District Court of Appeal, First District, Division 1, prepared by Mr. Justice Knight, as correctly disposing of the contention: "The evidence shows that besides receiving numerous cuts and abrasions and bruises about the head, shoulders, chest, and legs, Dunham suffered concussion of the brain, two ribs were broken, and he sustained permanent and serious injuries to the left ear and the right eye. The injuries to the ear consisted of a rupture of the ear drum and an obstruction of the bones of the ear, which has resulted in permanent and total deafness in the left ear; and as to the injuries to the eye the evidence shows that a hemorrhage took place under the retina, which left a blood clot, as a result of which he is afflicted with double vision. In describing this condition his physician testified: 'Well, his chief disturbance was a double vision when looking to the left; the double vision was present in both eyes but later cleared in the left and has cleared in the right so that he can look to an angle of about fifty degrees towards the left—that is, bringing the eyeball to the left and then his double vision begins. I would say there is a permanent loss of vision in one half of the field.' The evidence further shows that at the time of trial he was still affected with dizziness, which impaired his capacity for work. He was confined to the hospital for ten days and afterwards remained under the doctor's care for about four months. His special damage amounted to \$344, which leaves \$5,500 to compensate him for pain, suffering, and the injuries above mentioned; and in view of the fact that both his sight and hearing have been permanently impaired to the extent

above described, we cannot say as a matter of law that the amount awarded as damages therefor is, as defendant claims, grossly disproportionate."

The judgment in each action is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

217 Cal. 282

MEDA et al. v. LAWTON et al.

S. F. 14499.

Supreme Court of California.

Jan. 27, 1933.

Rehearing Denied Feb. 24, 1933.

1. Mechanics' liens § 74.

Property owner not filing building contract and bond could not have liability to materialmen and laborers restricted to amount due contractor (Code Civ. Proc. § 1183).

2. Mechanics' liens § 315.

That property owner and contractor were acting as principal and agent, and that owner did not pay contractor in full, held immaterial, as regards surety's liability to lien claimants.

3. Mechanics' liens § 315.

Property owner's failure to file contract and bond did not relieve surety from liability to laborers and materialmen (Code Civ. Proc. § 1183).

4. Mechanics' liens § 315.

In proceedings by lien claimants against property owner, contractor, and surety, court properly awarded interest from date of completion of work (Civ. Code, § 3287).

Evidence disclosed that in order to bring themselves within statute, plaintiffs alleged that amounts sued for were reasonable value of their services or materials, and in some cases an agreed price was set forth, and in all cases amounts sued for were stipulated to be reasonable value of services or materials, and court so found.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Actions by S. P. Meda and others against Frederick H. Lawton and others, which were consolidated for trial. From a judgment for plaintiffs, defendants appeal.

Affirmed.

See, also, 7 P. (2d) 180, 214 Cal. 588.

Kirkbride, Wilson & Brooks, of San Mateo, for appellant Frederick H. Lawton.

R. P. Wisecarver, of San Francisco, for appellant National Surety Co.

J. E. McCurdy, of San Mateo, for appellant August Gerske et ux.

John D. Willard, of Redwood City, of counsel, for appellants F. H. Lawton and National Surety Co.

Albert Picard, of San Francisco, for respondents S. P. Meda and C. Meda.

Franklin Swart and Edmund Scott, both of Redwood City, for respondent San Francisco Lumber Co.

William Evans and Samuel R. Davis, both of San Francisco, for respondents L. A. Nelson and R. C. Shirkey.

Walter E. Dorn, of San Francisco, for respondents Jas. Michel and W. A. Pfeffer.

J. W. Coleberd, of South San Francisco, for respondent San Mateo Feed & Fuel Co.

F. M. O'Brien and O'Brien & Lucey, all of San Francisco, for respondents Malott & Peterson.

PER CURIAM.

This is an appeal from judgments totalling \$11,541.20, rendered in favor of plaintiffs in cases consolidated before trial. The actions were brought to foreclose mechanics' liens and to recover personal judgments against the defendants Lawton and National Surety Company. The essential findings are that defendant Gerske engaged defendant Lawton to construct a dwelling house for him; that defendant National Surety Company executed a bond in the sum of \$15,000, which recited that a written contract had been entered into between the contractor and the owner, and which provided, as required by statute, that it should inure to the benefit of persons performing labor or furnishing materials; that this contract and bond were never filed for record; and that plaintiffs furnished labor and materials for which they were not paid. The court gave judgment for foreclosure of the liens and personally against the contractor and surety company, as prayed. Defendants bring this appeal.

[1] The appeal of defendant Gerske is based upon his own testimony showing that he paid the contractor the full agreed price of \$16,000. From this he argues that the court should not have decreed a lien upon the building, but should have permitted recovery only against the contractor and his surety. In support of this position he advances the theory that the statute (section 1183, Code Civ. Proc.), as it read prior to 1929, the period during which the transactions took place, provided only for "derivative liens" where-ever the owner had paid the contractor in full. This is in direct conflict with the language of the statute, stating that they "shall be direct liens, and shall not in the case of

any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided." The section goes on to provide that upon the filing for record of the contract and the contractor's bond, in proper form, the court must, "where it would be equitable to do so," restrict the recovery under the liens to the amount due from the owner to the contractor. Inasmuch as defendant Gerske wholly failed to comply with the statutory requirement of filing the contract and bond for record, his position is groundless.

[2, 3] The appeal of defendant surety company raises a number of points, some of which may be briefly mentioned. It is contended that Gerske and Lawton, who were formerly partners, were acting as principal and agent in this transaction; that Gerske did not in fact pay Lawton in full, because the house actually cost much more than \$16,000; and that these parties are attempting to compel the surety to pay part of the cost of the house. Lawton did not appear to testify, and the trial court refused to grant a continuance, and likewise sustained objections to certain questions asked defendant Gerske and certain evidence offered to show greater cost as well as modification of the original contract. The lower court was of the view that these matters, while they might affect the relative rights of Gerske, Lawton, and the surety company as between themselves, were immaterial in proceedings brought by lien claimants; and we think that this conclusion was sound. It is further argued that the failure of defendant Gerske to file the contract and bond relieved the surety company from liability under the statute; that the instrument was thereafter valid only as a "common law bond"; and that the surety was exonerated by alterations in the contract. The actual contract of the parties, it should be noted, consisted of letters and oral negotiations; and there is no convincing evidence of material alteration. But we are unable to agree that the suppression of the contract and bond by Gerske had the effect of exonerating the surety. The liability was fixed by the statute and the bond in favor of persons in the position of plaintiffs, and the only effect of Gerske's action is to place upon him a greater liability than if he had recorded the instruments. The provision for filing is unquestionably for the benefit of the owner and not the surety. The failure to file does not add to the surety's burden or prejudice him in any way. *Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 P. 947. Nor do we find any merit in the contention that the one-year period of limitation specified in the bond for actions under it has run, so as to defeat the claims of plaintiffs. A reading of the instrument shows that this applies only to the person named

therein as "obligee," the defendant Gerske, and that laborers and materialmen "shall have the right of action given them by the laws of the state of California."

The other points of this appeal are equally unsubstantial, and require no discussion.

[4] The final point made by all defendants is that the court erred in awarding interest from the date of completion of the work; the total amount being \$555.75. It is urged that the amounts due plaintiffs were unliquidated and uncertain, and that therefore, under the settled rule, interest was proper only from the date of judgment. We find no error in the court's determination in this regard. To bring themselves within the statute the lien claimants alleged that the amounts sued for were the reasonable value of their services or materials. In some cases, an agreed price was set forth. In all cases the amounts sued for were stipulated to be the reasonable value of the services or materials, and the court so found. Section 3287 of the Civil Code provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. * * *" In the absence of any objection by defendants as to those amounts, we think it must be presumed that they were "certain, or capable of being made certain by calculation," and that it was therefore correct to award interest from the time they were due, upon the filing of the notice of completion.

The judgment is affirmed.

217 Cal. 787

Emily L. BEAN, Russell Stanford Dingley, and Frank De Guerre, Plaintiffs and Appellants, v. ODD FELLOWS CEMETERY ASSOCIATION, Richard H. Bell, Henry E. Monroe, William Grant, and J. B. Zimdars, Defendants and Respondents.

S. F. 14596.

Supreme Court of California.

Jan. 27, 1933.

Rehearing Denied Feb. 24, 1933.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

George Olshausen and H. W. Hutton, both of San Francisco, for appellants.

A. W. Scott, of San Francisco, for respondent Odd Fellows Cemetery Ass'n.

Henry E. Monroe, of San Francisco, for respondent Richard H. Bell.

PER CURIAM.

This is an appeal by certain holders of lots in a cemetery from an order denying a pre-

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liminary injunction against abandoning the cemetery and removing the bodies interred therein. The issues are identical with those presented in the case of Seale v. Masonic Cemetery Association (Cal. Sup.) 18 P. (2d) 667, and on the authority of that case the order is affirmed.

217 Cal. 286

SEALE et al. v. MASONIC CEMETERY ASS'N.

S. F. 14523.

Supreme Court of California.

Jan. 27, 1933.

Rehearing Denied Feb. 24, 1933.

Cemeteries — 1.

Statute authorizing governing body of municipalities exceeding 100,000 population to compel removal of bodies from cemeteries within municipality and ordinance thereunder, held constitutional (St. 1923, p. 646).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Proceeding by Minnie Seale and others for an injunction against the Masonic Cemetery Association. From the order denying preliminary injunction, plaintiffs appeal.

Affirmed.

George Olshausen, of San Francisco (H. W. Hutton, of San Francisco, of counsel), for appellants.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

LANGDON, J.

This is an appeal by plaintiffs from an order of the Superior Court of the city and county of San Francisco denying a preliminary injunction. The undisputed facts are as follows: Plaintiffs and others bought burial lots in the Masonic cemetery, controlled by defendant corporation, in 1884. In 1901 an ordinance of said city and county prohibited the further burial of the dead within its limits, which ordinance was tested in the courts and upheld. Odd Fellows' Cemetery Association v. City & County of San Francisco, 140 Cal. 226, 73 P. 987; Laurel Hill Cemetery v. City & County of San Francisco, 152 Cal. 464, 93 P. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080; Laurel Hill Cemetery Association v. San Francisco, 216 U. S. 353, 30 S. Ct. 301, 54 L. Ed. 515. In 1921 the Legislature passed a statute known as the Morris Act (St. 1921, p. 199), which provided for abandonment of such cemeteries and removal of the bodies, which statute was held unconstitutional on the ground that it vested in the cemetery corporation an uncontrolled discretion to abandon or

continue. *Hornblower v. Masonic Cemetery Association*, 191 Cal. 83, 214 P. 978. The court recognized, however, that a mandatory statute could validly be enacted under the police power. Thereafter, in 1923, the Legislature passed the second Morris Act (St. 1923, p. 646), providing that the board of supervisors or other governing body of municipalities of more than 100,000 population, where interments had been prohibited by law for 15 years or more, should have the power to compel the removal of bodies, whenever they should declare that the further maintenance of the cemetery was dangerous to the health, safety, comfort, or welfare of the public. In pursuance of this statute, the board of supervisors of the city and county of San Francisco, on July 9, 1928, passed such an ordinance applicable to defendant and another ordinance affecting the Odd Fellows' cemetery. These ordinances required the removal and reinterment of the bodies in a suitable place outside the city limits. The board of directors of defendant thereupon adopted a resolution declaring their intention to carry out the provisions of the ordinance, and called a meeting of the lot owners at which a large majority voted to approve the action. Some of the dissenters brought an action in the federal court to enjoin the defendant from carrying out its plan; the contention being made that the ordinance was unconstitutional. In *Masonic Cemetery Ass'n v. Gamage* (C. C. A.) 38 F.(2d) 950, 71 A. L. R. 1027, it was held valid in every particular. Plaintiffs brought a separate proceeding in the Superior Court which is the basis of this appeal.

The opinion in *Masonic Cemetery Ass'n v. Gamage*, supra, contains a full and careful discussion of all of the issues which are involved in this proceeding, and we agree with the conclusion reached therein, that the legislative act and the ordinance are constitutional, and that the action proposed to be taken thereunder is proper. None of the points raised by plaintiffs is substantial. It is asserted, for example, that the defendant is still subject to the permanent injunction given after the decision in *Hornblower v. Masonic Cemetery Ass'n*, supra, but, since that decision was made with reference to the first Morris Act, it can have no effect on action taken under the later statute. The validity of a statute delegating to municipalities the power to compel the removal of cemeteries is settled by numerous authorities. The plaintiffs do not have title in fee simple to their lots, but merely a right of burial therein, subject at all times to proper regulation under the police power. *Masonic Cemetery Ass'n v. Gamage*, supra; *Hollywood Cemetery Ass'n v. Powell*, 210 Cal. 121, 291 P. 397, 71 A. L. R. 310; *Hornblower v. Masonic Cemetery Ass'n*, supra. It is contended, also, that the two-year period for removal provided for in the ordinance has lapsed. Although it hardly seems proper for lot holders

whose injunctive proceedings caused the delay to raise this point, it is sufficient to say that this provision not only appears to be directory, but was actually extended by the General Cemetery Act passed by the Legislature in 1931 (Stats. of 1931, p. 2434).

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

217 Cal. 297

ASSOCIATED OIL CO. v. MYERS et al.

Sac. 4549.

Supreme Court of California.

Jan. 30, 1933.

As Amended Feb. 20, 1933.

Rehearing Denied March 1, 1933.

1. Landlord and tenant ⇨24(1).

Lease for three years with option to renew for two and thereafter until canceled by either party on ninety days' notice, and tenant's license to landlord to sell specified petroleum products, *held* not to lack mutuality.

2. Contracts ⇨10(1).

When contract is terminable at will of plaintiff, he may not have relief against defendant.

3. Contracts ⇨10(1).

Where reciprocal obligations of parties are concurrent, continuance of obligation of each to perform his part being dependent upon continued performance by other, any material injury which might be sustained by defendant because not having efficient remedy for coercing future performance by plaintiff is avoided by making defendant's obligation to continue performance dependent upon continuance of plaintiff's performance.

4. Injunction ⇨59(1).

Tenant holding exclusive advertising and gasoline-storage rights, and bound to pay as rent 4 cents per gallon of gasoline sold by landlord licensed to sell specified petroleum products, monthly rent to be not less than \$10, *held* entitled to restrain licensee's sale of other products and display of other advertising.

5. Injunction ⇨59(1).

Rent payable at rate of 4 cents per gallon of gasoline sold by landlord licensed to sell specified petroleum products, provided minimum monthly rent should not be less than \$10, *held* not unreasonable on face so as to warrant denial of injunctive relief to tenant-licensor for breach of license.

6. Monopolies ⇨17(2).

Lease providing for tenant's exclusive right to keep or store gasoline and use property for advertising, and license from tenant to landlord to sell only specified petroleum products, *held* not contract in restraint of trade (Civ. Code, § 1673).

7. Injunction $\S$ 59(1).

Licenser-tenant, with exclusive advertising and gasoline-storage rights, held without adequate remedy at law, and hence entitled to restrain sale by licensee-landlord of other petroleum products and display of other advertising contrary to license.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by the Associated Oil Company against Harold Myers and others. From judgment dismissing plaintiff's complaint on demurrer, plaintiff appeals.

Reversed.

David E. Snodgrass and Daniel W. Hone, both of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter and Glenn D. Newton, both of Redding, for respondents.

THOMPSON, J.

On February 23, 1929, the defendants were the owners of an automobile service station and the ground upon which it was situated at the corner of Market and Lincoln streets in Redding, the real property extending fifty feet along Market street and thirty feet along Lincoln. On that day they executed a lease of the property to plaintiff, excluding only a residence thereon, for the term of three years commencing March 1, 1929, and terminating March 1, 1932, with the option to the plaintiff to extend the term to March 1, 1934, and thereafter until cancelled by a written notice of ninety days given by either of the parties. The lease recited that plaintiff intended to use the property for handling and advertising its petroleum products and that it should have the exclusive right to use all space for advertising purposes and the "exclusive right to keep or store gasoline in, or about said property." The lessee agreed to pay lessors as rental 3 cents per gallon for all gasoline sold to lessors for resale from said premises during the preceding month, in accordance with the provisions of a license agreement executed contemporaneously with the lease, which rental was, however, in no event to be less than ten dollars per month. By the license agreement, of the same date, the plaintiff gave the defendants "the right to use" the leased premises "on the conditions and solely for the purpose * * *" of "reselling therefrom to consumers petroleum products purchased" by the defendants from the plaintiff "and/or Tide Water Oil Sales Corporation * * * together with one other brand of Eastern lubricating oil." It was further agreed that the defendants should purchase from the plaintiff all gasoline "handled at or in connection with the property at the regular posted price to resellers or retailers." On June 1, 1929, the parties executed an agreement of modification which somewhat

changed the basis of the cost price of the gasoline to defendants and increased the rental of the premises to the plaintiff from 3 cents to 4 cents per gallon of gasoline, but did not otherwise affect the agreements.

The plaintiff brought this action, not only alleging the facts which we have already recited, but also setting up that solely for the purposes noted the defendants took possession of the premises and until August 23, 1930, the products of plaintiff were sold to consumers thereof and a large demand therefor and a substantial good will established, there being employed for advertising purposes in connection therewith the colors, signs, symbols, and lettering used by the plaintiff throughout the Pacific Coast territory. It was also alleged that the plaintiff is a producer and refiner of petroleum products and has, at all of the times mentioned, advertised its products throughout the Pacific Coast by means of such advertising at its stations and that there is a substantial value in having its products advertised exclusively on the property leased by it from the defendants. Further, it was alleged that in contravention of their agreement the defendants have used the property since August 23, 1930, for the purpose of selling gasoline purchased from vendors other than plaintiff or the Tidewater Oil Sales Corporation and have refused, over the objections of plaintiff, to cease; that on the same day in August the defendants changed and altered the advertising theretofore displayed; that such changes confuse the public and have greatly and irreparably injured the plaintiff and will continue to do so unless the defendants be restrained and enjoined from using the property for unauthorized purposes.

The defendants interposed a demurrer to the complaint, which was sustained without leave to amend. From a judgment of dismissal the plaintiff prosecutes this appeal.

The action of the trial court was based, as indicated by a written opinion, upon three theories, as follows: (1) Equity will not restrain one from violating a contract calling for personal service, especially where the service to be performed requires special knowledge, skill, or ability; (2) the agreements lack a mutuality of remedy; and (3) the agreements are in restraint of trade and therefore void. The respondents not only urge the foregoing reasons as support for the judgment but also say that the agreements are not just and reasonable; that they received no adequate consideration for them; and that the plaintiff has an adequate remedy at law.

[1-3] It must be conceded, if there be need for construction, that respondents' preliminary argument to the effect that the instruments of lease and license should be read together is sound, for which proposition of law nothing more need be cited than section 1642 of the Civil Code. It does not necessarily fol-

low, however, that the two agreements constitute but one contract (*Malmstedt v. Stillwell*, 110 Cal. App. 393, 294 P. 41), or that appellant acquired no rights in the property which it is entitled to have protected. As we read the contracts it cannot be seriously doubted that the parties intended that plaintiff should have a leasehold interest in the demised premises, nor can it be seriously questioned that the contracts were prepared and executed in the form in which we find them with the intent and for the express purpose of enabling the appellant to determine the use to which the property should be put during the term of the lease. The instruments declare such to be the purpose. We are therefore in the same position, assuming for the moment that the lease agreement was valid, as though the appellant were the owner of the real property and had licensed respondents to enter thereupon for the purpose set forth in the license agreement.

With such a basis from which to proceed we may turn to examine the specific objections lodged by respondents to the relief demanded by appellant. First of all it is argued that the agreements lack mutuality of remedy and obligation. The argument advanced by respondents to support this assertion is based upon the proposition that the lease granted appellant the right to cancel upon giving a ninety days' written notice. The authorities are unanimous to the effect that, when the contract is terminable at the will of the plaintiff, he may not have relief against the defendant. But to assert, as a matter of equity, that a lease for a three months' period is of no value and entitled to no protection is, we think, going further than the doctrine warrants. Furthermore, it is a recognized rule of equity that where, as here, "the reciprocal obligations of the parties to the contract in question are concurrent, the continuance of the obligation of each to perform his part being dependent upon continued performance by the other, any material injury which otherwise might be sustained by the defendant, of whom performance is required, in consequence of his not having an efficient remedy for coercing future performance by the plaintiff, is effectually avoided by making the defendant's obligation to continue performance dependent upon a continuance of performance by the plaintiff." *Montgomery Traction Co. v. Montgomery L. & W. P. Co.*, 229 F. 672, 676.

[4, 5] However, there is a more serious question in the contention itself and cognate to the second and third arguments advanced by defendants, to wit: That the agreements are not just and reasonable to respondents and call for the personal services, skill, and judgment of respondents. The view we entertain concerning these propositions makes the solution of one the solution of all. It is to be remembered that the plaintiff did not seek to compel the respondents to remain on the property and sell its products. It simply

sought to restrain the sale of other products and the display of other advertising. In *Shell Petroleum Corp. v. Ford*, 255 Mich. 105, 237 N. W. 378, 379, the defendant leased to plaintiff a parcel of property for purposes, the same as here, and entered into an agreement by which he was employed by plaintiff to superintend the operation of the station. Some time later he attempted to terminate his employment and cancel the lease. The station was one of a chain of stations established by the plaintiff for the sale of its products. The plaintiff brought its action to enjoin the defendant from interfering with its possession and its right to the exclusive sale of its products. In that case, as here, the trial court entered a judgment of dismissal. The Supreme Court of Michigan reversed the decree, saying: "This station was one of a chain of stations established by the plaintiff throughout the country for the sale of its products. It had been operated about two years before this controversy arose. It had the benefit of a nation-wide advertising of the Shell products. It was building up a trade and good will, the loss of which cannot be compensated for in money. The damages sustained by the unwarranted action of Mr. Ford, in ousting the plaintiff and giving over the station to a business competitor, cannot be measured by any known standard. The quantity of petroleum the plaintiff might have sold if it had been allowed to continue the business cannot be determined with any degree of accuracy. Inasmuch, therefore, as its damages are impossible of ascertainment, it has no adequate remedy at law." It is to be observed that the court in the case from which we have just quoted took occasion to point out that while the instrument was entitled "Lease and Contract of Employment," there was nothing to indicate that the continuance of one depended upon the other and that "the employment might be terminated whenever Mr. Ford desired it, or whenever his services were not satisfactory to the plaintiff." Assuming that the respondents had the right to discontinue their individual efforts at the station, would not the appellant have the right, so long as they continued to serve, to restrain their interference with its possession of the property by selling other products and displaying other advertising at its station? Similarly, would not equity protect respondents in their limited possession so long as they conformed to the terms of their agreement? If we are to accept the authority from the jurisdiction of Michigan, as persuasive of the point, both questions must be answered in the affirmative. We are induced not only by the logic of the situation but also by the reasoning in *General Petroleum Corp. v. Beilby*, 213 Cal. 601, 2 P.(2d) 797, to accept the answers indicated as being correct. From which it follows that the arguments heretofore noted as advanced by respondents must fall. It is urged, however, that respondents have not received an adequate consideration, i. e., that the lease agreement is not support-

ed by an adequate consideration. It will be remembered that the lessor was, by the first agreement, entitled to receive 3 cents per gallon of gasoline sold to lessor for resale during the preceding month, which by the modification was increased to 4 cents, and in no event was the rental to be less than \$10 per month. We see no occasion, as is suggested by respondents' brief, to discuss the two standards agreed upon by the parties, the one in the original lease and the other in the modification agreement for determining the price which respondents should pay appellant for gasoline, for the reason that the lease determined what should be allowed as rental irrespective of prices which might vary. Nor do we see how it is possible, in the absence of any evidence whatsoever, to determine that the consideration for the lease agreement was inadequate. Respondents have cited authority to the effect that in an action for specific performance it is necessary for the plaintiff to allege facts showing that the contract sought to be enforced is, as to the defendant, fair and just and supported by an adequate consideration, which is a well-recognized rule of pleading in such cases. But they have cited no case and we know of none which says a similar allegation is required in an action such as the one here. Fundamentally, if the complaint fails to disclose a situation which calls for the interposition of the equitable arm of the court or discloses a situation where it would be inequitable for the court to act, it is fatally defective. But as we have already observed, on the face of the pleading the lease agreement appears to be supported by a sufficient consideration.

[4] We therefore pass to the question of whether the agreements are in restraint of trade. Section 1673 of the Civil Code says: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." The exceptions noted in the succeeding sections do not comprehend the situation of the instant case. Respondents not only rely upon the quoted provision, but also upon those authorities which declare that contracts which are designed to create monopolies and injuriously deprive the public of the benefits of trade resulting from free and unrestricted competition are void. In this category we may place all those authorities which, following the case of *Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502, declare that manufacturers of patented articles may not make valid contracts with the wholesalers by which the retail price is to be fixed and determined. We may also add the cases of *Santa Clara M. & L. Co. v. Hayes*, 76 Cal. 388, 18 P. 391, 9 Am. St. Rep. 211, and *Morey v. Paladini*, 187 Cal. 727, 203 P. 760, in both of which cases the design and intent of the contract was to secure a complete monopoly

and stifle competition in the article which was the subject of contract. It is obvious that we are not dealing with a situation comparable to those cases. However, *Coombs v. Burk*, 40 Cal. App. 8, 180 P. 59, comes nearest to our problem. In the *Coombs* Case it was held that a contract whereby a gas company furnished a number of gas-burning appliances in consideration of an agreement on the part of the purchaser and consumer to purchase from the gas company all of the gas which might be used at the place where the articles were installed, and in case of his failure so to do to pay the company a designated sum for the equipment was illegal and void and in contravention of public policy. For the reasons hereafter stated we do not deem this case to be controlling. In the case of *Fidelity Credit Assur. Co. v. Crosby*, 90 Cal. App. 22, 265 P. 372, which, at first blush, seems to announce a similar conclusion, it will be found that counsel conceded the point and argued that the particular offending provision might be severed from the remainder of the contract, which latter point was the one passed upon by the court.

On the other hand, we are confronted by authorities from other jurisdictions where contracts of the very nature here involved were declared not to be in restraint of trade. They are *Cox, Inc., v. Humble Oil Refining Co.* (Tex. Com. App.) 16 S.W.(2d) 285; *Wiseman v. Dennis*, 156 Va. 431, 157 S. E. 716; and *McQuaig v. Seaboard Oil Co.*, 96 Fla. 275, 118 So. 424. In addition we are referred to the following cases, where, while the specific question of whether the contracts were in restraint of trade was not discussed, it was held that the contracts were enforceable and the rights arising therefrom the subject of equitable cognizance: *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 239 N. W. 467, 469; *Abshire v. Smith*, 86 Ind. App. 354, 156 N. E. 408, and *Shell Petroleum Corp. v. Ford*, 255 Mich. 105, 237 N. W. 378. Our attention is also directed to *Grogan v. Chaffee*, 156 Cal. 611, 105 P. 745, 747, 27 L. R. A. (N. S.) 385, and *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 P. 1041, in which cases this court determined that a manufacturer of a product which he claimed to be superior to others, and which constituted only a small percentage of the entire product available on the market might impose by contract a fixed minimum retail price upon the article which would not be in restraint of trade and which would be enforceable. In the *Grogan* Case the following was quoted from *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979: "Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not,

unreasonable." It requires no argument to demonstrate that appellant had the right to decline to sell any but its own product upon the leased property. We can see nothing unreasonable in requiring the licensees to do the same thing. The public interest is not involved and competition is not stifled. In no way does the agreement attempt to limit production or fix the price of the commodity involved.

[5] Sufficient has been said to indicate that the appellant is without an adequate remedy at law. The quotation from *Shell Petroleum Corp. v. Ford*, supra, is apropos, in addition to which the following apt statement from *Standard Oil Co. v. O'Hare*, supra, may be set down: "It needs no argument to show that a remedy at law would not afford appellant as complete prompt and efficient a remedy for the destruction of its business and the personal property therein contained, or the loss of its going business, as would be furnished by a court of equity in preventing such an injury. Any defense which the appellee may have to the petition must be pleaded."

Judgment reversed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

217 Cal. 353

BIRNEY v. BIRNEY.

S. F. 14615.

Supreme Court of California.

Jan. 31, 1933.

1. Gifts ☞49(6).

Trusts ☞44(1).

In action to establish trust in securities and proceeds, evidence supported finding that plaintiff was owner and entitled to possession of securities delivered to defendant, his daughter, that no gift thereof was made to defendant, and that trust existed.

2. Equity ☞65(2).

In father's action against daughter to establish trust in securities delivered to her for safe-keeping on daughter's representation that unless he did so plaintiff's wife would get possession thereof, daughter *held* not entitled to take advantage of own wrong by setting up father's coming into equity with unclean hands, parties not being in equal wrong.

It appeared that at time of transaction, plaintiff was over 72 years of age and infirm, he being a physical cripple; that he had great confidence in defendant's legal

ability, and was guided by her advice; that it was upon her constant urging that he sent bonds to her for safe-keeping, and his wife had no interest therein, they being his separate property; and although in wife's action for separate maintenance and support, he made affidavit to effect that he was worth only about sum of \$5,000, when as a matter of fact he owned bonds in question, bonds being of much greater value, he denied ever having advised his attorney to incorporate such statement in affidavit, and testified that he signed all papers prepared by his attorney upon attorney's advice without reading them.

3. Equity ☞65(2).

Where deed, made for improper purpose, is unfairly procured through undue influence of grantee in violation of fiduciary relationship, or by abuse of confidence, or oppression or fraud, relief will not be denied to party least in fault.

4. Trusts ☞374.

Where plaintiff sued to establish trust in securities delivered to defendant and proceeds thereof, defendant *held* entitled to credit for full market value of securities in which proceeds were invested and for return of which plaintiff recovered judgment.

5. Trusts ☞374.

In action to establish trust in securities delivered to defendant and proceeds thereof, defendant *held* entitled to credit for defendant's authorized advances and expenses incurred for plaintiff's benefit.

6. Trusts ☞374.

In father's action against daughter to establish trust in securities delivered to daughter and proceeds thereof, daughter *held* not entitled to credit for support of herself and sister during time she possessed securities, where no issue was presented on such matter.

7. Trusts ☞374.

In father's action against daughter to establish trust in securities delivered to daughter for safe-keeping, and proceeds thereof, daughter *held* not entitled to credit for support of herself and sister during time she possessed securities, in view of their wrongful conduct.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Bascom H. Birney against Marian Birney and another. From a judgment in favor of plaintiff and an order denying a motion for a new trial, named defendant appeals.

Affirmed in part, and reversed in part, with directions.

Robert E. Fitzgerald, of San Francisco, for appellant.

James F. Brennan and Vincent Surr, both of San Francisco, for respondent.

PER CURIAM.

This action is one brought by a father against his daughter, to establish a trust in certain securities and the proceeds of other securities sold and held by defendant, and for a decree requiring her to deliver up the same. Judgment went in favor of plaintiff for the return of certain specified securities of the value of \$39,646.67, for a net money judgment representing the proceeds of the sale of other securities of the value of \$22,021.19, and a judgment for the further sum of \$1,351.59 against defendant Bank of California National Association, representing the amount on deposit to the credit of defendant Marian Birney, which account represented a portion of the proceeds of the sale of plaintiff's securities. A motion for a new trial was made and denied. This is an appeal from the judgment and order.

Three main points are relied upon for a reversal. It is claimed that the evidence does not support the judgment; that the plaintiff by his own showing is not entitled to the equitable relief sought because of the fact that he comes into court without clean hands; that the money judgment for \$22,021.19 is not supported by, but is contrary to, the evidence. The record does not afford pleasant reading.

[1] The complaint, in substance, alleges that defendant Marian Birney is the daughter of plaintiff; that the most confidential relations always existed between the parties; that at the request of defendant, plaintiff delivered to her certain securities of the value of \$63,000 for safe-keeping, which securities she promised to return upon demand; that demand was made for their return but defendant refused to deliver the same to plaintiff. Defendant denied ownership of the securities in plaintiff except securities of the value of \$6,000 which she offered to return.

At the trial it appeared in evidence that plaintiff, the father of defendant Marian Birney and another younger daughter, Mrs. Clementine Birney de Prosse, married many years ago in the state of Illinois. The daughters are the issue of that marriage. Plaintiff was a practicing physician and accumulated several thousand dollars from his practice. He and his wife concluded to move to the state of New York to better their condition. Plaintiff there gave up the practice of his profession and engaged in the bond and real estate business. He was successful in his enterprise and accumulated various securities of the approximate value of \$62,000. In addition thereto, he had acquired two par-

cels of real property. The real property consisted of a farm at Kinderhook, N. Y., known as Lindenwald, the former home of President Van Buren. This property with its furnishings was of the value of between \$25,000 and \$40,000. The other parcel consisted of a home in the state of Vermont, valued at \$8,000 and which was subsequently sold for that amount. His income was large, varying from \$25,000 to \$45,000 a year. The family lived extravagantly and traveled extensively. Both daughters had been highly educated and given every possible advantage at considerable cost to plaintiff. While at school he permitted them to draw directly upon his bank account. In the year 1922 his wife Grace E. Birney died, and plaintiff succeeded to the above described property by succession. Within a few months thereafter he executed to defendant Marian Birney a deed to the Lindenwald property. At the same time he caused the safe deposit box in which his securities were kept to be placed in the joint name of himself and this defendant with the right of survivorship; his object being that, in the event of his death, his daughters could acquire them without the probate of his estate. Later in the year 1925, plaintiff opened a custodian and trading account at the National City Bank in New York, to which there were transferred the securities referred to. This account was likewise a joint account with the right of survivorship in defendant Marian. A checking account was also opened at the Guaranty Trust Company in Brooklyn, N. Y., in the joint names of plaintiff and this defendant, with the right of survivorship. From 1922 to July, 1929, all of the securities and all of the money were thus held, and this appellant for her younger sister and herself, whether at school or traveling, and for the maintenance and payment of taxes of the Lindenwald farm, drew freely upon the funds in the bank in large amounts. About this time plaintiff took his daughters on a trip to Europe at considerable expense and on this occasion presented his younger daughter, who was to be married, with several thousand dollars for her trousseau. In addition thereto he presented her with an automobile and a sum of money. Defendant Marian had taken a two years' course in law at Yale University, and plaintiff had great confidence in her legal and business ability, considering her one of the smartest women in the country. He had like confidence in her integrity. In the year 1927 he married a second time, this wife being Myrtle K. Birney. Defendant Marian then came to California where she was for a time a student of agriculture at the University of California. Plaintiff still continued to support her. The marital relation of plaintiff and his second wife proved unfortunate and she brought suit against plaintiff for separate maintenance. About this time plaintiff visited California and advised with defendant concern-

ing his marital affairs and his securities. Defendant informed him his wife was nothing but a "gold digger" and that unless he turned over to her all of his securities his wife would get possession of the same. Later defendant visited plaintiff in New York and again advised him to turn over his securities to her for his own protection. Acting upon this advice, plaintiff caused the National City Bank to forward to defendant in San Francisco bonds and other securities of the face value of \$56,000 in her sole name, at the same time retaining in New York securities of the value of \$7,000. He advised defendant to leave the securities sent her with the local representative of National City Bank until she heard further from him. Contrary to these instructions, defendant sold the securities through the Bank of California for the sum of \$58,206.74 and this amount was placed to her credit in said bank. Prior to this sale, defendant had sold two Austrian bonds for the sum of \$2,000. She also received coupons from certain of the bonds prior to their sale in a sum in excess of \$2,000, the total amount she received being over \$62,000. Subsequently defendant sent \$40,000 to New York for investment, and the securities purchased for this amount are those for which plaintiff recovered judgment herein. Some sums of money were sent to her sister Clementine, and \$12,000 was invested by defendant in securities in San Francisco. After forwarding the securities to defendant, plaintiff wrote to her concerning the same. Not receiving a reply and becoming suspicious, he came to San Francisco from Miami, Fla. Upon arriving here he went directly to defendant's apartment and in her absence discovered correspondence between her and an attorney, and also from her sister Clementine, as well as other documents including her record with banks. These documents convinced plaintiff that defendant and her sister had entered into a conspiracy to deprive him of his securities, and that they intended to keep them. Upon defendant's return to her apartment she was confronted by plaintiff with this evidence and she informed him that she had been advised by her attorney to keep the bonds. She agreed to meet plaintiff the next day and discuss the matter with him. In the meantime plaintiff had procured an attorney who informed the Bank of California that the securities it had sold were the property of plaintiff, and defendant had stolen the same. The next day defendant visited this bank and was informed of plaintiff's claim. Instead of meeting her father as she had promised, and being frightened by the accusations made to the bank officials by plaintiff, she left that night for New York, taking with her the balance of the securities on hand here. Upon arriving in New York she learned that her father had procured a warrant for her arrest. She then telephoned him that if he had her

arrested she would inform the authorities that he had committed perjury in his wife's maintenance suit in filing an affidavit to the effect that he was worth \$6,000 only. Defendant was thereafter brought back to San Francisco. At this time she made no claim that the bonds belonged to her, but on the contrary she made statements to certain persons that the bonds belonged to her father and she had taken them to protect him. Like statements were made to an officer of the National City Bank at its office in San Francisco. She also informed a friend of hers that she had her father's securities in her name and that she intended to keep them for herself. This evidence is ample to support the finding that plaintiff was the owner and entitled to the possession of the securities. Aside from this positive testimony that no gift of the bonds was ever made to defendant as she claimed, her conduct during the entire transaction is inconsistent with the idea that her father made a gift of the securities to her. It is hardly probable that her aged and infirm father would have stripped himself of everything he possessed.

We are not called upon to express any opinion as to the standard of filial conduct displayed by defendant and her sister toward their aged and indulgent parent. Suffice it to say that it is the tragedy of Lear, retold. Upon this branch of the case we conclude that the finding that a trust existed is fully supported by the evidence.

[2, 3] The further claim that plaintiff is not entitled to the relief sought for the reason that he does not come into a court of equity with clean hands is also without merit. At the time of the transaction plaintiff was over seventy-two years of age and infirm, he being a physical cripple. He had great confidence in defendant's legal ability and was guided by her advice. It was upon her constant urging that he sent the bonds to her for safekeeping, and his wife had no interest in the same; they being his separate property. It is true that in the action by his wife for separate maintenance and support plaintiff made an affidavit to the effect that he was worth only about the sum of \$5,000, when as a matter of fact he owned the bonds in question. In the present suit he denied ever having advised his attorney to incorporate such a statement in the affidavit, and he testified that he signed all papers prepared by his attorney upon his advice without reading them. However this may be, defendant should not be permitted to take advantage of her own wrong. As was said in *Chamberlain v. Chamberlain*, 7 Cal. App. 634, 95 P. 659, one cannot lay a trap for another, secure his confidence, induce him to make a conveyance of his property in expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that the donor too readily

yielded to temptation to save himself at the possible expense of his creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken. Though a deed made for an improper purpose is unfairly procured through the undue influence of the grantee, in violation of a fiduciary relationship, abuse of confidence, oppression, or fraud, a court of equity will still grant relief to one in fault. Such relief will not be denied to a party least in fault against one who has led him into the act by a violation of confidence. They are not in equal wrong. *Anderson v. Nelson*, 83 Cal. App. 1, 256 P. 294. Under the circumstances plaintiff should not be denied the relief he seeks.

This brings us to the final contention that the money judgment is unsupported by the evidence. The judgment determined plaintiff to be the owner of all those certain stocks and bonds and cash held in the name and in trust for defendant by Hudson Trust Company at Hoboken, N. J. It was also determined that plaintiff also recover from defendant the net value of funds converted by her in the sum of \$22,021.19, and that as to \$1,351.59 of said sum, plaintiff also be given judgment against defendant Bank of California National Association; said amount being on deposit to the credit of defendant in said bank. The court made special findings with reference to the various items involved. As all of these findings are attacked as being unsupported, it is necessary to discuss them in detail. They are in substance as follows: (1) That the sum of \$1,351.59 deposited in the Bank of California National Association belongs to plaintiff; (2) that all the denials in the answer of defendant are untrue and all the admissions are true; (3) that on July 19, 1929, plaintiff sent his daughter, Marian Birney, in trust for himself, bonds of the actual value of \$60,202.74; (4) that defendant sold the same and, apart from certain coupons of the value of \$2,177.50 (clipped therefrom and converted by her), she received for said bonds the sum of \$60,202.74; (5) that defendant thereafter reinvested \$40,000.66, being part of said \$60,202.74, and bought directly in her name bonds of the market value of \$39,646.67; that said bonds are in the custody of Hudson Trust Company at Hoboken, N. J., and held in trust in the name of defendant; that the bonds are of the value of \$37,470 and cash in the amount of \$2,176.67, or a total of \$39,646.67 in all; (6) that defendant clipped from bonds originally intrusted to her the sum of \$2,177.50; (7) that defendant disposed of certain bonds of the market value of \$14,000 and converted the same to her own use, and subsequently delivered them to her sister, Clementine de Prose; (8) that Clementine de Prose reinvested a part of said \$14,000 in securities of the market value of \$5,131.47; (9) that from the 19th of July, 1929, the bonds and securities

owned by plaintiff and converted by defendant have earned in interest the sum of \$8,400; (10) that the sum of \$1,351.59 on deposit with Bank of California National Association is part of the proceeds from the sale of plaintiff's bonds; (11) that defendant has restored to plaintiff from the proceeds of the bonds intrusted to her, cash used for different purposes in the amount of \$6,618.97.

[4-7] The first finding, that the sum of \$1,351.59 was part of the proceeds derived from the sale of the securities, is fully supported by the evidence. The second finding, referring to the ownership of the securities, is also fully supported by the evidence. Findings 3, 4, and 6, relating to the value of the securities, are likewise fully supported. Finding 5, relating to the investment of \$40,000 of the converted funds and their deposit in the trust company at Hoboken, finds full support in the evidence; but there is no evidence in the record, so far as we have been able to discover, and counsel for respondent has pointed us to none, which supports the finding that these bonds were of the value of \$37,470 only. On the contrary, the evidence shows that the sum of \$40,000.66 was paid for the same. Appellant is entitled to a credit of their full market value. Finding 6, relating to the amount of coupons clipped from the bonds, is fully supported. Finding 7, relating to the disposition of \$14,000 of the bonds, is also fully supported. Appellant claims that she has been charged with the sum of \$2,000 of this amount under finding 4, and that the finding constitutes a double charge in so far as the value of the Austrian government bonds is concerned. The value of the Austrian bonds was not duplicated in the judgment. Finding No. 8, it is claimed, is unsupported in so far as it determines the value of the bonds restored to plaintiff. There is evidence to show that these bonds were of the value of \$4,000 only. Appellant was given a credit of \$5,131.47 for the same. Appellant has, therefore, no cause for complaint on account of this finding. Finding 9, to the effect that the converted bonds earned a total of not less than \$8,400 interest, it is claimed, is unsupported by the evidence. Respondent waives this amount of the judgment. Finding 10, to the effect that the deposit in the Bank of California National Association was part of the proceeds of the sale of the bonds, was admitted. Finding 11 is assailed for the reason that it fails to include in the credit allowed expenditures by defendant which were directly authorized by plaintiff. It appears without conflict in the record that plaintiff directly authorized defendant to advance certain sums for different purposes, and that she incurred expenses on trips to New York made at plaintiff's request and for his benefit. For these several undisputed items she was given no credit. She is entitled to the same. She further claims that she was also entitled to a

further credit assuming that she had no interest in the securities sent her, for the support of herself and sister during the time she was possessed of the same, as she had full authority to make expenditures for this purpose. No issue was presented upon this subject. Moreover, the conduct of herself and sister deprive her of any such benefits.

From what we have said it follows that the portion of the judgment decreeing the securities in question to be the property of plaintiff, and that defendant was a mere trustee thereof, should be and it is hereby affirmed. The portion decreeing plaintiff to be entitled to a judgment of \$22,021.19 is reversed, with directions to the trial court to take evidence and determine the correct amount in accordance with the views herein expressed.

217 Cal. 292

PRATT-LOW PRESERVING CO. v. JORDAN,
Secretary of State.
S. F. 14691.

Supreme Court of California.

Jan. 27, 1933.

Rehearing Denied Feb. 24, 1933.

1. Corporations Ⓒ13.

Compliance with statutory requirements is condition precedent to corporation's right to perform corporate functions.

2. Corporations Ⓒ40.

Secretary of state has same authority to inquire into formal compliance with law concerning amendment of incorporation articles as he has over original articles.

3. Mandamus Ⓒ88.

Mandamus lies to compel secretary of state to file amended incorporation articles.

4. Corporations Ⓒ40.

Statute providing that corporation "may" amend incorporation articles to state number of directors as increased or diminished *held* permissive, not mandatory (Civ. Code, § 362).

[Ed. Note.—For other definitions of "May," see Words and Phrases.]

5. Corporations Ⓒ40.

"Articles of incorporation" within statutes relating to amendments thereof and changes in number of directors include, not only formal articles, but also such instruments or certificates as evidence change therein pursuant to statute (Civ. Code, §§ 361, 362).

[Ed. Note.—For other definitions of "Articles of Incorporation," see Words and Phrases.]

6. Corporations Ⓒ40.

Corporation filing certificate of increase in number of directors pursuant to statute thereby effectuated change in original incorporation articles without formal amendment thereof as permitted by statute (Civ. Code, §§ 361, 362, 362a, 362b).

In Bank.

Petition by the Pratt-Low Preserving Company for a writ of mandate against Frank C. Jordan, to compel respondent, as Secretary of State, to accept for filing a certificate of amendment of articles of incorporation.

Petition granted, and writ previously issued made peremptory.

Chickering & Gregory, Donald Y. Lamont, and Lalor Crimmins, all of San Francisco, for petitioner.

Charles F. Going, of Sacramento, for respondent.

SEAWELL, J.

Petition for a writ of mandate compelling the secretary of state to accept for filing a certificate of amendment of articles of incorporation of the Pratt-Low Preserving Company decreasing the number of its directors from nine to seven. The respondent secretary of state has demurred generally to the petition.

As originally incorporated in 1905, petitioner corporation had seven directors. Thereafter in 1919, pursuant to section 361 of the Civil Code as it then read (repealed in 1929), steps were taken to increase the number of directors to nine. Accordingly, there was filed with the respondent secretary of state on April 5, 1919, a certificate purporting to show such an increase of directors. It is admitted that the provisions of section 361, *supra*, were fully complied with by petitioner. Since 1919, and until April, 1932, petitioner purported to act by and through a board of nine directors. At this latter date, and under and pursuant to the provisions of section 362 of the Civil Code as enacted in 1929 (St. 1929, p. 1275), petitioner took steps to decrease its board of directors to the original number of seven. Pursuant to the provisions of that section, petitioner presented for filing with the secretary of state a certificate showing such decrease in the number of directors, and indicating that the articles of incorporation had been amended accordingly. The respondent secretary of state concedes that the certificate satisfies the requirements of section 362, *supra*, as it now stands, but has refused to file said certificate on the ground that the attempt to increase the number of directors from seven to nine in 1919 was abortive, and to permit a purported decrease from nine to seven now would be an idle act. Respondent con-

tends that the purported increase in 1919 was ineffectual, for the reason that, although petitioner complied with all the provisions of section 361, supra, as it then read, it failed to formally amend its articles in accordance with section 362, as it then read.

On the other hand, petitioner argues that a California corporation had the power pursuant to the provisions of section 361 of the Civil Code as that section stood in 1919 to change the number of its directors fixed by its articles of incorporation by merely complying with the provisions of section 361, and filing a certificate showing such change, and that it was not necessary to amend its articles as provided in section 362 of the Civil Code as it then read. Petitioner therefore contends that, having validly increased its board of directors from seven to nine, it may now decrease that number by the procedure outlined in sections 362, 362a, and 362b as they now read, and which petitioner has admittedly followed.

In 1919 section 361 of the Civil Code, enacted in 1915, read: "Any corporation or association may increase or diminish the number of its directors or trustees by the vote or written assent of stockholders representing a majority of its subscribed capital stock, or, if it has no capital stock, by the vote or written assent of a majority of the members. A certificate over the corporate seal, setting forth the action taken by the stockholders, or members, and stating the new number of directors, shall be signed by the president and secretary of such corporation or association, and filed in the office of the county clerk of the county where its original articles of incorporation were filed, and a copy of said certificate, certified by such county clerk, shall be filed in the office of the secretary of state, whereupon the number of directors or trustees shall be changed as stated in said certificate." This section shall apply to all corporations existing under the laws of the state of California, whether organized and incorporated prior to the enactment of this Code, or subsequent thereto.

The pertinent portions of section 362 in force at the same time read: "Any corporation organized under the laws of this state *may* amend its articles of incorporation for any or all of the following purposes: * * * 5. To state the number of its directors, as increased or diminished. * * *"

The question therefore presented is: Can a California corporation which increased the original number of its directors in 1919 under former section 361 of the Civil Code, without amending its articles under the former section 362 of the Civil Code, now decrease the number of its directors to the original number by amending its articles under the present sections 362, 362a, and 362b of the Civil Code?

[1-3] The question presented is wholly one of interpretation, and appears to be one of

first impression. Compliance with the requirements of the statutes is a condition precedent to the right of a corporation to perform corporate functions. *Calif., etc., Light Co. v. Jordan*, 19 Cal. App. 536, 543, 126 P. 598. The secretary of state has the same authority to inquire into the formal compliance with law of amendments as he has over the original articles. *Del Monte Light & Power Co. v. Jordan*, 196 Cal. 488, 238 P. 710. The duty to file amended articles is one compellable by mandamus in a proper case. *Tognazzini v. Jordan*, 165 Cal. 19, 130 P. 879, Ann. Cas. 1914C, 655; *Tashiro v. Jordan*, 201 Cal. 236, 256 P. 545, 53 A. L. R. 1279.

[4] Section 361 in 1919 contained no provision requiring an amendment of the articles to effectuate a change in the number of directors. It simply required action by a majority of the shareholders and the filing of the certificate of increase or decrease. As already stated, this procedure was strictly complied with by petitioner. Section 362 in 1919 dealt with the amendment of articles of incorporation for the purposes set forth therein. Among other things, it was therein provided that the articles "may" be amended "to state the number of its directors, as increased or diminished." The quoted language from section 362 as it read in 1919 indisputably indicates that it was not necessary in order to effectuate a change in the number of directors to amend the articles. In other words, the provisions of section 362, supra, so far as pertinent here, were permissive only and not mandatory, and compliance therewith necessarily was not a condition precedent to increasing or diminishing the number of directors.

Petitioner argues with force that increasing the number of directors pursuant to the provisions of section 361 was substantially an amendment of the articles as effecting changes in the fundamental powers of the corporation and the contract between it and the state, citing *Tomlinson v. Jessup*, 82 U. S. (15 Wall.) 454, 21 L. Ed. 204, and that section 362 therefore should be considered merely as supplying one of the procedures for making changes in corporate structure, but not as defining what in substance are amendments of the articles, a distinction that has been removed by provisions of the General Corporation Law (Stats. 1931, c. 862, p. 1762) providing that all changes of fundamental corporate powers should be accomplished under one form of procedure.

[5, 6] Upon a consideration of the various sections of the Codes applicable to the proposition here involved as they read in 1919, we are of the opinion that the broadest meaning should be given to the term "Articles of Incorporation" as not only evidencing the formal articles but also as embodying such instruments or certificates as evidence a change therein made pursuant to legislative enact-

ment. The Legislature, by enacting section 361 in 1915, provided the means by which such a change could be effectuated, and compliance with its provisions was mandatory in order to effect a change in the number of directors, and required affirmative action by the shareholders to be witnessed by a certificate of increase properly prepared and filed with the secretary of state to make the change effective. The petitioner having complied with all that a fair interpretation of section 361 required, it may be said that a change in the original articles and the agreement between the corporation and the state was effectuated, and that the number of directors was thereby increased from seven to nine upon the filing of the certificate of increase with the secretary of state as directed by the statute, and that the same should now control, thereby impliedly changing article "Fifth" of the articles of incorporation as originally filed to read "nine" instead of "seven" directors.

We have considered other contentions made by respondent, but do not consider them substantial in the determination of the question herein involved.

The petition for a writ of mandamus is granted, and the writ heretofore issued is made peremptory.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

217 Cal. 362

EATON et al. v. KLIMM et al.
S. F. 14363.

Supreme Court of California.
Jan. 31, 1933.

1. Nuisance ⇨78.

That only some persons were annoyed by asphalt mixing plant operations could not convert public nuisance of such operations into private nuisances so as to preclude abatement by public body (Civ. Code, § 3480).

2. Appeal and error ⇨1008(1).

Whether operation of asphalt mixing plant, resulting in dirt, smoke, and noise, constituted public nuisance, was fact question for trial court (Civ. Code, § 3480).

3. Appeal and error ⇨1011(1).

Trial court's finding on conflicting evidence must be upheld.

4. Injunction ⇨130.

Findings that allegation that operation of asphalt mixing plant did not constitute a

nuisance was not true *held* to show nuisance was public nuisance, where action was to restrain public body from abating operations, and judgment held board of health could abate nuisance (Civ. Code, § 3480).

5. Nuisance ⇨66.

Establishment of asphalt mixing plant in neighborhood prior to establishment of homes did not result in prescriptive right to maintain operations thereof constituting public nuisance.

6. Nuisance ⇨66.

Right to maintain public nuisance may not be gained by prescription.

7. Nuisance ⇨64.

That zoning ordinance permitted continued operation of asphalt mixing plant did not preclude its abatement as public nuisance.

8. Nuisance ⇨64.

License, permit, or franchise does not authorize creation or maintenance of nuisance.

9. Injunction ⇨128.

Evidence, in action to enjoin abatement of nuisance, established that dirt, smoke, noise, and blocking of sidewalks related exclusively to asphalt mixing plant, and not to defendants' adjoining buildings.

10. Nuisance ⇨78.

Penalties for failure to comply with orders of board of health pursuant to ordinance relating to insanitary buildings *held* inapplicable to enforcement of order regarding nuisance of operating asphalt plant, not coming within scope of such ordinance.

11. Nuisance ⇨78.

Board of health *held* authorized to abate operation of asphalt mixing plant constituting public nuisance, though ordinance board proceeded under was inapplicable to nuisance involved (Civ. Code, § 3494).

12. Injunction ⇨85(1).

Operators of asphalt mixing plant constituting public nuisance *held* entitled to injunction restraining board of health from demolishing buildings and removing equipment and from enforcing order of abatement by inflicting penalties provided for by inapplicable ordinance (Civ. Code, § 3494).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Clarence B. Eaton and another, copartners, against Frank J. Klimm and others, as and constituting the Board of Health of the City and County of San Francisco, and another. From a judgment denying an injunction, plaintiffs appeal.

Reversed and remanded, with directions.

Grover O'Connor, of San Francisco, for appellants.

J. A. Pettis, of San Francisco, for Calif. Mfrs. Ass'n, amici curiæ for appellants.

John J. O'Toole, City Atty., and Thos. P. Slevin, both of San Francisco, for respondents.

CURTIS, J.

Plaintiffs sought an injunction to enjoin the board of health of the city and county of San Francisco from carrying into effect a resolution adopted by said board declaring the structures occupied by the plaintiffs, as partners in the business of general contractors for street improvement work, to be a nuisance, and ordering that said structures be vacated and demolished, and further to enjoin William Quinn, as chief of police of said city, from taking summary action against said plaintiffs for their failure to comply with said order.

It appears from the complaint that in 1916 the plaintiffs, as partners in a general contracting business for street improvement work, established their offices, store yards, asphalt mixing plant, shops, and other appurtenances connected with said business on a parcel of land situated at 715 Ocean avenue, which is on the southerly side of Ocean avenue between Tara and Howth streets. The property occupied by the plaintiffs embraced more than one-half of the area of the block bounded by Ocean avenue, Tara, Geneva, and Howth streets. Directly north of the block occupied by plaintiffs is a tract of land owned by said city and county and occupied only by the county jail, and directly to the east of said property of plaintiffs is a block of land zoned as a light industrial district. At the time of the establishment of plaintiffs' business, there were practically no dwellings in the immediate vicinity, but since that time families have moved into the neighborhood. In some instances the heads of the families are employed by plaintiffs. The ordinance which zoned the district as a light industrial district expressly provided that any use not conforming with the other sections of the ordinance which existed at the time of the passage of the ordinance (of which plaintiffs' business was one) might be continued.

On May 17, 1928, a complaint signed by William C. Hassler, health officer of said city and county, was filed with the board of health, seeking the vacation of said premises of the plaintiffs. The said complaint is as follows: "The conditions complained of are as follows: Said premises, consisting of a two story frame structure used as a mixing plant for rock, sand, gravel, asphalt, and other substances, and a series of nondescript one story wooden sheds, used as places of storage, are insanitary, and a nuisance, and a menace to life and health, in that said plant is lacking in proper facilities to prevent the escape of dust and

dirt generated in the manufacture of the mixture prepared in this plant for road building, that the boilers and heating apparatus thereof are likewise lacking in smoke and soot controls, all of which permits the escape over and about the entire neighborhood of fine dirt, dust, particles of sand, and rock, and large flakes of soot, and at times, a dense volume of black smoke, creating a condition that makes it impossible for persons in the vicinity to properly ventilate their homes and impossible to use their yards for play spaces for their children, and as a place for the drying of clothes; furthermore, the operation of said plant during the night hours creates a noise nuisance that disturbs the rest and sleep of those persons in the immediate neighborhood, all of which creates a condition that pollutes the atmosphere of the residential portion of this section and disturbs the peace and quiet of the residents; and furthermore, because of the spur track permitting the bringing into the premises of carloads of gravel, sand, and other materials, and the loading of trucks upon the public sidewalk in front of the plant for the delivery of the finished product thereof, creates a condition that menaces the life and limb of children and other passers-by, all of which is a nuisance and a detriment to the health of the entire neighborhood and a menace to life and limb."

Thereafter, on May 31, 1928, the board of health, acting under the authority of Ordinance 501 (new series) and an amendment thereof designated as Ordinance 816 (new series), after due notice and a hearing wherein plaintiffs participated, passed a resolution that the firm of Eaton & Smith "be instructed to abate the nuisance that exists in the operation of this plant, and that the nuisance is said to consist of dirt, smoke and noise incident to the operation of the plant and the obstruction of the sidewalks with teams." Subsequent to said resolution, the plaintiffs installed apparatus at a cost of approximately \$3,000 in an attempt to control and confine to said plant all dirt, odors, smoke, and noise incident to the operation of said plant, and took steps to eliminate the obstruction of sidewalks bordering on said plant by the teams of plaintiffs.

Thereafter, on the 12th day of December, 1929, the board of health again, without any notice to the plaintiffs, took up the question of whether or not the said premises constituted a nuisance, decided that it did, and passed a resolution declaring said premises to be "insanitary and a nuisance and a menace to life and health," and ordering that "said structure shall be vacated and demolished and the lot cleared of all old wood, refuse, rubbish and débris and placed in a clean and sanitary condition within 60 days." Mr. Smith, one of the plaintiffs, having heard indirectly that the matter was to be before the board, attended the meeting. In pursu-

ance to said resolution, formal notice was served upon the plaintiffs, in which they were notified that the premises, consisting of a two-story frame structure used as a mixing plant and a series of nondescript one-story woodsheds used as places of storage, had been declared insanitary by the board of health at the meeting held on December 12, 1929, and ordering "that such structures shall be vacated and demolished and the lot cleared of all old wood, refuse, rubbish, and débris, and placed in a clean and sanitary condition." Said notice further specified that "failure to comply with the above orders within 60 days will result in this department requesting the Chief of Police to take summary action in accordance with Section 6 of the above ordinance." Plaintiffs thereupon instituted this proceeding for an injunction in an effort to restrain the board of health from carrying into effect this said order. After a hearing at which various members of the families in the immediate vicinity of the premises of plaintiffs testified with reference to the conditions arising out of the operation of said plant, the injunction was refused by the trial court. From the judgment denying such injunction, the plaintiffs prosecute this appeal.

At the hearing before the trial court, there was offered in evidence the testimony of members of six families residing in the vicinity that, for various reasons, the plant was a nuisance so far as they were concerned. On the other hand, testimony of three families, and the superintendent of the Market Street Railway (the yards of which company were situated to the east of the appellants' plant) was to the effect that the asphalt mixing plant operated by appellants caused no annoyance whatever to them, either as to dust, smoke, or noise.

[1-3] From this conflict in testimony appellants argue that, since only some of the persons living in the neighborhood are caused annoyance, the nuisance, if such, is necessarily a private nuisance and not a public nuisance, and therefore the right of redress belongs only to the particular parties injured, and the nuisance cannot be abated by a public body acting in the interest of the public. Appellants also argue that, the nuisance, if such, being a series of private nuisances, they may interpose the defense that they, by carrying on such business since 1916, have acquired a prescriptive right to maintain a purely private nuisance. We cannot subscribe to the soundness of this reasoning. A public nuisance is defined by section 3480 of the Civil Code as one which "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Clearly the conditions complained of affect the entire neighborhood, and the fact that some members of the community are less susceptible to

offense by reason of a particular condition, or by reason of the fact that they, because such conditions emanate from the business in which they are employed are willing to suffer such conditions without complaint, cannot convert a public nuisance into a series of private nuisances. It is apparent in the face of the conflict of evidence that the conclusion of the trial court that the operation of the asphalt mixing plant constituted a public nuisance must be upheld. The question of whether or not, considering all of the factors of the situation such as the nature of the district, the direction of the wind, the time when the asphalt mixing plant is in operation, etc., the operation of the plant in the manner set forth in the testimony of the various witnesses constituted a nuisance, was a question of fact for the trial court. The trial court having decided, upon a conflict of evidence, that the operation of the asphalt mixing plant did constitute a nuisance, this court cannot say, as a matter of law, that it did not constitute a nuisance.

[4] Appellants object that there is no finding that the nuisance constituted a *public* nuisance. The findings of the trial court took the form of a specific affirmation or denial of the various allegations set forth in the appellants' complaint. It is therefore true that, since appellants' complaint merely alleged that the operation of said plant did not constitute a nuisance, the finding of the court that this allegation was not true merely held that the operation of said plant did constitute a nuisance without specifying whether or not such nuisance was a public or a private nuisance. However, the very nature of the action, a proceeding to secure an injunction to restrain a public body from abating a claimed nuisance, demonstrates that the question presented was whether or not the nuisance was a public or a private nuisance, and the denial of the injunction demonstrates that, since the trial court was of the opinion that the board of health was entitled to abate said nuisance, the nuisance designated in said findings as a nuisance was a public nuisance.

[5, 6] The operation of said asphalt mixing plant in the manner complained of constituting a public nuisance, appellants' contention that, since their business was established in the neighborhood prior to the establishment of all of the homes of those complaining, with one exception, said business cannot be abated, cannot be upheld. The theory that a right to maintain a nuisance may be gained by prescription does not apply to a public nuisance. In *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722, the complaint of defendants therein was similar to that of appellants here—the complaint that the business having been established when the district was not built up, the fact that families had moved in should not operate to the detriment of the established business.

The court there held: "The fact that a business was established in the open country remote from habitations will not defeat a proceeding for the maintenance of a nuisance after the land in its vicinity has been built up and occupied; such business must give way to the rights of the public, and when buildings and habitations approach the place of its location means must be devised to avoid the nuisance, or it must be removed or stopped." See 20 R. C. L. pp. 440, 441.

[7, 8] It is also to be noted that the fact that, by the zoning ordinance which zoned the district as a light industrial district, the appellants were permitted to continue the operation of their plant, is not an absolute defense to proceedings for the abatement of such business on the ground that it constitutes a nuisance. "It has been held a number of times in this court that a license, permit, or franchise does not authorize the creation or maintenance of a nuisance." *People v. City of Reedley*, 66 Cal. App. 409, 413, 226 P. 408, 409. This rule is not only applicable to private nuisances (*Williams v. Blue Bird Laundry Co.*, 85 Cal. App. 388, 259 P. 484; *Fendley v. City of Anaheim*, 110 Cal. App. 731, 294 P. 769; *Vowinkel v. N. Clark & Sons* [Cal. Sup.] 13 P. (2d) 733), but to public nuisances as well (*People v. City of Reedley*, supra).

[9] We have purposely limited our statement with reference to the alleged nuisance to the "operation of the asphalt mixing plant." We have limited it to the *asphalt mixing plant*, for the reason that the trial court expressly found that "the odor, dust, noise and other results of the use of said property, referred to in said resolution, relate exclusively but to one structure on said property. Said structure is located at the northeasterly corner of the property so occupied by plaintiffs, and takes up but a small portion of the area occupied by them, and on the balance of said area no dust, odor, or noise, such as are described in said resolution, could possibly arise. Said asphalt mixing plant is operated by said plaintiffs customarily not more than about sixty days on an average during the year." This finding is supported by the evidence. It follows, we think, that it is only the conditions emanating from the operation of the asphalt mixing plant which constitute the nuisance.

We have also purposely limited our statement to the "operation" of the asphalt mixing plant, for the reason that we are unable, after a careful search of the record, to find any evidence warranting a conclusion that the buildings, or any part thereof, are in an insanitary condition. The conditions of which complaint is made—the escape over and about the neighborhood of fine dirt, dust, particles of sand and rock, and large flakes of soot, and at times a dense volume of black smoke, the creation of "a noise nuisance that disturbs

the rest and sleep of those persons in the neighborhood," and "the loading of trucks upon the public sidewalks in front of the plant"—relate exclusively to the *operation* of the asphalt mixing plant, in other words, to the *use* to which said structure is put, and are not even remotely connected with the *sanitary condition* of the buildings upon said premises.

[10] We agree with the contention of appellants that Ordinance No. 501 (new series), under which the board of health purported to act, and which purported to furnish authority for its order that said buildings be vacated and demolished, relates solely and exclusively to insanitary buildings, structures, or parts thereof, as such, and does not deal or purport to deal with the operation or carrying on in any building, or structures, of a business which may create an insanitary condition outside of and away from said buildings and structures. A cursory reading of said ordinance compels the conclusion that said ordinance was designed to cover, purported to cover, and did cover, only those situations in which the buildings themselves, or any part thereof, were insanitary.

The penalty specified in Ordinance No. 501 (new series) related solely to a forcible resistance or prevention of the enforcement of an order of the board of health. Therefore Ordinance No. 816 (new series) was subsequently passed, adding a further provision that the violation of any of the provisions of Ordinance No. 501 (new series), or a failure to comply with any direction or order of the board of health pursuant to the provisions of said ordinance, constituted a misdemeanor, and that each day of a failure to comply with the directions of the board of health constituted a new and separate offense.

It is unnecessary to point out in detail that each and every reference in said ordinance to an insanitary condition is a reference to an insanitary building or structure, and nowhere contained therein is any statement or expression which even by inference could be held applicable to the operation of a business or the use to which the building or structures may be devoted. The strongest argument that such ordinance relates exclusively to insanitary buildings as such, and not to their use or the operation of the business therein located, is the remedy provided for such nuisance—the immediate vacation and abolition of said buildings, unless within forty-eight hours the owner give notice that he will make such alterations and repairs as in the judgment of the board of health shall be necessary for the purpose of making said building, structure, or part thereof sanitary. It follows that, since the nuisance here complained of does not come within the classification specified in said Ordinance No. 501 (new series), the remedy therein provided and the penalty prescribed by Ordinance No. 816 (new series) for

the failure to comply with the orders of the board of health passed pursuant thereto were inapplicable to the instant situation.

[11] It does not follow, however, that appellants were entitled to the injunction which they sought restraining the defendant board of health from "taking possession of, or removing, or in any manner whatever interfering with any of the property hereinabove described, or with the business of plaintiffs conducted thereon, or with plaintiffs' operation of said business upon said property." In *McQueen v. Phelan*, 4 Cal. App. 695, 88 P. 1099, 1100, it was held that, inasmuch as under section 3494 of the Civil Code "a public nuisance may be abated by any public body or officer authorized thereto by law," public officials could not be restrained by injunction from proceeding, according to law, to abate what is found to be a public nuisance whether the ordinance under which they purported to act was valid or void. This case involved the propriety of an injunction restraining certain public officials from interfering with plaintiff's carpet beating works. The court therein conceded for the sake of argument, that the ordinance attacked was void, but, after stating that the case had gone to trial upon a distinct issue as to whether or not the premises described in the complaint were or were not a nuisance, and the court had found such business to constitute a nuisance, held that the question of the validity of the ordinance was immaterial, and the injunction sought by plaintiff was properly denied. The case did, however, contain the following language, "We do not mean to intimate that any public official may, of his own volition, without any order of court, tear down or destroy a building because he believes it to be a nuisance." In the instant case, the issue of whether or not the operation of appellants' business constituted a nuisance was presented by the pleadings, and the court expressly found that the conditions complained of were true, and that the operation of the plant constituted a nuisance. It follows that the board of health under section 3494 of the Civil Code is entitled to abate the operation of said asphalt mixing plant, and the trial court properly refused to grant an injunction restraining the board of health from interfering in any manner whatever with the appellants' business.

[12] As before indicated, however, the appellants were entitled to an injunction restraining the carrying into effect of the drastic order issued by the board of health under the purported authority of Ordinance No. 501 (new series); that is to say, the demolishing of the buildings, and the removal of appellants' equipment. Appellants are also entitled to an injunction against the attempted enforcement of said order by the infliction of

the penalty specified in Ordinance No. 816 (new series) for a failure to comply with said orders.

The judgment is therefore reversed, and the cause remanded to the trial court, with directions to issue an injunction in accordance with the conclusions herein expressed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; PRES-
TON, J.

129 Cal.App. 383

BALDOCCHI et al. v. FOUR FIFTY SUTTER CORPORATION (two cases).

Civ. 8584, 8585.

District Court of Appeal, First District,
Division 1, California.

Feb. 1, 1933.

Hearing Denied by Supreme Court March 30,
1933.

1. Municipal corporations ☞671(8).

Property owner, having invaded right of adjoining owner in reconstructing sidewalk, could not urge as defense, in injunction suit, that destruction of sidewalk, making reconstruction necessary, was caused by plaintiff.

The evidence disclosed that plaintiff owned apartment building having frontage on alleyway, together with adjoining strip fronting on alleyway, which strip was used by tenants for recreational purposes, and along its side of the alley to its property line, plaintiff had constructed a four-foot sidewalk. Defendant owning adjoining property gave notice of intention to erect a large garage and office building, and advised plaintiffs as coterminal owners to protect their building by underpinning exposed wall. The sidewalk along the alley was destroyed by act of one of the parties, and defendant thereupon undertook to reconstruct it.

2. Municipal corporations ☞671(7).

Owner of apartment house and abutting lot, whose four-foot sidewalk along alley was destroyed, held entitled to injunction to require adjoining owner to restore sidewalk in former condition, where defendant, to facilitate entrance to garage in new building, reconstructed alley by eliminating sidewalk in part (Civ. Code, § 3479).

The trial court found that defendant restored sidewalk to its former condition along part of distance, but then tapered width thereof until it was but one foot in width at corner of lot adjoining apartment house, and that in front of that lot, the area formerly occupied by sidewalk was paved as part of roadway for vehicu-

lar travel, and that as result, plaintiffs and their tenants could not safely enter or leave the adjoining lot by means of the sidewalk, but were exposed to hazards of traffic.

3. Municipal corporations Ⓒ663(1).

Abutting owner has easement in street for ingress and egress.

4. Nuisance Ⓒ26.

Property owner suffering actual injury is entitled to redress for nuisances peculiar to him.

5. Nuisance Ⓒ49(5).

Evidence authorized recovery of damages in suit against adjoining landowner for eliminating in part plaintiff's sidewalk in attempting reconstruction thereof.

6. Municipal corporations Ⓒ671(9).

In suit to require restoration of sidewalk reconstructed by defendant, finding of defendant's failure to obtain permit from board of public works held justified.

7. Injunction Ⓒ126.

One seeking mandatory injunction must show wrong has resulted or will result in substantial injury.

8. Injunction Ⓒ23.

Court of equity will not balance inconvenience of tortious wrongdoer against other's inconvenience.

9. Municipal corporations Ⓒ671(9).

Court granting mandatory injunction for restoration of sidewalk could allow change in curb line for last four feet along plaintiff's property, where plaintiff would not be damaged.

Defendant owning adjoining property on which garage and office building was erected, was permitted by court's decree to construct curb diagonally or on straight line to corner of plaintiff's vacant lot for purpose of facilitating entrance of automobiles from alley into garage. The decree, however, afforded plaintiffs, as owners of the apartment house, and their tenants, full use of the adjoining vacant lot by requiring restoration of sidewalk along alley abutting the vacant lot, and the only modification of this requirement was that the last four feet of the sidewalk would be diminished in width.

Appeals from Superior Court, City and County of San Francisco; John J. Van Nosstrand, Judge.

Suit by Narciso F. Baldocchi and another against the Four Fifty Sutter Corporation. From the judgment, both defendant and plaintiffs appeal.

Affirmed.

Theodore J. Savage, of San Francisco, for plaintiffs.

Hartley F. Peart and Sylvester J. McAtee, both of San Francisco, for defendant.

WOODWARD, Justice pro tem.

Defendant Four Fifty Sutter Corporation appeals from a judgment granting plaintiffs a writ of injunction with damages, while plaintiffs separately appeal from a portion of the same judgment on the ground of inadequacy of relief. At the suggestion of counsel we shall consider the appeals together and, in order to avoid confusion, will refer to the parties as plaintiffs and defendant.

Stripped of technical minutia, the controversy involves the restoration of a sidewalk and the relative rights of the parties thereto. The factual background of the litigation may be sketched as follows: During the year 1912 plaintiffs erected a five-story apartment house in the city of San Francisco, said structure having a frontage on Bush street of fifty-seven feet and six inches and on Chelsea place, a public alleyway, of one hundred four feet and six inches. Contemporaneously therewith they constructed a four-foot sidewalk along the entire westerly side of Chelsea place from Bush street to what is now defendant's property line at the end of the alley. This sidewalk provided the only entrance to plaintiffs' strip of land situate south of the building, which area, referred to as "lot B," has a frontage of ten feet on Chelsea place and extends westerly approximately fifty-seven feet. Until the occurrence of the acts charged against the defendant, plaintiffs' tenants, including a number of women and children, used said "lot B" for recreational purposes. The defendant acquired property on the north side of Sutter street, between Powell and Stockton streets, and, during the month of December, 1927, notified plaintiffs of its intention to erect a large garage and office building. Plaintiffs were informed that the building operation contemplated would necessitate a foundational excavation seventy feet in depth, and they were advised, as coterminous owners, to protect their building by underpinning the exposed walls. This plaintiffs proceeded to do at a cost of \$15,700, employing for that purpose defendant's general contractors, Lindgren & Swinerton. While the walls of plaintiffs' apartment house were being underpinned and defendant's lot excavated, plaintiffs' strip in the rear of the apartment house and a large portion of the sidewalk referred to were damaged. After the completion of the office building plaintiffs filed suit alleging, among other things, that defendant had failed and refused to restore either the pavement or sidewalk to its former condition.

Defendant's appeal is largely concerned with questions of fact. Before discussing the points relied on for reversal, we will set forth the substance of the trial court's findings. The court determined that plaintiffs had certain private easements in front of and adjacent to their lot, among them being the right of ingress and egress to and from said lot and every part thereof over and by means of Chelsea place, and that they also had the right to have the street space kept open; that, after defendant had completed its building and undertaken, through its general contractors and agents, to restore and reconstruct the street and sidewalk of Chelsea place, it neglected to restore the area to its original condition; that it restored the sidewalk to its former width from Bush street to a point southerly eighty-one feet, but from that point to the northeasterly corner of "lot B" it tapered said sidewalk gradually until it was but one foot in width at said corner; that all the rest of the area of Chelsea place, including all the portion south and east of the line described, formerly occupied by said sidewalk, the defendant paved in such a manner that the area formed a part of the roadway of Chelsea place for vehicular travel; that the scheme of restoration, as thus effected, was without the consent and against the will of plaintiffs, and was also without authorization from the board of public works of the city and county of San Francisco; that with the sidewalk space in front of "lot B" thus paved as a roadway, plaintiffs and their tenants could not safely enter or leave said "lot B" by means of a sidewalk, but would have to cross a portion of the vehicular roadway and expose themselves to the hazards of traffic; that the acts of defendant in depriving plaintiffs of their sidewalk constituted a nuisance; that damage had accrued to plaintiffs in the aggregate sum of \$1,000; and that plaintiffs would continue to be damaged in the sum of \$50 per month until the abatement of said nuisance.

It thus appears from the findings, which we have paraphrased, that when Chelsea place was restored by defendant, plaintiffs found themselves in a disadvantageous position. The sidewalk in front of their building, beginning at a point approximately twenty-eight feet south of their Chelsea place entrance and ending at the northeasterly corner of their "lot B," had not been restored to its former width of four feet, but had been tapered along a straight line between the two points. No sidewalk at all had been constructed in front of "lot B," the space formerly occupied by such sidewalk having been utilized to widen the street in front of the entrance to defendant's garage.

[1-4] Under the caption, "evidence does not support judgment," the defendant corpora-

tion urges that the judgment requires it to restore a sidewalk which the plaintiffs themselves destroyed. This view is predicated on evidence that plaintiffs employed Lindgren & Swinerton to shore up their walls and that in doing so the contractors damaged "lot B" and destroyed the sidewalk in front thereof. Notwithstanding plaintiffs' oral "understanding" with the contractors that the latter should restore the sidewalk, we believe the subtle distinction sought to be made between the rights and duties of the respective parties, because of their joint employment of Lindgren & Swinerton, is far-fetched. The evidence at least discloses that the defendant destroyed a portion of the said sidewalk pursuant to its building operations. But regardless of whether the sidewalk of "lot B" was destroyed by Lindgren & Swinerton as agents of the defendant, or as agents of the plaintiffs, the evidence discloses beyond all doubt that the plan, or "layout," as it was called by several of the witnesses, for restoring Chelsea place was conceived and executed by the defendant. Narciso Baldocchi, one of the plaintiffs, testified that he had no information or knowledge as to the details of this plan until the work had been completed. When he discovered, according to his testimony, that the defendant had paved a portion of the sidewalk space opposite the apartment house and all of the sidewalk space opposite "lot B," thereby widening the roadway, he immediately called upon the secretary of the Four Fifty Sutter Corporation and vigorously protested. Moreover, both plaintiffs made written demand upon the defendant and upon the contracting firm of Lindgren & Swinerton that the sidewalk be restored to its former condition. The only results of these protests, so Baldocchi averred, were persuasive attempts on the part of defendant corporation's secretary to induce plaintiffs to accept the scheme of restoration as executed. Then, too, Alfred Swinerton, a member of the contracting firm and a director in defendant corporation, testified that the entire work of reconstruction was done in behalf of, and paid for, by the defendant. We think, therefore, that defendant's point is without merit. The defendant having essayed to invade plaintiffs' right by reconstructing Chelsea place in accordance with its own plan—a plan clearly designed to eliminate the sidewalk formerly in front of "lot B" in order to widen the roadway and thus facilitate the moving of cars to and from the garage—it is in no position equitably to urge that plaintiffs destroyed their own sidewalk and hence should be denied relief. As a matter of fact, we entertain no doubt whatsoever that plaintiffs were entitled to equitable relief. Anything which is an obstruction to the free use of property or which interferes with the comfortable enjoyment thereof, or unlawfully obstructs the free passage

or use, in the customary manner, is a nuisance. Civ. Code, § 3479. And it has been held that the property which an abutting owner has in the street in front of his land is an easement therein for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as that which he has in the lot itself. *Brown v. Board of Supervisors*, 124 Cal. 274, 280, 57 P. 82. Again, when the nuisance complained of is peculiar to the abutting owner, as distinguished from the public at large, and actual injury has been sustained, he is entitled to redress. *Siskiyou Lumber, etc., Co. v. Rostel*, 121 Cal. 511-514, 53 P. 1118; *Harniss v. Bulpitt*, 1 Cal. App. 140-142, 81 P. 1022.

[5] Defendant's next contention is that there is no support in the evidence for the damages allowed plaintiffs. On this phase of the controversy Baldocchi testified, in part, as follows:

"Q. You stated on your examination by counsel that the omission or absence of any sidewalk in portion of the former sidewalk in Chelsea Place, which I indicated on the plat in yellow, is \$100.00 per month? A. I said approximately that.

"Q. Approximately? A. At least that.

"Q. Upon what do you base that computation or that estimate? That is wholly an estimate, is it not? A. Well, it has deprived us of the use of that lot for the apartment house; we have not been able to use it at all.

"Q. In other words, it is a conclusion on your part, isn't it, that the ten-foot strip was an attraction to the tenants in the apartment house? A. Well, it is not a conclusion. Mr. Flannery complained about it and complained on that account, he could not use it, and he figured was losing tenants by not being able to use it.

"Q. Isn't what Mr. Flannery complained of was the loss of the use of the ten-foot strip? A. That is correct, yes.

"Q. But how is it possible for you to make an estimate of damages of \$100.00 per month? A. Because I had to reduce the rent over \$250.00 at the time of the complaint.

"Q. Is that the only reason you can give for your estimate? A. Yes."

Basing their argument on the foregoing excerpt from the cross-examination of plaintiff, counsel for defendant ingeniously urge that the evidence affords no causal connection between the reduction of rent and the gravamen of the action. It seems to be defendant's position that plaintiffs, having sustained their damage through the shoring-up process of the apartment house, are in no position to attribute their loss to the improvement of Chelsea place. It is true, of course, that plaintiffs would not be entitled

to recover monetary damages proximately caused by their own acts. But we do not understand that the judgment was in any sense predicated on the temporary loss of "lot B," or the sidewalk in front thereof, *except in so far as said loss was made permanent by the defendant's own acts*. In this connection, it must be borne in mind that the complaint was based on the inaccessibility of "lot B," after the paving project had been completed. It is true that Baldocchi's testimony to the effect that he allocated \$100 of his rental loss to the absence of a sidewalk amounted to nothing more than a conclusion. The reduction of the rent, however, even though it occurred before the paving project was launched, was a fact. In these circumstances it would have been difficult for plaintiffs to prove their loss with mathematical exactitude. It apparently was their position that had it not been for the unwarranted acts of the defendant, they might eventually have restored "lot P" to its customary use and recovered some, if not all, of their rental loss. However that may be, the physical situation which confronted plaintiffs at the completion of the paving scheme, furnishes persuasive evidence that they had been damaged. Mrs. Helen Strong, manager of the apartment house, described this situation in a few words. According to her testimony, automobiles pass to and from the garage "every two or three minutes on an average." Because of the narrow street and the lack of sidewalk space it was, in her opinion, unsafe for children to play in "lot B." She testified further that the apartment house lost tenants because it lacked playground facilities. On the other hand, the court permitted George C. Taggart, apartment house broker, to testify as an expert that the rental value of the apartment house had not decreased as a result of the paving and reconstruction plan. The court, while doubtless appreciating the fact that the proof of monetary damage was not as satisfactory as could be desired, determined that plaintiffs were entitled at least to a portion of the amount claimed. The court heard the testimony and visited the premises. We cannot say from all the facts and circumstances of the case that its finding on the question of monetary damage was without support in the evidence. It is not suggested that the amount of damages awarded plaintiffs is excessive.

[6] Lastly, defendant assails the court's finding to the effect that defendant failed to obtain a permit from the board of public works for the reconstruction of Chelsea place. Except as bearing on the good faith of defendant, this question appears relatively unimportant. The evidence discloses that the defendant on July 18, 1929, made application to the board of public works for permission to reconstruct the area in question. The application was accompanied by a blue-

print, showing the changes proposed to be made in the curb lines. The application was referred as a matter of routine to the city engineer, who, in due time, issued a blueprint which contained certain modifications of the plan as originally proposed, including provision for proper drainage. Without further authorization from the city, Lindgren & Swinerton, thereupon proceeded to make the improvements in question. Our attention is not called to any section of the San Francisco charter which authorizes the city engineer to issue permits for the doing of street work. On the contrary, we conclude from the numerous sections of said charter cited by plaintiffs that he possessed no such authority. It may be reasonably inferred from the evidence that the city engineer, at the time he issued the blueprint, concluded that a formal permit from the department of public works had been, or would be issued. In this connection the testimony of Clyde Healy, second assistant city engineer, is significant. He testified that he advised Mr. Swinerton that the scheme of reconstruction was feasible "provided the property owners on both sides were agreeable to it, for the reason he was asking for improvements not in front of his property but in front of property of other owners, and the only legal way I could do that was refer it to the Board of Supervisors." We feel that defendant's point is without merit. The issuance of a blueprint by the city engineer under the circumstances narrated was not tantamount to obtaining permission from the proper authorities. There is no evidence, however, that the defendant acted in bad faith.

Because of the views hereinabove expressed, we do not feel it necessary to discuss, although we have carefully considered, the other factual points urged by the defendant. The judgment granting plaintiffs a mandatory and prohibitory writ of injunction with damages is amply supported by the evidence, and it is our opinion that it should not be disturbed.

Turning now to plaintiffs' appeal from a portion of the judgment:

[7-9] The judgment directs the restoration of plaintiffs' sidewalk along the entire westerly line of Chelsea place to its former width with one exception. Avoiding a technically exact description, this exception may be condensed in the following language: Beginning at a point four feet from the end of the alleyway, which is a cul-de-sac, defendant, in replacing said four-foot sidewalk, is permitted to construct the curb diagonally, or on a straight line, to the southeast corner of "lot B," thus excluding from the former sidewalk area a triangular paved segment containing eight square feet.

Plaintiffs contend that the portion of the judgment appealed from constitutes a denial

to them of the full measure of relief to which they were entitled under the law and the evidence. The effect of the court's action, of course, was to refuse plaintiffs a mandatory injunction requiring defendant to restore the southerly four feet of the sidewalk to its former condition. Scrutiny of the physical surroundings, as disclosed by the evidence, makes the reason for the court's determination easily understood. Defendant's large building is used in part for storing automobiles with a public entrance at the southerly end of Chelsea place. Due to the narrow street, which is but twenty feet wide inclusive of sidewalk space, and the presence of large supporting columns a short way within said entrance, it is necessary for automobiles to be turned slightly to the right in order to negotiate the driveway. Defendant's whole plan for reconstructing Chelsea place seems to have been designed to meet the exigencies of this situation.

In support of the judgment, defendant, after citing its space restrictions and the concomitant difficulty of utilizing this driveway, seeks to invoke the equitable doctrine known as the balancing of conveniences. We do not deem it necessary to set forth this doctrine with its manifold variations and ramifications. Suffice it to say that, whatever may be the refinements of the rule in other jurisdictions, the courts of California, especially with reference to the issuance of mandatory or perpetual injunctions, frown upon the doctrine. For example, in the case of *Hulbert v. California, etc., Cement Co.*, 161 Cal. 239, 249, 118 P. 928, 932, 38 L. R. A. (N. S.) 436, the Supreme Court, after discussing various phases of the rule, as declared in other jurisdictions, asserts that "none of them, nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property, because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public." And it seems to be the rule in all jurisdictions that the doctrine has no application where the act complained of is of a tortious character and when the balancing of conveniences extinguishes a valuable vested right. In the case of *Felsenthal v. Warring*, 40 Cal. App. 119, 129, 180 P. 67, 71, the court declares: "The rule that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can be heard to say that he is injured by being prevented from doing to the hurt of another that which he has no right to do. When a suitor has brought his cause clearly within the rules of equity jurisprudence, the

relief he asks is demandable ex debito justitiæ, and needs not to be implored ex gratia." (Long list of authorities cited.)

While courts of equity will not balance the inconvenience of a tortious wrongdoer against one whose rights have clearly been infringed upon, it is nevertheless incumbent upon one who seeks a mandatory injunction to show that the wrong complained of has resulted, or will result, in a substantial injury. The injury, it is true, may be only slight, but it must be real and ascertainable as distinguished from fanciful and imaginary. "When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical unsubstantial right." *Frost v. City of Los Angeles*, 181 Cal. 22, 31, 183 P. 342, 346, 6 A. L. R. 468. "Consequently," declares the Supreme Court in the case of *Thompson v. Kraft Cheese Co.*, 210 Cal. 171, 179, 291 P. 204, 208, "if an injunction is given, it must be directed against only those acts which cause some material injury to plaintiffs."

The decision of *McKean v. Alliance Land Co.*, 200 Cal. 396-399, 253 P. 134, 135, is peculiarly applicable to the facts of the present controversy. In that case plaintiffs and defendants were adjoining owners of real property and the former claimed that the latter's building encroached upon their lot from one-half to five-eighths of an inch. The trial court refused to order removal of the encroachment on the ground that there was no evidence that the same caused any actual damage to plaintiffs. Instead, the court gave plaintiffs judgment for \$10, holding that this nominal sum would afford full, complete, and adequate relief. The Supreme Court, in affirming the case, declared that in view of the fact that there was no evidence of actual damage to plaintiffs, "the award of the trial court is both wise and just."

In the foregoing case the encroachments were actually on the freehold of the plaintiffs. In the present case the plaintiffs, if we correctly apprehend their pleadings, claim only an easement to the area involved—an easement also enjoyed by the defendant since the four feet of sidewalk at the end of Chelsea place fronts also upon its property. The gravamen of plaintiffs' action was that they had been deprived of the use of "lot B" by

reason of the defendant's acts. The judgment, we think, affords full, complete, and adequate relief to plaintiffs. As already pointed out, the sidewalk must be restored to its original width to a point four feet north from defendant's property line. This will afford plaintiffs the full use of "lot B." They will have a sidewalk from Bush street to the southerly end of their property, the only difference being that the last four feet of said sidewalk will be diminished in width. In going to and from "lot B" it will not be necessary for plaintiffs or their tenants to step into the street and thus be exposed to the hazards of traffic. The slight change in the curb line, permitted by the trial court, is not an appropriation by defendant of plaintiffs' property. The small area involved has been paved as a part of the roadway to facilitate the moving of automobiles to and from the garage. The trial court undoubtedly concluded that, even assuming that plaintiffs had an easement to said area as sidewalk space, they could not be damaged by being deprived thereof in the manner described. If the full and unrestricted use by plaintiffs of "lot B" required the extension of a four-foot sidewalk beyond the point involved, an entirely different situation would obtain. In that event, regardless of the resultant inconvenience to defendant, the court doubtless would have granted the relief as prayed for. The trial court, it appears, concluded that the defendant, in executing its plan for the restoration of Chelsea place, acted in good faith but under a mistaken conception of its legal rights. The court likewise concluded that plaintiffs were insisting on technical and unsubstantial rights, the loss of which had not, and could not, cause them any injury whatsoever. We see no reason for disturbing the judgment.

The findings in some respects appear deficient, but since our attention is not called to any of these deficiencies, and since counsel for the respective parties concede in their briefs that the court had jurisdiction to determine the entire controversy, we see no occasion to discuss the matter.

For the reasons herein stated the judgment as appealed from both by the plaintiffs and by the defendant is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

129 Cal.App. 335

TREFETHEN et al. v. DALTON et al.
Civ. 7072.District Court of Appeal, Second District,
Division 1, California.
Jan. 30, 1933.**Appeal and error** ¶1008(1).

In action to enjoin nuisance and for damages, whether plaintiffs were guilty of laches, precluding relief, *held* question for trial court.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Alfred B. Trefethen and another against Frank Dalton and another, doing business as copartners under the fictitious firm name and style of D. & M. Machine Works. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

Perry G. Briney, of San Pedro, and Victor R. Hansen and Arthur C. Verge, both of Los Angeles, for appellants.

Woodruff, Musick & Hartke, of Los Angeles, for respondents.

YORK, J.

Practically the only question raised by appellant in this case is: "There is no substantial evidence to support the findings." An examination of the transcript discloses that each of the findings is supported by some evidence.

This is an action to enjoin a nuisance, and for damages. Appellants have not filed any supplement to their brief or set out the evidence relating to the matters they urge upon this appeal, but, as stated by respondents, "have contented themselves with printing only such isolated testimony as favors their contentions."

Appellant is attempting to raise the question that the respondents were guilty of laches to such an extent that the court was not justified in rendering the judgment that was rendered. However, it was a question for the trial court to determine upon all of the evidence before it what the facts were in regard to the allegations as to such laches charged, and then to determine as a matter of law, whether, under the circumstances found, the plaintiffs were guilty of such laches as would preclude their recovery. We can find no error in the court's determination either as to such facts or as to the law.

The judgment appealed from is affirmed.

HOUSER, J.

I concur in the judgment.

CONREY, P. J.

I concur in the judgment. While the record has been examined, I think it appropriate to suggest that the court is not under obligation to search the record for errors beyond those properly brought to light in an appellant's brief.

In rule VIII, section 3, governing the practice on appeals, it is provided that "the pleadings need not be printed in such briefs, but the nature of the action and the substance of the pleadings must be stated in general terms." Section 953c, Code of Civil Procedure, relating to appeals presented under the so-called "alternative method," provides that the parties shall "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Rule VIII, section 3, allows a party, who relies upon any part of the record which is required to be printed in the brief, "to state therein the substance of such record, parenthetically referring to the line and page of the typewritten transcript for verification." For failure to comply with these rules an appeal may be dismissed. Rule VIII, section 4; *Birkland v. Ratterree Land Co.* (Cal. App.) 14 P.(2d) 133; *Haines v. Commercial Mortgage Co.*, 205 Cal. 71, 269 P. 921. The rules ought to be observed in the writing of briefs, even though in the matter of their enforcement the appellate courts (in their desire to decide cases on their actual merits) have been "slow to wrath, and plenteous in mercy."

In the present case appellant in his brief made no attempt to set forth, in form or substance, the pleadings or the judgment. He does copy certain findings, and evidence in relation thereto. But that is not sufficient to show the relation of those findings to the judgment or to the issues which may have been raised by the pleadings.

Appellant says that the action was instituted by respondents to "restrain the further operation" of a certain machine shop. On reading the judgment as set forth in the transcript, I find that it takes the form of a regulation of the described operations, apparently for the purpose of preventing certain noises, obnoxious odors, etc., at times when they would be a nuisance to the plaintiffs in their home. Upon the record as presented, I find no sufficient reason for a reversal of the judgment.

HYLTON FLOUR MILLS, Inc., v. BOWEN.
Civ. 632.District Court of Appeal, Fourth District,
California.

Jan. 17, 1933.

Rehearing Denied Feb. 15, 1933.

Hearing Denied by Supreme Court March 17,
1933.**1. Sales** ⇨ 1(4).

Where contract provided for sale of definite quantity of flour, fixed time of shipment and terms of payment, discretion permitted buyer in choice of five different brands did not invalidate contract.

2. Damages ⇨ 79(5).

Provision for liquidated damages for breach of contract for sale of flour held valid, in view of allegation of impracticability in fixing actual damages for breach (Civ. Code, §§ 1670, 1671).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Hylton Flour Mills, Inc., against Edith J. Bowen, as executrix of the will of E. A. Bowen. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

Jones, Stephenson, Palmer & Moore, of Los Angeles, for appellant.

Alphonse E. Ganahl, of Corona, for respondent.

JENNINGS, J.

Plaintiff instituted this action to recover from defendant damages for the alleged breach of a written contract. Defendant interposed a demurrer, both general and special, to plaintiff's complaint. The demurrer was sustained without leave to amend, and judgment was rendered in defendant's favor. Plaintiff appeals from the judgment. It is conceded that the single question presented for consideration upon this appeal is the sufficiency of the complaint to withstand the attack presented by defendant's general demurrer.

Two grounds were urged before the trial court in support of the demurrer to the complaint and are here urged by defendant in support of the judgment. These grounds are, first, that the contract for whose breach the action was brought is void for uncertainty; and, second, that the complaint shows on its face that it seeks to recover liquidated damages expressly prohibited by section 1670, Civil Code.

The contract is pleaded in *hæc verba* in the complaint. Omitting that portion of the instrument entitled "Conditions," it is in the following language:

"Miller's National Federation Uniform Sales Contract.

"Contract No. (Adopted June 3, 1929)
"Date Aug-17-29.

"Hylton Flour Mills, Inc. Ogden, Utah

"Sell (s) and E. A. Bowen buy (s) the following commodities (to be manufactured), on the terms and conditions stated below and on Back Hereof, f. o. b. cars to initial carrier at shipping point, freight (basis freight rate in effect date of sale), allowed to Corona Calif.

"Time of shipment July 1st, 1930

"Destination Track Corona

"Terms of payment Arrival draft with bill of lading attached, through First National Bank.

"Bank of Corona

"Routing Mill option

"Seller shall have the option as to routing except as to the delivering carrier.

Quantity No. of	Packages Size Kind	No. Bbls. Ton or Cwt.	Commodity or Brand	Price per Unit (Bbl.Ton or Cwt.)
1260	98 Cot	630	Confidence	6.65
			Harvester	6.45
			DeLuxe Pastry	6.40
			Overland Clear	6.15
			Sierra Pastry	5.90

Shipping dates to follow

Ship as follows: — Bbls. on or about —; — bbls. on or about —; — bbls. on or about —; — bbls. on or about —. No modification, transfer, or change of destination specified in this contract shall be made without the written consent of both seller and buyer.

"This contract is subject to confirmation by the seller at

"Hylton Flour Mills, Inc. Seller

"By S. E. Arnold

"E. A. Bowen Buyer

"By ————

"Confirmed by Hylton Flour Mills, Inc. Seller

"Date 8/22/29

By C. J. Baker."

It is alleged in the complaint that by this contract defendant agreed to purchase from plaintiff 630 barrels of "Confidence" flour to be manufactured by plaintiff at its mills in Ogden, Utah, and delivered to defendant at Corona, Cal., and that in accordance with the terms of the agreement plaintiff manufactured and delivered to defendant 210 barrels of said "Confidence" flour on January 20, 1930, and that defendant paid plaintiff therefor.

[1] Defendant urges that the contract is, at best, an offer by the plaintiff to protect the stated prices, severally, for five specified brands of flour, in a maximum quantity of 630 barrels, until July 1, 1930, on the terms declared, and that defendant's signature to the agreement imports no more than an acceptance of the offer. It is further argued that, by the averment contained in the complaint relative to the acceptance of 210 barrels of

"Confidence" flour on January 20, 1930, and the payment therefor and the refusal of defendant to order any more flour, it is disclosed that there was no meeting of the minds of the parties as to what brand of flour the remaining 420 barrels should contain. In other words, the contention is that, until and unless the buyer should designate what particular brand of flour he desired, there was no agreement for the sale and purchase of any flour. With this contention we cannot agree. The above-quoted language of the contract states that plaintiff "sells" and defendant "buys." The quantity is definite. The time within which shipment is to be made is fixed. The terms of payment are set forth. It is true that the buyer is permitted a choice of five different brands. This circumstance, however, does not alter the fact that he has specifically agreed to purchase a definite quantity of flour within a certain fixed period of time. The discretion permitted the purchaser as to the quality or brand of flour to be selected by him did not introduce such an element of uncertainty as would invalidate the contract. *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 P. 917.

[2] It is further contended, as above noted, that the complaint is obnoxious to the general demurrer and that the court's action in sustaining the demurrer and in rendering judgment in defendant's favor is sustainable because the only cause of action alleged in the complaint is one whereby plaintiff seeks to recover liquidated damages, so declared in the contract and so pleaded in the complaint. This is said to be in direct contravention of the provisions of section 1670, Civil Code. The aforesaid section of the Civil Code is in the following language:

"Contract fixing damages, void. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

The "next section" of the Code to which reference is thus made is section 1671. It reads as follows:

"Exception. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

This latter section declares a specific exception to the general rule announced in section 1670, which states that every contract providing for liquidated damages "is to that extent void." In the complaint herein there is contained the following allegation: "That at the time said contract was entered into, to wit: August 17, 1929, it was impracticable

and extremely difficult to fix the amount of actual damage or loss that would result to plaintiff by reason of a breach of said contract by defendant, or to prove the same, and for that reason there was provided in said contract a method of calculating the said damages so arising from such breach by defendant as liquidated damages. * * *" Such an allegation is sufficient to bring the case within the exception provided by section 1671, Civil Code, and provides a satisfactory answer to defendant's second contention. *Dyer Bros. Iron Works v. Central Iron Works*, 182 Cal. 588, 593, 189 P. 445; *Los Angeles O. G. Assoc. v. Pacific S. Co.*, 24 Cal. App. 95, 99, 140 P. 295.

For the reasons stated, the judgment is reversed, and the trial court is directed to overrule the demurrer and to permit the defendant to file an answer to the complaint within the time allowed by law or by the order of said court.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 716
REYNOLDS v. STRUBLE.
Civ. 8079.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1933.

Rehearing Denied Feb. 17, 1933.

Hearing Denied by Supreme Court March 17, 1933.

1. Physicians and surgeons ⇨14(4).

In forming opinion in reading X-ray, physician is presumed to have, and is chargeable with, ordinary skill and knowledge possessed by practitioners in his community.

2. Physicians and surgeons ⇨18(9).

Whether physician diagnosing injury and failing to discover fracture shown by X-ray failed to exercise care and skill ordinarily exercised by physicians practicing in same locality held for jury.

3. Physicians and surgeons ⇨18(7).

In malpractice action for physician's negligent diagnosis and treatment, whether physician would have administered other treatment than that given if diagnosis had been proper held immaterial.

4. Physicians and surgeons ⇨15.

As regards physician's liability for negligent diagnosis, diagnosis terminates only when physician learns to his own satisfaction nature of ailment.

5. Evidence ⇨20(1).

Court could, in absence of testimony, take judicial notice that ordinary skill and care

of practitioners in defendant physician's community required use of X-ray as aid to diagnosis in fracture cases.

6. Physicians and surgeons ⇨15.

Physician cannot be charged for errors of judgment or for erroneous conclusions on matters of opinion.

Physician must, however, use the judgment and form the opinions, not of a layman, but of one possessed of knowledge and skill common to medical men practicing in the same or a like community.

7. Physicians and surgeons ⇨18(8).

Where first X-ray picture disclosed downward position of bony structure of shoulder, and later pictures disclosed same condition, jury was not bound to accept attending physician's statement that in between such times case was entirely different.

8. Evidence ⇨588.

Jury's power of weighing testimony and determining witnesses' credibility must be exercised in conformity with rules of law.

9. Evidence ⇨588.

Jury could consider demeanor of witnesses, reasonableness of testimony, motives, interest, and whether their testimony was contradicted.

10. Physicians and surgeons ⇨18(8).

Evidence sustained finding that physician's failure to discover and reduce fracture of bony structure of shoulder proximately caused loss of use of arm as useful working member.

11. Evidence ⇨558(8).

On cross-examination, different aspects of subject may be gone into for testing witness' knowledge and different phases of subject embraced within hypothesis may be developed.

12. Appeal and error ⇨1048(1).

Permitting examination of defendant's medical witness, in malpractice action, regarding whether such witness, attending patient, had received patient's consent to testify, *held* not prejudicial.

13. Evidence ⇨556.

Counsel in malpractice action could examine medical witness from medical textbook.

14. Appeal and error ⇨1048(3).

In malpractice action, permitting use of terms ordinary doctor or average surgeon in propounding questions, instead of phrase that degree of skill ordinarily possessed and exercised by physicians practicing in same or similar localities, *held* not prejudicial where counsel agreed to use shorter term.

15. Appeal and error ⇨1067.

Failure to withdraw from jury issues regarding injury to coracoid process, from which patient suffered no injury from physician's failure of treatment, *held* not reversible error where such process was part of bony structure of shoulder out of placement, for which action was brought.

16. Physicians and surgeons ⇨18(10).

In malpractice action, evidence warranted instructions on patient's pain and suffering resulting from physician's negligence.

17. Trial ⇨295(1).

Instructions must be read as a whole.

18. Appeal and error ⇨1004(1).

Excessive nature of award must be apparent to justify interference by reviewing court, much being left to trial judge's discretion.

19. Damages ⇨132(8).

\$20,000 for complete loss of use of left arm of structural iron worker 44 years old having approximate expectancy of 20 years *held* not excessive.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Jack Reynolds against H. P. Struble. From a judgment for plaintiff, defendant appeals.

Affirmed.

Dutton & Gilkey, of Oakland (Lewis E. Lercara, of Oakland, of counsel), for appellant.

Jesse G. Benson and Ford & Johnson, all of Oakland, for respondent.

PARKER, Justice pro tem.

This is an action wherein plaintiff sought to recover damages from defendant, a practicing physician and surgeon, for and on account of alleged negligent diagnosis and treatment of plaintiff while the latter was a patient under the care of the said defendant. The case was tried in the court below by a jury and a verdict returned in favor of the plaintiff in the sum of \$20,000, upon which verdict judgment was entered. Thereafter defendant moved the court for judgment notwithstanding the verdict, which motion was denied. Defendant appeals from the judgment entered pursuant to the verdict and from the order and judgment denying the motion for judgment notwithstanding the verdict.

A reversal is sought by appellant upon numerous grounds, which may be detailed as follows: (1) The evidence in the case is in-

sufficient to justify or sustain the verdict. (2) The trial court committed reversible error in denying the motion of defendant for a directed verdict and also in denying the motion of defendant for a judgment notwithstanding the verdict. (3) Error of the trial court in its rulings on the admission and rejection of evidence. (4) Error in the instructions to the jury. (5) The verdict is excessive. The first two grounds urged necessarily involve the same points, both going to the sufficiency of the evidence.

Before outlining the facts the contention of appellant on this phase of the case may be noted. He contends that in a case such as this two things are essential to a recovery by plaintiff. The alleged negligence must be shown and also there must be evidence sufficient to connect the negligence with the claimed damage.

Plaintiff was, on November 27, 1929, a structural steel worker, following his occupation and employed upon a building being erected in Alameda county. On that date, towards the close of the day, plaintiff was repairing or closing up a hole on the fourth floor when he lost his balance and fell through. In his fall he dropped to the second floor, going practically two stories, crashing through timbers on the way and landing against a steel column. He was a man weighing approximately two hundred pounds. Fellow workmen came to his assistance and within approximately thirty minutes the injured man was in the hospital at Hayward. His clothing was removed by a nurse, aided by the men who had accompanied him. In a short time after his arrival at the hospital the defendant doctor appeared and took charge of the case. In discussing the diagnosis and treatment up to the time the plaintiff left the hospital the defendant and appellant will be designated and referred to as the doctor. As soon as the doctor arrived he began an examination of the patient, during which he received the history of the accident and the nature of the fall. The condition of the patient, a heavy man as stated, was that of a person in extreme pain, with a severe bruise extending over almost the entire back, and the left shoulder was badly contused and abraded with black and blue areas over the left shoulder blade. The patient was unable to move his left arm or lift it at all and protested with emphasis when attempts were made by the doctor to manipulate that member.

It will be unnecessary to detail the steps of the attempted diagnosis, inasmuch as it is not strenuously contended that the doctor failed in any degree of care in as far as the clinical steps went. Suffice it to say that the doctor went through all of the ordinary and recognized procedure. He tested the chest and lungs to ascertain the probability or possibility of injury or congestion; he tested

the blood pressure to determine if head injury had been sustained; and he tested the urine to ascertain the reaction of the kidneys or other organs that might disclose any ill effects from the fall. Thereupon the doctor determined that it was necessary to make use of the X-ray. The touch had revealed no fractures and the swollen condition of the surface had obscured all anatomical landmarks. Accordingly a portable X-ray machine was brought to the bedside and the patient placed in a position permitting the taking of the picture. A picture was taken and the film developed and studied by the doctor. Upon the completion of the examination, including the X-ray, the doctor stated to the patient and to his friends who were present that there were no fractured bones nor were there any broken bones. The doctor had detected some lung symptoms and stated to the patient that he should be kept in bed for a few days, about one week; the idea being to forestall an onset of pneumonia, which is frequently an aftermath of an injury such as that sustained by the patient. After two days in bed the patient regained normality in every particular save in the injured area. His temperature, respiration, lung action, and general condition, aside from the locality of the afflicted area, gave normal reaction, save for a slight cough. After these two days the patient was able to attend to his natural needs and on the eighth day left the hospital. He left in an automobile in which he sat upright in the front seat, being able to walk to and from the auto. From the time of his departure from the hospital to the time of trial he had never returned to the hospital nor received further treatment from the doctor.

The fact is, as disclosed by the evidence, that at the time the injured man was brought to the hospital he was suffering with and from a series of fractures involving almost the entire structure of the left shoulder and its inclusive processes. It will not be necessary here to detail with anatomical accuracy the exact nature of the injury. The structure of the shoulder includes the cavity wherein rests the head of the humerus (being the long bone of the upper arm) and likewise includes the acromion process which is the highest point of the bony structure commonly referred to as the shoulder tip. Attached to the structure or adjacent thereto and being a part of the functional mechanism is the clavicle or collar bone and the scapula or shoulder blade. Lying somewhat under the acromion process is the coracoid process. The negligence and lack of skill charged to the doctor rests upon his alleged failure to discover the true condition existing. It is, as indicated hereinbefore, not claimed that any lack of skill was shown up to the time of the X-ray picture, though plaintiff does not admit there would have been a

skillful diagnosis without the use of this agency. But we may pass the questions arising under this head. Whether or not a skillful diagnosis required the use of the X-ray, the undisputed fact is that such a picture was taken.

While the doctor, after reading the developed film of the X-ray picture, decided that there was no fracture present, the X-ray picture discloses a fracture of the neck of the scapula, with an inward and downward displacement. Much medical testimony was adduced by both sides on the subject of this X-ray picture. It seemed to be almost the unanimous conclusion of the experts that the picture was not of the highest type in clarity and detail and likewise it seemed agreed that such a picture would not be accepted as a basis of diagnosis by a doctor possessed of ordinary skill practicing in the community wherein the case arose.

Notwithstanding the lack of detail and disregarding the claimed imperfections in the picture, the evidence almost conclusively shows that there was sufficient clearness and detail to disclose the presence of a fracture. One witness for the plaintiff, in all respects qualified, testified that the fracture was so obvious that a two-year medical student would have no difficulty in locating it on the picture. The picture was in evidence and displayed to the jury. The witness, before the jury, with pencil, outlined the fracture on the picture and even the witnesses apparently most favorable to defendant conceded that sufficient did appear to demand further pictures. There was more than sufficient testimony adduced by both sides to almost demonstrate that the picture showed plainly a fracture. Witnesses whom the record would indicate to be men of high standing in the medical profession, called as witnesses for the defendant, when shown the picture would not deny that fact.

[1, 2] It is the contention of appellant in this regard that the reading of an X-ray film or negative involves to a large degree the opinion and judgment of the person reading the same. And, argues appellant, a doctor or physician cannot be held accountable for an honest error in drawing a conclusion on such a matter. Such may be conceded to be the law, within certain limits. Yet, in forming an opinion and acting thereon a physician is presumed to have and is chargeable with ordinary skill and knowledge possessed by practitioners in his community. The existence or nonexistence of things visible to the eye, with reference to material objects, is not a matter of opinion, and necessarily cannot be. It would seem absurd to say that a surgeon looking at a bleeding wound could claim the benefit of an opinion that there was no wound. We are satisfied that there was sufficient evidence before the jury to

warrant the finding that in making a diagnosis of the plaintiff's injuries the defendant doctor failed to use and exercise that degree of care, skill and learning ordinarily possessed and exercised by physicians or surgeons practicing in the same locality.

It might be noted, in view of what has been said regarding the imperfections of the X-ray, that defendant doctor steadfastly contends that the picture was clear and good, though lacking in a detail that could be secured only through a more elaborately constructed machine. This, of course, reflecting the doctor's own conduct, would make the unskillfulness more apparent.

The contention is made, and it seems to be conceded, that the condition of the patient demanded great care, aside from the question of the fractured parts. In other words, the general condition of a man after the history given might be such as to relegate the fracture to the rank of a comparatively minor injury. The claim follows that in taking the X-ray the purpose thereof was solely to get a chest picture in an effort to visualize the lung condition or other internal hurt, if any, and that therefore the disclosure of the fracture was but incidental in the picture. However, it is shown by competent testimony that any picture of the chest, taken as was this one, would necessarily show up the scapula.

[3, 4] And it is likewise in the record, beyond dispute, that the exercise of ordinary skill and care such as possessed by physicians and surgeons practicing in that community would have required further examination and the taking of further X-ray pictures to determine the true condition of the patient. It is admitted that there may be sufficient reasons which would prevent further examination or at least defer it. Foremost and perhaps the principal reason is the condition of the patient. It is shown and conceded that there is always a certain element of risk in moving a patient, in the condition of plaintiff at the time; that many elements combine to make this risk, including shock, pain, and danger of pneumonia. The question then of further examination becomes a question to be determined by the doctor in charge, in each particular case. Yet the record before us discloses sufficient evidence to warrant the jury in finding that none of these conditions were present in the instant case. The patient was able to and did move about the room, his temperature, respiration, and pulse became approximately normal, and his appetite and sleep combined with the other normal symptoms to remove any anticipated danger in further examination. During the time the patient remained in the hospital, the record discloses that nothing was done for him along other lines of treatment other than rest and general care. The undisputed fact is that he lay there during that

period with almost the entire structure involving his left shoulder broken down and disorganized, constantly complaining of pain in those parts, and no effort at all being made to locate the cause of his trouble, due entirely to the lack of care and skill of the physician to interpret or read the X-ray which demonstrated the trouble. And then, when he did leave the hospital, it was with the consent of the doctor and with his knowledge and at that time the doctor again told the patient that he had suffered no fractures. Much is said and much testimony was introduced concerning the point as to what ordinary care and skill would have required if the doctor had discovered the fracture. The point is urged that had the fracture been observed and a complete and proper diagnosis made it would have become a matter of personal judgment with the doctor as to whether or not he would have done anything other than he did. On this phase of the case the point is immaterial. Just where diagnosis ends and treatment begins may become a moot question, but to us it seems obvious that diagnosis terminates only when the physician learns at least to his own satisfaction the nature of the ailment. And it seems to be true from the record before us that the purpose of detaining the patient in the hospital, among other things, was to note developments and for further examination. As hereinbefore indicated, nothing further did develop and the original diagnosis of mere bruises and contusions remained the diagnosis with which the patient left the hospital. There is evidence warranting a finding of the jury that if the fracture had been discovered, then ordinary care and skill such as possessed and used by physicians practicing in that locality required that steps be forthwith taken to accomplish a reduction or replacement.

[5] There is further evidence that ordinary skill and care required the use of the X-ray as an essential aid to a skillful diagnosis, employing that skill and care possessed and used by the ordinary practitioner in that community. Indeed, it might be almost said that the use of the X-ray as an aid to diagnosis, in cases of fracture or other indicated cases, is a matter of common knowledge. Even the layman, when injured, of his own accord seeks the X-ray. And under the rule of *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, the court could, in the absence of testimony, take judicial notice of this scientific advancement.

We have no hesitation in holding, under the evidence adduced, that there is sufficient in the record for the jury to have concluded that when the patient left the hospital, in the condition in which he was, that he was then the victim of the unskillful diagnosis

and that he had not received that skillful care which the doctor impliedly held out to him. Further there is evidence that the fractures existing could, with ordinary skill and care, have been reduced and a functional arm result. And still further is there testimony that the present useless condition of that arm is the result of the failure of the attending physician to discover and reduce the fractures; of which more hereinafter.

[6] On this phase of the case we meet the constant argument that the charged negligence involves matters of judgment and opinion on the part of the physician, for errors of which he cannot be held liable in damages. We have no quarrel with the principle of law that a physician cannot be charged and held on mere errors of judgment or for erroneous conclusions on matters of opinion. However, he must use the judgment and form the opinions, not of a layman, but of one possessed of knowledge and skill common to medical men practicing in the same or a like community. That a practicing physician may have done his best is no answer to an action of this sort. The law has fixed a standard, liberal to the practitioner and easy of fulfillment. We pass, then, this phase of the case.

[7] The second essential is that there must be a causal connection between the negligence and the injury; in other words, the use of proximate cause.

The plaintiff charges his present condition to the found lack of skill. It then becomes important to disclose his condition. The plaintiff has forever lost the use of his left arm as a useful working member. There may be some slight value thereto, but it seems agreed by all of the medical witnesses that the use to be gained from the arm is practically nil. Again, the medical authorities are in seeming accord as to the conditions existing which bring about this result, as far as the mechanism is involved.

Anatomically speaking, the structure of the human body is such that the mere framework on the living being is by itself of little more value than the same framework on the cadaver. Motive power and muscular control are required to animate the structure. The large muscle which controls the action of the upper arm is called the "deltoid muscle." This muscle is in turn energized by a nerve structure, the chief nerve being the circumflex nerve. We find it needless to attempt any scientific nicety as to all of the various muscles and nerves which either directly or remotely combine with those named in the supplying of power and control to the parts involved. The medical testimony likened the human system to the distribution of electric power with the creation and distribution of energy and included many factors, each intimately connected in the scheme. Yet all

agree that with the destruction of this deltoid muscle or at least the complete impairment of its use and power, the arm is and will remain useless. And they all agree that this muscle is almost completely gone. It is plaintiff's theory and claim that the muscle has become atrophied through disuse. This theory reasons out as follows: The original injury was such that the force of the fall drove downward and inward the shoulder bones and the processes thereunto attached, including the scapula, the acromion and the glenoid fossa, the latter being the cavity wherein rests the end or head of the large bone of the upper arm. The deltoid muscle, in normality, is of certain elasticity and tension and of a length sufficient to function in accord with the mechanical design of leverage with the arm and the joints or bony structure of the shoulder. By driving the upper processes inward and downward the distance between the termini of the operating ends of the muscle was shortened, leaving, as it were, a slack in the muscle. With the tension removed the muscle could not within itself contract and relax and even if energized to the capacity of the supplying nerve could not tighten to the point required to function. Explanatory, without the anatomical nicety, the situation would be somewhat visualized by comparing a rope of ten feet in length with its ends attached to points only eight feet apart. A contraction of one foot in the rope would, obviously, apply no power to either end. Through the consequent disuse of the muscle, contends plaintiff, it has become atrophied and this atrophy has been of such long standing as to preclude recovery of function without deep and somewhat experimental surgery, which, it is agreed, should not be undertaken at this time.

Appellant's theory is somewhat different. It is his contention that the muscle has become paralyzed through loss of nerve energy. The argument, supported by medical testimony, is that the original injury caused certain injuries to the nerve structure with the result that some of these energizing nerves were either severed or bruised to a point of degeneracy; that for this reason the nerve supply has been cut off from the muscle, bringing about both paralysis and its consequent atrophy from disuse. There was a direct conflict of evidence on this feature and evidently the jury chose to adopt the views of the medical witness for the plaintiff. Indeed, at the trial a demonstration was had for the benefit of the jury with the purpose of showing that the claimed dead nerve yet functioned and did supply energy to the muscle.

Going further on this disputed point of causal connection or proximate cause, appellant contends that the opinion of a medical or other expert stands or falls upon the rea-

sons given for his conclusion. Plaintiff's witness testified that the present condition of the plaintiff was due to the failure to discover and reduce the fracture conceded to have taken place in the body of plaintiff. The reason he assigns for this is that almost immediately upon the fracture of a bone in the human body nature starts to repair and heal the damage. Given such a fracture, the process nature adopts is to immediately throw out a callus, liquid in form at the start, with which to cement the break and restore a complete bony unit. As time goes on this fluid so thrown out begins to harden, gradually becoming of a bony hardness and in reality new bone. However, while healing of the bone is thus effected, there is no replacement or restoration to alignment. The break is healed in the same position as left by the fracture. If the bones were displaced, or as in the instant case thrown downward and inward, they would remain in that position, though healed and united by new bone. The muscles and ligaments attached to these bones would hold them firmly in the position of displacement and reduction could not be accomplished, and in this case was not accomplished due to the negligent delay. The witnesses for the defendant were surgeons who had attended plaintiff commencing at a period three weeks after the accident and approximately two weeks after he had left the hospital where he had been in the care of the defendant. These doctors testified that when plaintiff came under their care there was not a single bad result present from the failure to have reduced the fracture. They testified that there was no bony union present and that the shoulders were in normal apposition, the left shoulder being in uniformity with the right in location. They detected a still present swelling, which it was found necessary to reduce, and outer inflammation which they undertook to allay. Their X-rays disclosed the fractures noted and the same pictures disclosed to them the complete absence of bony union. They agree that the fractures subsequently healed without reducing the fractures and agree that this process of healing was accomplished by nature through means of the union hereinbefore discussed. But, they testify, this union did not take place until many weeks after. They repeat, strenuously, that the condition they found was in nowise aggravated through the delay in treatment and that they found the same condition in all respects as would have been present at the outset without aggravation or increased involvement of any sort. They testify that as far as the bony structure of the shoulder is concerned, while slightly out of placement, yet it is in all respects as good as new and that the helpless condition of plaintiff is not due to any bone or structural defect but due to the loss of muscular power to operate the mechanism; this, to repeat, being due entirely to the lack of nerve supply.

This nerve condition, they testify, was apparent to them on the patient's first visit. And, they aver, this condition resulted from the fall and the impact thereupon resulting, and the delay in diagnosis and attempted repair in no way or manner nor in any degree contributed to the damage they found.

We have thus presented a conflict in the evidence, the opposing theories each resting on either actual or assumed facts. The appellant argues strenuously that this conflict is but apparent. His reasoning, in the main, is based upon the cases cited as follows: *Winthrop v. Industrial Accident Commission*, 213 Cal. 351, 2 P.(2d) 142; *Thoreau v. Industrial Accident Commission*, 120 Cal. App. 67, 7 P.(2d) 767; and *Singer v. Industrial Accident Commission*, 105 Cal. App. 374, 287 P. 567.

It will be noted, before further discussion, that all of these cases arose under the Workmen's Compensation Act (St. 1917, p. 831, as amended) and the rule of decision necessarily liberal in order to effectuate the intent of the statute. The rule announced in those cases may be taken from the *Winthrop Case*. There it is stated that physicians who have made physical examination of the affected area and have treated petitioner have before them the original evidence which is not before the physicians who give their opinions based on a statement of facts without opportunity to investigate the original condition attempted to be described. Following out the rule the court held that the testimony of the physicians testifying without having had the opportunity of investigation of the original condition did not have the effect of creating a conflict with the testimony of the physicians who had made the original examination and who had before them the original evidence. Expressed in a different way, mere conclusions will not serve to meet the definition of substantial or any evidence as against positive, direct evidence of a fact.

However, the same situation is not present in the instant case. The evidence of plaintiff's medical expert was based upon an X-ray picture of the scapula taken on the very day of the accident and on pictures subsequently taken showing the exact nature of the injury. He testified from this picture that the shoulders were out of balance and that the left shoulder was impacted downward and inward. The testimony of the physicians who attended later was that no such condition existed and they too presented X-ray pictures to support their claim. Both sides relied, to a great extent, upon these pictures. The testimony of both sets of doctors was illustrated and explained through the use of these various X-rays and what each picture disclosed was explained to the jury who had the pictures before them. The claim of plaintiff was not only that a union would have been creat-

ed which would make reduction difficult if not impossible but also that the muscles and ligaments and soft tissue would combine to hold in misplacement the disturbed bones. The testimony of the physicians who attended the plaintiff three weeks after the accident was that no union had formed. This conclusion, as noted, was based to the larger part upon the X-ray pictures. However, it was admitted that such a picture would not disclose a union until the same had become of the substance of bone. In other words, the callus, if even to the hardness of cartilage, would not reveal itself to the X-ray machine. Neither set of medical witnesses ever went inside to find the exact location of the bones or the muscular surrounding that maintained the offset. When the first picture disclosed the downward and inward position and the irregularity of shape and the latter pictures disclosed the same situation and the present physical examination of the patient likewise disclosed a similar situation, we cannot say that the jury was bound to accept the statement of the attending physicians that at a time in between the case was entirely different.

[8, 9] On this phase of the discussion there enters another question. It has been and is an old stock instruction which almost every trial judge gives to a jury that they are the sole judges of the weight to be given the testimony of any witness and that it is for the jury to determine the credibility of the witnesses. The instruction goes further and tells the jury that this power of weighing the testimony and determining the credibility of the witnesses is not an arbitrary power but is to be exercised in conformity with certain rules of law. The jury is then told that they may consider the demeanor of the witness on the stand, the reasonableness or unreasonableness of his testimony, his motives, if any, and his interest. Also they may consider whether or not his testimony is contradicted. That this is sound law and a sound rule of practice cannot be questioned.

In the instant case the witnesses testifying for the defendant on the points under discussion did display a direct interest in the outcome of the case. One testified that he was unalterably opposed to malpractice cases, regardless of the facts. Almost all of them testified that they were acting without fee or charge as a professional duty, as it were, to repel the inference that might arise against physicians and surgeons as a class. It was shown that some of the medical witnesses had approached the plaintiff's witness and attempted to intimidate him or at least to dissuade him from testifying under pain of ostracism. Also it appeared that the physicians who upon the first examination of the plaintiff found the nerve injury did make an extensive report of their findings, embracing

some thirty or more pages, and a careful scrutiny of the report failed to disclose a single mention of any nerve impairment. Also it was before the jury that these same physicians began their treatment by putting the arm in what was designated an airplane splint, the stated object being to remove the bony structure from muscular interference, leaving the obvious query as to what interference might be expected from a muscle already dead.

From these and various other considerations including the demeanor of the witnesses and the manner of testifying, we cannot say what weight the jury gave to the testimony of the various witnesses. If the jury concluded that medical experts were before them in some sort of united effort to pull the case out of the fire as a matter of professional pride or interest they would naturally discount the testimony to some extent. And beyond the jury's verdict we find the action of the trial judge, upholding the verdict, both on motion for a judgment for defendant notwithstanding the verdict and on motion for a new trial.

[10] While, as we have stated, the law requires proof of both negligence and causal connection of the proven negligence with the injury, yet there is no hard and fast rule as to the quality or quantity of proof. We quote from *Barham v. Widing*, 210 Cal. 206, 215, 291 P. 173, 177, as follows: "After the verdict of a jury has been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof." Quoting then from *Dimock v. Miller*, 202 Cal. 668, 671, 262 P. 311, we find: "If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science." And in *Ley v. Bishopp*, 88 Cal. App. 313, 316, 263 P. 369, it is held that it is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment. We therefore conclude that the evidence is sufficient on both branches, namely, negligence and proximate cause.

What has preceded sufficiently answers the claim of error in the refusal of the court to direct a verdict for defendant and the alleged error in denying defendant's motion for a judgment notwithstanding the verdict.

[11] We will now take up seriatim the other grounds set forth in appellant's claim
18 P.(2d)—44½

of prejudicial error requiring a reversal. The point is made that the trial court committed reversible error in permitting respondent to propound hypothetical questions which were based on facts not only not in evidence but directly in conflict with all of the evidence. We have examined the record and find the point without merit. The complaint is based mainly on questions asked in cross-examination after the witness had answered the hypothetical question first propounded by appellant. It is a well-recognized rule of cross-examination that different aspects of the subject may be gone into for the purpose of testing the knowledge of the witness and different phases of the subject embraced within the hypothesis may be developed.

[12] It is next urged that error warranting reversal resulted in the court's allowing the examination of a doctor, called by appellant, relative to his omission to divulge certain information to the respondent. Without conceding the error, we cannot say that it is of any moment in the instant case. In any event, the point is misstated, inasmuch as the error complained of was not on the fact of failure to divulge information to respondent but was on the question as to whether or not the doctor, who had attended the plaintiff, had received the latter's consent to testify. To repeat, we find no prejudicial error.

[13] The next claim is that the court committed reversible error in allowing respondent to examine a doctor from a medical textbook. The record does not bear out the appellant in his statement of the fact. The matter was called to the attention of the trial court and it was held that plaintiff's counsel was not doing the thing complained of. Indeed, we know of no rule of law or practice that would prevent counsel from being intelligently advised as to the accuracy of his questions.

[14] Complaint is next made that the trial court committed reversible error in allowing respondent to propound various questions to expert witnesses which assumed a standard which the law does not set up. The transcript discloses that throughout the trial there was an interchange of terms and phrases. Often, instead of using the term or phrase "that degree of skill, care and learning ordinarily possessed and exercised by physicians or surgeons practicing in the same or similar localities," both counsel dropped into the shorter terms of "average physician," "ordinary doctor," "reasonably prudent physician or surgeon," etc. At one stage of the trial an understanding was had between counsel that instead of using the long term that they use the term "the ordinary doctor." This understanding was unequivocal and explicit. Surely if it did no harm thereafter it could have done none before.

The next point may be passed without comment inasmuch as an analysis would extend to great length and involve purely academic discussion. Here again, conceding error, no harm resulted therefrom nor was any right, substantial or otherwise, taken from the defendant or prejudiced.

[15] It is then urged that the trial court committed reversible error in refusing to grant appellant's motion to withdraw certain issues from the jury. The point arises with reference to the injury to the coracoid process. This may be described as a small protuberance on the scapula, being one of the three bones of the shoulder. The testimony of plaintiff's witnesses disclosed that no injury resulted to plaintiff for any failure of care with respect to this process. Accordingly, at the time of the closing of the case, appellant requested or moved that this issue with reference to the coracoid process be withdrawn from the jury. The motion was denied. Without detail it may be stated that this process is a part of the structure of the shoulder and while it might not have been subject to reduction after fracture, yet it did remain a part of the structure out of placement. We cannot hold that the trial court would have been warranted in this case in outlining the anatomical structure of the plaintiff and narrowing the issues to any one or more bones.

The next complaint goes to the instructions. The first instruction criticized is the one defining negligence of a physician. Without quoting the instruction we find no fault therewith. All negligence is relative, whether negligence of a physician or negligence of a person in any other walk of life. The first element of relativity, and perhaps the whole of it, is a fixed duty, or a degree of care fixed by law. While the instruction is general, it is admittedly preliminary and definitive. Further on in the instructions the subject was completely and exhaustively and correctly covered.

[16, 17] The next instructions are in the form of a direction to return a verdict for defendant. Sufficient has been said hereinbefore to dispense with further discussion on this point. The last instructions criticized and made the basis of reversal involve the question of pain and suffering. Appellant strenuously maintains that there was no sufficient distinction made between pain and suffering following and resulting from the accident itself and that claimed to have followed from the alleged negligence. Likewise it is urged that there was no evidence on the subject warranting the giving of any instruction thereon. Taking up the last contention it would be readily apparent that there was much from which a jury might infer pain. The testimony was, as we have found, sufficient to charge the unfortunate condition of

the plaintiff to the negligence alleged, inasmuch as the result of such negligence was the continuation of the fractured and generally disabled state of plaintiff. No inference of resultant pleasure could follow from the evidence of the subsequent treatment. Nor could aught but pain and distress be inferred from the three weeks' delay in treatment. In addition thereto was the evidence of the physicians as to the pain expressed and the swelling present and permitted to remain. *Kinnear v. Martinelli*, 84 Cal. App. 721, 258 P. 686, supports the rule that instructions may be based upon reasonable inference from the evidence disclosed by the record. On the point that the court did not clearly distinguish as to the source of the pain suffered we find that the specific instructions brought to our attention by appellant constitute but a part of the instructions given. By a somewhat strict construction the portion submitted by appellant might bear out his contention. But no rule of law is more settled than the rule providing that the instructions must be read as a whole. Upon a study of the instructions, taken as a whole, we find the subject fully and intelligently covered and the jury specifically instructed that recovery could be had for such pain and suffering as followed and resulted from the alleged negligence of defendant as distinguished from the pain ordinarily to be expected from the accident. We find further that the instructions are not tainted with the vice of conflict, nor are they misleading.

[18, 19] The last point urged is that the verdict is excessive. Given the finding that the complete helplessness of the plaintiff resulted from the negligence alleged, we cannot assume for ourselves that a portion thereof would naturally result from the original injury. The plaintiff was a man forty-four years of age, with a wife and minor son. He was a structural iron worker earning eleven dollars per day and working five and one-half days per week for ten months in the year. His expectancy was approximately twenty years. His earnings over the period of expectancy would exceed \$50,000, and if we cut the period of expectancy in half, to allow for the inability of age, we find an earning capacity in excess of \$25,000. Aside from this there are certain other elements of damage well embraceable within the amount awarded. The plaintiff did suffer pain; there would be a continuing pain, either mental or physical, perhaps both. In fact mental pain or anguish cannot by any process of law or medicine or kindred science be separated from purely physical pain and suffering. His status in the social order is completely changed. He is, as it were, one of the wrecks of industry. With all of these things in mind we can not arbitrarily pronounce the amount of such proportion as to indicate passion or prejudice

on the part of the jury. The law respecting the powers of a reviewing court on the subject of an excessive award is to the effect that the excessive nature of the award must be apparent. And further the rule is announced, that much is left to the discretion of the trial judge in determining whether or not the sum awarded is unjust and excessive. Further, it was shown that the plaintiff was already impaired in the use of his remaining arm so that his present situation is one of utter and complete disability.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

129 Cal.App. 177

NOBLE v. BACON.
Civ. 7917.

District Court of Appeal, First District, Division 1, California.

Jan. 25, 1933.

Rehearing Denied Feb. 24, 1933.

1. Automobiles ⇨245(72).

Contributory negligence of pedestrian, struck by automobile driven through street intersection at excessive speed after dark without lights, in failing to see or proceeding across street in pedestrian's lane after seeing car, *held* for jury.

2. Appeal and error ⇨1001(1).

Jury's finding on substantial testimony that pedestrian struck by automobile was not contributorily negligent will not be disturbed on appeal.

3. Trial ⇨127.

Evidence of reference to defendant's insurance is admissible in personal injury suit, if incidental to admission of liability and part of same statement.

4. Trial ⇨127.

Admission of testimony, in action for injuries to pedestrian struck by automobile, that defendant said he was sorry, but did not see plaintiff until he hit him, and that defendant's insurer would take care of him, *held* not ground for mistrial or reversal of judgment for plaintiff.

Defendant's counsel stated, after court struck out and directed jury to disregard testimony as to insurance, that effect thereof was in and they had better go into matter; and that insurance company was insolvent and could pay nothing, whereupon plaintiff's counsel stated that defendant's counsel might show such fact, if he could, and court stated that he had

no objection to going into question with consent of plaintiff's counsel.

5. Appeal and error ⇨1060(1).

Reviewing court should not arbitrarily undo results of trial because of reference to defendant's insurance, where question whether it was intended solely to create prejudice or merely incidental is debatable.

6. Appeal and error ⇨901, 1032(1).

Appellant must show error complained of and wherein his substantial rights were affected.

7. Appeal and error ⇨215(1).

Appellant's failure to call appellate court's attention to instructions given or whether subject of refused instructions was elsewhere fully covered requires affirmance of judgment as against contention that court erred in refusing such instructions.

8. Automobiles ⇨246(38).

Instruction that defendant motorist was under no duty to drive car so as to protect person who might suddenly run into its path without warning *held* properly refused as too broad.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Wayne Noble, by Gladys Barnett, his guardian ad litem, against Thomas P. Bacon. Judgment for plaintiff, and defendant appeals.

Affirmed.

Brobeck, Phleger & Harrison and Bronson, Bronson & Slaven, all of San Francisco (Southall R. Pfund, of San Francisco, of counsel), for appellant.

C. D. Dethlefsen and Clifton Hildebrand, both of San Francisco (Thomas F. McCue, of San Francisco, of counsel), for respondent.

PARKER, Justice pro tem.

This is an appeal by defendant from the judgment below entered on the jury's verdict, in favor of plaintiff, for \$10,000, assessed as damages for personal injuries. At the outset appellant admits that there is evidence which the jury had a right to believe which supports the implied finding that defendant was negligent. It therefore becomes unnecessary to discuss any conflict in the evidence or to do more than sketch the facts, save as certain parts of the record become essential to illustrate the points presented.

[1] The first claim of appellant is that the plaintiff was as a matter of law guilty of contributory negligence to an extent and with such relation to the accident as will bar any recovery. The plaintiff at the time of the accident was a boy of the age of eleven years and some months, and apparently of full de-

velopment proportionate to that age. There is no dispute that there was an accident wherein the plaintiff in some manner collided with an automobile driven by defendant. True, there is some conflict as to whether the plaintiff was struck head-on or whether the auto hit him after having passed partially the point where the plaintiff was standing. For the purposes hereof it is unnecessary to go into the minutest detail in this regard. The accident happened during the evening hours and at a time of general darkness. There is no question of the injuries sustained or the extent thereof, though some dispute arises as to the effect and permanency thereof. As to the manner of the occurrence there is a sharp and irreconcilable conflict. With this conflict we, however, on this phase of the case have little concern. We find sufficient evidence to support the following version of the accident: Plaintiff had alighted from an automobile at a point some 8 or 10 feet from the corner of two intersecting streets. He had alighted to the sidewalk and proceeded to the corner, it being his purpose to cross the street. He was at the regular point of crossing reserved for pedestrians and entered upon that section of the intersection so reserved. Before leaving the curb he paused and looked for approaching traffic. He stopped again after entering the intersection and looked in both directions and then proceeded. He had gone but a few feet from this last stop when the impact occurred. The defendant was driving his car to and through the intersection at a speed of twenty-five miles per hour, in a fifteen-mile zone. The car of defendant was without lights of any kind, headlights or other lights, side or tail. The testimony showed, however, that the area of the intersection was lighted and that the car of defendant could be observed or at least was observed by one witness, although another witness testified that the first view of the approaching car was almost at the time of the accident. It may also be noted that the width of the street which the plaintiff was engaged in crossing was approximately 60 feet, perhaps little over 50.

Appellant contends that the law required of the plaintiff an ever alert vigilance throughout the entire crossing and that this requirement is not satisfied by occasional glances. Then, argues appellant, the law presumes that to be seen which was in plain and common sight and that having seen the approaching car it was negligence, as a matter of law, for plaintiff to have proceeded. The contention is wholly argumentative and to a great extent academic. In the first place, there is testimony that the car was not seen until about the time of the impact. Repeating the record, the car had no lights and was approaching at a speed of twenty-five miles per hour, being at the rate of 36.66 feet per second. There are then so many factors that enter

into a consideration of the question of negligence on the part of the pedestrian. We find the pedestrian in the lane provided for foot travel; it is night and dark. The street is narrow and the approach of the on-coming car is sudden. The car is unlighted and unobservable save for the street lights surrounding the area. The pedestrian, in the usual course of things, would look for a lighted car and the extent of his observation would be controlled more or less by the lights he might observe. The natural expectation of the foot man would be that approaching vehicles might yield or at least be under such speed control as would permit safety in crossing. Without further enumerating these varying and various factors, we might concede that from a standpoint of fact negligence might be attributed to the pedestrian; nevertheless we must conclude that there are too many independent conditions to permit the law to set up any arbitrary requirements of conduct.

In *Smith v. Southern Pacific Co.*, 201 Cal. 57, 68, 255 P. 500, 505, it is said: "Each [referring to pedestrians and operators of vehicles] may rightfully expect that the other will, at the proper time, discharge his proper duty towards others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time." The court quotes liberally from *Scott v. San Bernardino, etc., Co.*, 152 Cal. 604, 93 P. 677.

In the case of *Flach v. Fikes*, 204 Cal. 329, 332, 267 P. 1079, 1080, we find the following: "He [the pedestrian] has a right to expect that those operating automobiles upon a public street will operate them in the manner and at the speed, customary at the particular place. Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court." After citing many authorities in support of the foregoing, the court continues: "While the above authorities all deal with the rights and duties of a pedestrian in crossing a city street in front of an approaching street car, we think the same rule should govern in the case of persons crossing in front of a moving automobile." In the same case the court reviews the factual situation with reference to the pedestrians observing the approaching automobile and con-

cludes that if the former had looked he must have seen the approaching automobile. The court then says: "He may well have reasoned that defendant was traveling at a lawful rate of speed and therefore he could cross the street before defendant's automobile would reach the point in the street over which deceased [plaintiff] would be required to pass in crossing the same. Had defendant been traveling at a lawful rate of speed, decedent [plaintiff] might have crossed the street in safety. Under the circumstances, whether he acted negligently or not was for the trial court, and its findings as to his negligence will not be disturbed on appeal."

And finally the rule is enlarged upon and again exhaustively discussed in the case of *Leblanc v. Coverdale*, 213 Cal. 654, 3 P.(2d) 312. We will not quote from the last-cited case, but a reading thereof will leave no doubt as to the question of plaintiff's contributory negligence being one for the jury.

In the briefs on file the parties have not discussed this question at any great length. The contentions of the respective parties go more to the question of the plaintiff's age, appellant arguing that a minor of the age of eleven is chargeable with the same degree of care as an adult, while respondent cites much authority that in all cases the conduct of a minor is a question of fact for the jury.

[2] From what we have said it becomes unnecessary to determine this question, inasmuch as a concession to appellant's contention would bring us only to the point hereinbefore determined. We conclude, therefore, that the question of plaintiff's negligence has been determined by the jury upon substantial testimony and we will not disturb the finding.

[3, 4] The next two grounds urged by appellant, while separately stated, will be considered, as perforce they must, as one. These contentions are as follows: (1) The court erred in refusing to order a mistrial because of the injection of the element of insurance into the record. (2) The judgment should be reversed because defendant's right to a fair trial was prejudiced by the evidence and discussion of insurance.

Upon the voir dire of the jurors questions were asked concerning the interest, if any, the prospective juror might have in a certain insurance company. No impropriety is urged at this point. At the trial a certain witness was called by the plaintiff which witness was not an eyewitness to the accident and knew nothing concerning the facts of the occurrence. This witness was called to testify regarding a conversation had between the witness and the defendant. He was asked to state the conversation and what was said by the defendant. The reply was as follows: "He said he was very sorry he had hit the boy, he didn't see him until he hit him, and

that his insurance company would take care of him." At this point discussion began. Counsel for appellant moved that the answer be stricken out on the ground that it was incompetent, irrelevant, and immaterial; he then assigned the asking of the question as prejudicial error that could not be cured, and moved for a judgment of mistrial. Counsel for respondent contended the statement to be but an admission of liability and contended for its admission. Counsel for respondent disclaimed intent of bringing out the question of insurance. The court thereupon struck out all of the answer pertaining to insurance, and directed the jury to disregard it. Appellant then renewed his motion for a mistrial which the court again denied. There was then some further colloquy between court and counsel wherein the court suggested that counsel was blowing hot and cold, whereupon counsel for appellant stated: "Well, I want to blow hot right now, if your Honor please. The effect of this answer is in. We have got a statement here to the effect that this defendant would not have to pay any judgment that might be rendered against him, but that an insurance company would have to do so. Now we have got a situation here where the bell having been rung, cannot be unring. * * * Now we had better go into this. I want to say that the insurance company in this case is insolvent and can't pay anything, and counsel knows it." Whereupon counsel for respondent replied: "Well, let counsel go right ahead and show that if he can. We will show that they have plenty of assets. That's fine." They continued their cross-retorts on the subject of the carrier's solvency until stopped by the court saying: "You asked the Court to declare this a mistrial, Mr. Slaven [counsel for appellant]. The Court denied it because you moved to strike. You had not then asked that the jury be discharged. Now, you say you are perfectly willing to go into the question of insurance. The Court has no objection, counsel on the other side consenting." Counsel for respondent: "Yes, your Honor." This is all of the record necessary to cite at this period.

While a reference to the fact that defendant is insured against liability may be highly prejudicial, and the courts do not hesitate to reverse verdicts of juries where such evidence is improperly admitted, it is a well-settled exception to the general rule that where the reference to insurance is incidental to an admission of liability by defendant and a part of the same statement it is admissible, not to prove the fact of insurance, but solely because it is a part of the admission. *Handley v. Lombardi*, 122 Cal. App. 22, 9 P.(2d) 867, and cases therein cited.

In *King v. Wilson*, 116 Cal. App. 191, 2 P.(2d) 833, 834, the objectionable statement was as follows: "* * * He * * * said he was sorry it all happened but he had insur-

ance to pay for everything." The court refused to reverse the judgment and said: "The remaining question for decision is: Did the answer tend to disclose acknowledgment of responsibility, and would its admission be such as to create a prejudicial error that would warrant a reversal of the judgment of the trial court? It will be noted that the answer purported to relate a conversation had with defendant some time after the accident. * * * The last four words of the answer, 'to pay for everything,' would lead us to conclude that no other inference could logically be drawn therefrom and would constitute such an acknowledgment of responsibility and declaration against interest. This being true, such evidence was admissible."

Coming to the instant case, there seems but a play of words in attempting to differentiate between the language here used and the language of the cited case. To say, "I have insurance to pay for everything," or to say, "My insurance company will take care of you," are phrases of identical meaning.

The statement assailed here as prejudicial fits with the statement before the court in *Harju v. Market Street Ry. Co.*, 114 Cal. App. 133, 299 P. 783, 789. In that case the insured had stated that the accident was his own fault and that he was fully insured. The court again announced the rule of law as follows: " * * * Where a defendant makes a statement which may be fairly construed as an admission or acknowledgment of responsibility and as part of such statement makes reference to the fact that he carries insurance, the entire statement may be admissible." Applying this to the case at bar we find the entire claim of plaintiff to have been that defendant was driving at an excessive speed and without lights, after dark. The statement of defendant that he did not see the boy until he hit him could reasonably be construed as an admission that defendant was guilty of either or both of the negligent acts. Defendant expressed sorrow. While our language is elastic enough to preclude an implied admission of guilt by an expression of sorrow, yet, on the other hand, its elasticity does permit such a construction. We conclude that the showing made is not sufficient to warrant the setting aside of the judgment or its reversal.

We have noted the record hereinbefore. Appellant in the court below seemed quite anxious to thereafter open up the entire question of insurance, and if the jury got the impression that defendant had insurance this idea was certainly most strongly impressed upon its mind by appellant. He cannot now claim, on appeal, that the reaction was disappointing. The argument between counsel and the great stir that was caused by the mention of the word insurance did, as counsel states it, "ring the bell," and counsel is also correct perhaps in the claim that it cannot be unringed. But it cannot but be admitted

that appellant himself gave the rope a few hard jerks to complete the work. We mention this fact for the sole reason that on a subsequent occasion, but a few minutes after the argument, another witness referred to the fact of the insurance company doctor visiting the injured boy. After what had transpired we attach no importance to this.

[5] This question of a reference to the fact of a defendant carrying insurance has been before the courts on many occasions; sufficient, it would be surmised, to have established a definite rule. Yet no hard and fast rule has been announced. A fair conclusion, from a résumé of the cases, would be to class such a reference under the head of misconduct of counsel. It might be conceded that where it is obvious or fairly deducible that the sole purpose was to impress that fact of insurance on the minds of the jury, for no other reason than to create a prejudice, then a reversal will follow. But where the reference, as indicated in the cited cases, is merely incidental, misconduct will not be found. And it would seem a fair corollary of the rule that where the point is debatable and offers an open field for legitimate argument, a reviewing court should not arbitrarily undo the results of a trial had under the supervision of the trial judge, whose opportunity of approximating the situation was in the first instance, and who had refused a new trial.

[6-8] Lastly appellant contends that the trial court was in error when it refused certain instructions offered by him. Only two instructions are involved, and one of these, it is conceded, was to all intents substantially given in another form. While the concession noted is not absolute, yet no serious error is claimed and we find none. The instruction refused, out of which the serious error is alleged to have occurred, reads as follows: "I instruct you that defendant was under no duty to drive his automobile so as to protect persons who might suddenly run out into the street and into the path of his automobile unless and until he had warning that such person might suddenly run out into the street." Before discussion we might state that the record is somewhat scant on the subject of instructions given and refused. We deem it needless to repeat, again and again, that it is incumbent on an appellant to show the error he complains of and likewise to show wherein substantial rights were affected. Our attention is not directed to what other instructions, if any, were given or whether or not the subject was elsewhere fully covered. That alone would be sufficient to demand an affirmation. But the quoted instruction does not accurately state the law. Doubtless it was intended to convey the thought that one driving a motor vehicle was not chargeable with the duty of anticipating negligence on the part of another and

that the motorist has the right to assume that persons will not rush blindly out in the street between intersections. However, one of the issues in the instant case was lights on the car, plaintiff contending that there were none. The purpose of lights, at least one purpose, necessarily, is to protect persons at or on any part of the street or highway. To state that a motorist is under no duty at all to protect one who might run out into the street is putting it a trifle too broad. Speed laws are based primarily on the notion of a public user of streets, anticipating both a careful and a negligent use of the street. There would be no sense or reason in providing for different rates of lawful speed as between business, residence and open districts if the law were as loose as the instruction might lead a jury to infer. We find that the jury was elsewhere fully and fairly instructed.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 741

**CUNNINGHAM v. JUSTICE'S COURT OF
BROOKLYN TP. et al.**

Civ. 8903.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1933.

Justices of the peace ⇨194(1).

Certiorari did not lie to annul justice court judgment, though it exceeded its jurisdiction, since appeal to Superior Court furnished adequate remedy (Code Civ. Proc. § 1068).

Application for writ of certiorari by Mary E. Cunningham to review and annul a judgment rendered in the Justice's Court of Brooklyn Township, County of Alameda, State of California; Herbert D. Wise, Justice.

Writ denied.

H. H. McPike, of San Francisco, for petitioner.

PER CURIAM.

Petitioner has applied for a writ of certiorari to review and annul a judgment rendered by the justice's court of Brooklyn township, county of Alameda, in an action in ejectment instituted and tried therein. The application is based upon the ground that said court exceeded its jurisdiction in hearing and determining said proceeding.

Section 1068 of the Code of Civil Procedure provides that such a writ "may be granted * * * when an inferior tribunal * * * has exceeded the jurisdiction of such tribunal * * * and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." And in dealing with the power conferred by said Code section it has been uniformly held that even though a tribunal be without jurisdiction to render the alleged invalid judgment, if such judgment be appealable, certiorari will not lie, because under said Code section it lies only where "there is no appeal." *Stoddard v. Superior Court*, 108 Cal. 303, 41 P. 278; *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 P. 270; *Helbush v. Superior Court*, 99 Cal. App. 501, 278 P. 1062; *Hughson v. Superior Court*, 120 Cal. App. 658, 8 P.(2d) 227. In the present case petitioner is afforded an ample remedy by appeal to the superior court.

Moreover, and in any event, it appears from the petition herein that no application was made in the first instance to the superior court for the issuance of said writ (rule XXVI of the Supreme Court and District Courts of Appeal), and the circumstances set forth in said petition for not having done so are legally insufficient to warrant this court in hearing and determining the proceeding.

The application is denied.

129 Cal.App. 206

ANDERSON v. SOUTHERN PAC. CO.

Civ. 4704.

District Court of Appeal, Third District, California.

Jan. 25, 1933.

Hearing Denied by Supreme Court March 24, 1933.

1. Jury ⇨70(1).

Court may in its discretion order special venire, notwithstanding sufficiency of names in term trial jury box (Code Civ. Proc. § 227).

2. Jury ⇨70(1).

Where but 11 jurors of regular panel were available, court's calling special venire held no error (Code Civ. Proc. § 227).

Facts disclosed that when the case was called for trial on the day set only eleven jurors of the regular panel were available; that the court suggested that the counsel stipulate a special venire to be ordered to which plaintiff objected; and that thereupon the court ordered the case continued until 1:30 o'clock of same day and directed sheriff to summon a special venire to augment the regular panel.

3. Appeal and error ⇨200.

Plaintiff could not for first time on appeal object that sheriff was biased in select-

ing special veniremen, if plaintiff had such knowledge before conclusion of trial.

4. Jury $\Rightarrow$ 70(11).

That sheriff summoning special veniremen was client of opposing attorneys, that several special veniremen were opposing attorneys' friends and lodge brothers and were selected from particular vicinity held insufficient to show sheriff was biased (Code Civ. Proc. § 227).

5. Appeal and error $\Rightarrow$ 837(8).

Appellate court cannot take cognizance of affidavit used by appellant's counsel before trial court on motion for new trial on appeal from judgment.

6. Appeal and error $\Rightarrow$ 200.

Plaintiff, represented by associate local counsel at impanelment, could not excuse his lack of timely objection to sheriff's alleged bias in selecting special veniremen on ground that plaintiff did not know of alleged bias until after trial.

7. Evidence $\Rightarrow$ 558(3).

In action for railroad employee's death, cross-examination of plaintiff's witness offered as expert regarding his employment with another railroad after accident held not objectionable because nothing had been asked him on direct examination concerning such employment.

8. Evidence $\Rightarrow$ 558(7).

In action for railroad employee's death, question asked plaintiff's witness on cross-examination concerning witness' employment with another railroad after accident held proper to show witness' bias.

Facts disclosed that defendant was attempting to show that the witness had, after the accident, been employed by railroad other than defendant railroad under an assumed name, and that upon information furnished by the defendant the witness had been discharged, thereby challenging the impartiality and lack of bias of the witness.

9. Evidence $\Rightarrow$ 89.

Evidence required to overcome presumption that one will obey law is evidence balancing presumption rather than preponderance of evidence (Code Civ. Proc. §§ 1961, 1963, subds. 1, 33).

10. Trial $\Rightarrow$ 260(8).

Instruction that evidence required to rebut presumption that railroad performed duty toward deceased employee was preponderance of evidence held not prejudicial, in view of other instructions (Code Civ. Proc. §§ 1961, 1963, subds. 1, 33).

11. Appeal and error $\Rightarrow$ 1032(1).

Appellant has burden of pointing out that error complained of was prejudicial.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Alberta Anderson, administratrix of the estate of Ray Anderson, deceased, against the Southern Pacific Company. From a judgment for defendant, administratrix appeals.

Affirmed.

Thomas F. McCue, of San Francisco, Gumpert & Mazzera and C. H. Hogan, all of Stockton, and Clifton Hildebrand, of San Francisco, for appellant.

Levinisky & Jones, of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal arises from a judgment in favor of the defendant in an action brought by the administratrix of the estate of Ray Anderson, who met his death while employed by the Southern Pacific Company.

It is not necessary for a determination of this appeal to recite in detail the facts further than to state that Ray Anderson was, on the night in question, assigned as engine foreman directing the movements of a switching crew who were making up a train in the freight yard of the Southern Pacific Company at Tracy. It appears that a number of freight cars under the direction of decedent were being moved by an engine coupled to the rear of a string of cars, and, to ascertain whether or not the cars were properly coupled, a stop signal was given the engineer. This in switch yard parlance is called stretching the cut; a necessary and usual method when shoving cars to ascertain if all cars are properly coupled together. Shortly after this switching operation, Anderson was found dead near a point where the cut of cars had been stretched. It is the theory of appellant that the engineer in stopping gave the cars an unusual, violent jerk causing the cars to buckle and rebound, thereby throwing Anderson to his death beneath the wheels.

The first assignment of error by appellant is that the court erred and abused its discretion in calling a special venire of jurors for the trial of the cause. Upon the calling of the case for trial on the day set, it appeared that but eleven jurors of the regular panel were available for duty. The court suggested that counsel stipulate that a special venire be ordered, and awaiting their appearance that they proceed as far as possible to select a jury from the eleven members of the regular panel who answered the roll. To this counsel for plaintiff objected, and thereupon the court ordered the case continued until 1:30 o'clock on the same afternoon, and directed the sheriff to summon a special venire to augment the regular panel. To this counsel for plaintiff again objected,

stating that they were willing that the trial be continued until the following morning so they might have an opportunity to select the balance of the jurors from the regular panel. It appeared, however, that the regular panel had been called for duty the following day in another case, and would not be available.

Section 227 of the Code of Civil Procedure provides: "When there are not competent jurors enough present to form a panel the court may direct the sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel from the body of the county, or city and county, and not from the bystanders; and the sheriff or elisor shall summon the number so ordered accordingly and return the names to the court."

[1] The question of calling a special venire has been before the court on numerous occasions; the rule being that the court may, in its discretion, order a special venire, notwithstanding the fact that there are sufficient names in the term trial jury box.

People v. Ah Chung, 54 Cal. 398, provides, that whenever jurors are not drawn and summoned to attend any court of record or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be forthwith drawn and summoned to attend the court.

People v. Durrant, 116 Cal. 179, 48 P. 75, is authority for the rule that the court may summon jurors by special venire without exhausting all of the names upon the regular jury list.

[2] In *People v. Sehorn*, 116 Cal. 503, 48 P. 495, it is held that where the venire drawn from the regular jurors has been exhausted the court has discretion to order a special venire. To the same effect are the cases of *People v. Suesser*, 142 Cal. 354, 75 P. 1093; *In re Estate of Wall*, 187 Cal. 50, 200 P. 929; *People v. Slaughter*, 33 Cal. App. 365, 165 P. 44; *People v. Stennett*, 51 Cal. App. 370, 197 P. 372; *Hoffman v. S. P. Co.*, 101 Cal. App. 218, 281 P. 681. There being no showing of any abuse of discretion in this matter, and in accordance with the well-settled rule in this state, the propriety of calling a special venire under the circumstances cannot be seriously questioned.

[3-5] For a second specification of error appellant asserts bias and prejudice on the part of the sheriff who summoned the special venire. The bias and prejudice alleged lies in the fact that the sheriff was the client of the attorneys for respondent, and that a number of the members of the special venire summoned by the sheriff were personal friends and lodge brothers of the attorneys for respondent, not of itself grounds for disqualification of a juror. Appellant also asserts the panel was selected from the city of Stockton and not from the body of the county.

It does not appear that timely or any objection was made to the trial court of the alleged bias or prejudice or the asserted irregularity of the acts of the sheriff, which, if known to appellant before the conclusion of the trial, is a complete answer to the objection of appellant; but strictly no facts sufficient to intimate such bias or prejudice are before the court. Reference is made to an affidavit of one of the counsel for appellant used before the trial court on a motion for a new trial, but of that this court cannot take cognizance. *Hefner v. Sealey*, 175 Cal. 18, 164 P. 898. It does not appear that any challenge to the panel was interposed; it does not appear what, if any, challenges were interposed to the jurors upon their examination; whether or not all challenges were exhausted before the jury was accepted. That the panel was made up of persons from a particular vicinity is no ground upon which to base a claim that the sheriff was biased.

"The fact that all the jurors were residents of the vicinity of Upland furnishes no ground upon which to base the claim that the sheriff was biased. *People v. Vaughn*, 14 Cal. App. 201, 111 P. 620, where it is said: 'The offer of the defendant was to prove that the sheriff summoned the special venire "entirely from the city of Marysville, where the feeling and prejudice against the defendant was strong." From this he proposed to contend that "there must have been prejudice and bias on the part of the officer." The conclusion would not be warranted from the circumstance relied upon.' No claim is made in the instant case that any feeling of prejudice against defendant existed among the residents of Upland." *People v. Manuel*, 41 Cal. App. 153, 182 P. 306, 307.

[6] Appellant suggests the reason for not interposing a timely objection was that the facts were not discovered until after the trial of the case. However, the record shows that appellant was represented by associate local counsel during the impanelment of the jury at least, and if the close relationship existed between the sheriff and counsel for respondent as claimed, it was probably known or could have been ascertained by them. Appellant, having elected to take a chance upon a favorable verdict, cannot now object to its validity because of circumstances within her knowledge that she failed to reasonably urge.

[7, 8] Appellant next complains of the latitude of cross-examination of a witness for plaintiff. Appellant urges that nothing was asked of the witness on direct examination concerning his experience as a railroad man subsequent to the date of the accident, and was offered for the purpose only of proving certain technical matters of railroading. Counsel for respondent interrogated the witness as to his employment by the Santa Fe Railroad Company at a time after the accident. The line of examination objected to

by plaintiff was entirely proper. This witness having been offered as an expert, respondent had the right to examine fully into his knowledge of the particular matter covering his entire range of experience. More particularly were they entitled to go into the line of examination objected to for the purpose of showing bias or prejudice of the witness.

Respondent was attempting to show that the witness had, subsequent to the date of the accident, been employed by the Santa Fe Railroad Company under an assumed name, and upon information furnished the latter company by the Southern Pacific Company the witness had been discharged, thereby challenging the impartiality and lack of bias and prejudice of the witness. This was not improper.

Appellant objects to certain instructions given the jury. Nothing would be gained by repeating them here, but a careful consideration of those before us indicates that the objections of appellant as to all but one are without merit. It might be advisable, however, to refer to one instruction given by the court to which appellant takes exception.

[9, 10] The following instruction was submitted by respondent and given by the court: "You are instructed that there is a legal presumption that the defendant discharged its duties to the plaintiff's intestate, and the burden is upon the plaintiff to overcome such presumption by a preponderance of the evidence."

In case of *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393, 395, the following instruction was given:

"The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence."

"The defendant claims that this is erroneous. We think it is correct. The rule that contributory negligence of the plaintiff must be alleged in the answer, or it will not be available to the defendant as a defense, is based on this presumption. So, also, is the rule that the burden of proving it by a preponderance of the evidence is on the defendant. The Code expressly declares that this presumption is disputable that it 'may be controverted by other evidence,' and that unless so controverted, the jury is bound to find in accordance with it. Code Civ. Proc. §§ 1961, 1963, subds. 1, 33. The instruction is therefore strictly in accordance with the Code on the subject."

This reasoning has been approved in *Smellie v. S. P. Co.*, 212 Cal. 540, 299 P. 529, and cited with approval in *Pitt v. S. P. Co.*, 121 Cal. App. 228, 9 P.(2d) 273. The instruction

here given perhaps goes beyond the strict rule, in that it requires the presumption to be overcome by a preponderance of the evidence, whereas in fact evidence sufficient only to balance the presumption need be introduced to overcome it.

We do not believe the giving of this instruction as thus submitted constituted prejudicial error. We have examined such of the instructions as the record brings to us, and, construing them as a whole, we find the law bearing upon the evidence fairly presented to the jury.

"In determining whether a jury has been properly instructed as to the law, the instructions taken as a whole must be considered; * * * and questionable instructions are not ground for reversal where the rights of appellant are clearly stated to the jury in other instructions." *American Marine Paint Co. v. Nyno Line, Inc.*, 70 Cal. App. 415, 233 P. 366, 368.

[11] It devolves upon appellant to point out that the error complained of was prejudicial to her rights under the facts in evidence; this does not appear, nor does it appear that the error resulted in miscarriage of justice.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

129 Cal.App. 267

ROLDAN v. LOS ANGELES COUNTY et al.

Civ. 8455.

District Court of Appeal, Second District, Division 2, California.

Jan. 27, 1933.

Hearing Denied by Supreme Court March 27, 1933.

Marriage ⚭8.

Statute prohibiting issuance of license authorizing marriage of white person with "Mongolian" and making such marriages void held not applicable to Filipinos (Civ. Code, § 60, as amended by St. 1905, p. 554, § 2; Civ. Code, § 69, as amended by Code Amendments 1880, p. 3).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action for writ of mandate by Salvador Roldan against Los Angeles County and others to compel issuance of marriage license. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hearing denied by Supreme Court; SEAWELL, PRESTON, and THOMPSON, JJ., dissenting.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for appellants.

Gladys Towles Root and George B. Bush, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Solvidor Roldan applied to the county clerk of Los Angeles county for a license to wed a woman of Caucasian descent and was refused such license. On a hearing of his application before the superior court for a writ to compel the issuance thereof, he was found to be a "Filipino", viz., "an Illocano, born in the Philippine Islands of Filipino progenitors in whose blood was co-mingled a strain of Spanish," and not a Mongolian. From a judgment making the alternative writ of mandate permanent, the defendants have appealed.

Section 69 of the Civil Code, relating to marriage licenses, was amended in 1880 (Code Amendments, 1880, p. 3) to prohibit the issuance of a license authorizing the marriage of a white person "with a * * * Mongolian." Section 60 of the Civil Code was amended in 1905 (Stats. 1905, p. 554, § 2) by adding "Mongolians" to the classes whose marriage with a "white" was made "illegal and void." The sole question involved in this appeal is whether or not the Legislature in 1880 and 1905 meant to include Filipinos in its use of the word "Mongolian."

We find no dissent to the statement that the Filipino is included among the Malays, although since the time of Huxley, at least, there has been some question among ethnologists as to whether the five grand subdivisions of the races of mankind, as classified by Blumenbach, is the proper classification, or whether the Malays are to be included among the "Mongoloid" group and as a branch of the Mongolian family. We are not, however, interested in what the best scientific thought of the day was, but in what was the common use of the word "Mongolian" in California at the time of the enactment of the legislation above mentioned.

The case of Ah Yup, Fed. Cas. No. 104, decided by Judge Sawyer of the United States Circuit Court, District of California, in 1878, contains this information: "In speaking of the various classifications of races, Webster in his dictionary says [*italics ours*], 'The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race; * * * 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race; * * * 4. The American, or red race; * * * and, 5. The Malay, or brown race, occupying the * * * Indian Archipelago.' " The 1891 edition of Webster's, comprising the earlier editions of 1864, 1879, and 1884, under the heading "Race," says: "Naturalists and ethnographers divide mankind into several distinct varieties, or races * * * One of the common classifications is that of Blumenbach, who makes five races "

—describing them the same as the quotation of Judge Sawyer from the earlier Webster's, and adding that "many recent writers classify the Malay and American races as branches of the Mongolian." Practically the same wording is found in the 1903 edition of Webster's.

The Standard Dictionary of 1911 gives the following definition of a Mongolian: "(1) A Mongol. (2) By extension a Chinaman: In Blumenbach's system any one of the yellow peoples of China."

The New American Cyclopaedia (1863) defines "Mongolian Race" as "one of the great ethnological divisions of mankind," and the article thereon continues: "Dr. Pickering, in 'The Races of Men,' includes the American Indians among the Mongolians * * * By most writers, however, the American Indians are held to be a distinct race, and the term Mongolian is restricted chiefly to the following nations: the Mongols proper, the Mantchoos, Coreans, Chinese, Thibetans, Anamites, Burmese, Siamese, Japanese, Samoyeds, Koriaks, Ourals, Ostiaks, Kamchatdales, Finns, Laplanders, Esquimaux and the various tribes inhabiting Toorkistan or Independent Tartary, who are commonly called Tartars by Europeans."

Ogilvie's Imperial Dictionary of the English Language (1884), under "Mongol, Mongolian," says: "An epithet sometimes employed to the whole class of Turanian tongues, sometimes restricted to that group spoken by the Kalmucks and other tribes from Thibet to China.—Mongolian race, the second in Blumenbach's classification of the races of mankind. It corresponded very closely with the modern Turanian division." This dictionary also defines "Malay" as "belonging or relating to the Malays or to their country.—Malay race, one of the five principal divisions of mankind according to Blumenbach."

In the "Reports of the Immigration Commission" of the United States (1911), vol. 5, "Dictionary of Races or Peoples," p. 94, under "Malay, Malaysian or Brown Race," appears the following, the italics being ours: "One of the five grand divisions of mankind as commonly classified since the time of Blumenbach, but the most disputable one in the view of recent ethnologists. Many consider it to be a branch of the Mongolian race, but such admit, at least, that it is the most divergent great branch of the latter." And on page 97 of the same volume, under "Mongolian, etc.," we read: "Many ethnologists so define 'Mongolian' as to include the entire American and Malay races."

We think we have quoted enough to show that, regardless of the fine points of the argument from the ethnologist's standpoint, the early classification of Blumenbach left its impression on the writers from his day to 1905, at least, so that his classification is spoken of as the one "commonly" used; and we ven-

ture to think that in the recollection of those whose early schooling was anywhere in the period from 1850 to 1905 his classification of the races into the five divisions, the white, black, yellow, red, and brown, still persists.

From 1862 to 1885 the history of California is replete with legislation to curb the so-called "Chinese invasion," and as we read we are impressed with the fact that the terms "Asiatics," "Coolies," and "Mongolians" meant "Chinese" to the people who discussed and legislated on the problem, or at most that they only extended in their thought to natives of China and the inhabitants of adjacent countries having the same characteristics. It appears from the report in 1878 to the state Senate of its "Special Committee on Chinese Immigration" that the mass of the immigration complained of came from the "port of Hong Kong" (p. 64), and that of the Chinese then here "you would not find one in a thousand—probably one in five thousand—but that came from Kwang-Tung, the province of which Canton is capital" (p. 70). In the same volume (p. 265) is an article by H. W. Clement, a member of the San Francisco bar, entitled "Caucasian vs. Mongolian," in which he speaks of the Americans as the sons of Japheth in possession of America; that "seized with an insane desire to revisit the old homestead," and finding it surrounded by the "Chinese Wall," they battered it down, "but from out the breach swarmed one hundred fifty thousand of the three hundred millions of overcrowded humanity within, who threaten to overrun us. * * * We find by our twenty-five years of acquaintance with them * * * that the * * * changeless life of 'Shem' and his descendants from Asia has shaped their character * * * and determined their race, and we call them Mongolians. * * * The conflicting rights, prejudices and interests of these two races in California constitutes the Chinese problem."

In the "Debates and Proceedings of the Constitutional Convention of the State of California" (1878-79), speaking on the report of the "Committee on Chinese" relative to articles proposed affecting those nationals, Mr. John F. Miller says: "They [certain church people opposing restrictions] would Mongolize this land in a vain attempt to bring the Chinese to a knowledge * * *" (vol. 1, p. 633). Mr. Charles C. O'Donnell (p. 647): "If you expect to wipe out crime you must wipe out the presence of the Mongolian in our midst." We could quote an infinite number of similar statements, all of which point to the fact that the speakers were using the term "Mongolian" in the sense of the problem that they were discussing, viz., the Chinese problem, and that it only applied to that people, including possibly the inhabitants of contiguous countries of the same characteristics. Mr. Burt, not liking the designations "Mongolian race" and "persons not eligible to be-

come citizens," in some of the proposed articles, said (p. 652): "We mean Chinese, and why not come out squarely and say so." The report of the committee, instead of using the words "Chinese or Mongolian" now appearing in section 2, article 19 of the Constitution, used the words "foreigners who are not eligible for citizenship"; and Mr. N. G. Wyatt, a member from Monterey county, moved to amend the section by inserting in place of such words the words "Chinese or Mongolian," because of the uncertainty of the original language. Some courts apparently having admitted Chinese to citizenship while some denied them that privilege, Mr. Wyatt said (vol. 2, p. 681): "I want it amended so as to apply, eo nomine, to the class it is intended to affect." Mr. Barnes made a similar objection to the language used by the committee, saying (p. 687): "If we mean Chinamen, why not say Chinamen or Mongolian?"

Mr. John S. Hager, who moved to amend section 5 of the proposed article by prohibiting any resident or foreigner ineligible to citizenship from owning property in the state after 1880, said (vol. 3, p. 1429): "That applies to all classes of foreigners who are ineligible to become citizens. It also gives them sufficient notice." Mr. C. V. Stuart then inquired: "Will that apply to any but Chinese in fact?" Mr. Hager replied: "I think there are some others." The lone voice in the convention that objected to the use of the word "Mongolian" was that of James J. Ayers, who said (vol. 2, p. 717): "The term Mongolian does not apply exclusively to the Chinese. It is a generic type of the human family, and some of the leading authorities on ethnology have divided the species into three classes: Mongolian, Caucasian and Negro. Some of them claim that the word Mongol embraces the American Indian." He then added: "We all know that we mean Chinamen, and why not say Chinamen?" That the Malay race was not in the thoughts of any in the convention as being included in the designations used is clearly shown from the speech of Mr. James M. Shafter against the proposed amendment prohibiting the employment of Chinese by public officers and making a candidate for office ineligible who employed or had employed them within three months previously. After stating that such provision was the equivalent to debarring Chinese from employment (vol. 2, p. 676), he declared: "I have had in my employment natives of most European countries, of the isles of the sea, including the Cannibal Islands of the south Pacific. Why do you not exclude the Kanakas, the Fiji, the Malay or the criminal from Australia? No reason against the Chinaman but presses with greater force against these people." Apparently no one challenged this statement, which implied that the Malay, at least, was not included in the designation "Mongolian"; and we can draw but one conclusion from the debates, and that is that such an idea was not

present in the minds of the members of the Convention.

Much more could be shown, but we think we have set down sufficient to indicate that in 1880, in a group that would compare very favorably with the average Legislature, there was no thought of applying the name Mongolian to a Malay; that the word was used to designate the class of residents whose presence caused the problem at which all the legislation was directed, viz., the Chinese, and possibly contiguous peoples of like characteristics; that the *common* classification of the races was Blumenbach's, which made the "Malay" one of the five grand subdivisions, i. e., the "brown race," and that such classification persisted until after section 60 of the Civil Code was amended in 1905 to make it consistent with section 69 of the same Code. As counsel for appellants have well pointed out, this is not a social question before us, as that was decided by the Legislature at the time the Code was amended; and if the common thought of today is different from what it was at such time, the matter is one that addresses itself to the Legislature and not to the courts.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

129 Cal.App. 243

CALIFORNIA BANK v. LEAHY et al. (JOHN A. ECK CO., Intervener).

Civ. 4729.

District Court of Appeal, Third District, California.

Jan. 26, 1933.

Rehearing Denied Feb. 25, 1933.

Hearing Denied by Supreme Court March 27, 1933.

1. Liens §7.

To create "equitable lien," there must be intent to fasten obligation to given thing, or circumstances must be such that equitable adjustment of parties' rights contemplates dedication of property specifically to obligation.

"Equitable lien," as distinguished from statutory or contractual liens, cannot be limited to formula. The term, however, is somewhat to be understood from the word "lien," which implies something specific and definite. Whenever, in law or equity, a "lien" is created or declared, there are two things prominently concerned, namely, an obligation and a res or rem to which or upon which that obligation fastens itself. The theory of "equitable lien" is not devised as a substitute means of specific performance of every contract.

[Ed. Note.—For other definitions of "Equitable Lien" and "Lien," see Words and Phrases.]

2. Liens §7.

Commission merchant who, as part of selling agreement with general grower, lent money to grower, to be repaid before maturity of crop, *held* general creditor, without equitable lien on crop.

3. Liens §7.

Where money commission merchant lent general grower, under selling agreement, was used in general business of grower and was not traceable, commission merchant could not claim equitable lien upon crops.

4. Chattel mortgages §136.

Chattel mortgagee *held* not estopped to claim preference against proceeds of mortgagor's crops, as against commission merchant who lent mortgagor money under selling agreement, because mortgagee wrote commission merchant that mortgagee did not expect to interfere with mortgagor's shipments, where merchant did not subsequently lend mortgagor any money.

Appeal from Superior Court, Imperial County; Lacy D. Jennings, Judge.

Action to foreclose a chattel mortgage by the California Bank against Robert E. Leahy and another, copartners doing business under the firm name and style of Leahy & Gargiulo, wherein the John A. Eck Company intervened. From an adverse judgment, the intervener appeals.

Affirmed.

Harry W. Horton, of El Centro, for appellant.

Swanwick & Donnelly and William B. Himrod, all of Los Angeles (R. B. Whitelaw, of El Centro, of counsel), for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The plaintiff, a banking corporation, which had loaned the defendants, produce growers, certain sums of money, filed this suit to recover on promissory notes and obligations of defendants and to foreclose a chattel mortgage given to secure the aforesaid indebtedness.

A receiver was appointed who took possession of the crops, marketed the same, and who holds the proceeds. The defendants defaulted, and as against them plaintiff made sufficient proof to support a decree of foreclosure which followed.

Intervener, an Eastern produce company, appeared in the action claiming an equitable lien upon the crops with a preference of demand against the proceeds of the crops and

also claiming damages. The court below found against the intervener, and this appeal follows.

A detail of the situation becomes necessary. The defendant grower and producer will be referred to hereinafter, for brevity, as the Leahy Company.

The Leahy Company had been engaged for some years in growing cantaloupes and lettuce in Imperial Valley, Cal., and in the state of Texas. In connection with its business, it borrowed sums of money from plaintiff bank aggregating \$130,000; it also borrowed from Eck Company, as an advance upon produce to be grown, the sum of \$12,500. On or about April 4, 1924, the Leahy Company made, executed, and delivered to plaintiff bank the chattel mortgage herein decreed foreclosed.

The relations between the Leahy Company and intervener began, in so far as the present record indicates, on or about October 1, 1923. On that date a written agreement was entered into between those parties last named, the provisions of which follow: Leahy Company contract to grow and ship to Eck Company seventy-five cars of Shamrock brand cantaloupes at a guaranteed advance of \$1.25 per crate, f. o. b. Imperial Valley, Cal. It is understood that these cantaloupes are to come out of the Westmoreland and Brawley sections with the early shipments from those sections; the contract specifically excluding cantaloupes grown or shipped out of late sections. The Eck Company agreed to make an advance of \$200 per car or a total amount of \$15,000, payable one-half on October 10th and the remainder on December 26, 1923. This advance payment was to be deducted from the shipments of cantaloupes to be made. The Eck Company is to handle the cantaloupes and charge for their services 7 per cent. of the gross amount that the cantaloupes sell for and make returns to Leahy Company for the balance. The Leahy Company further agrees to grow in Imperial Valley and ship fifty cars of lettuce. Eck Company agrees to advance \$5,000 on this lettuce contract, which sum was to be paid on the execution of the agreement; Leahy Company to give the notes signed by members of the firm for the amount advanced with interest at 6 per cent. per annum. At the same time another agreement was made, by the terms of which Leahy Company agreed to repay the loan on March 15, 1924.

On or about March 21, 1924, Leahy Company and Eck Company made and entered into another agreement, the terms of which follow: Leahy Company agrees to ship and deliver to Eck Company at Chicago sixty-two cars Shamrock brand cantaloupes during the shipping season of 1924. The price of the cantaloupes is fixed according to size of crate. Eck Company agrees to market the produce and to retain for such service 7 per cent. of the gross, accounting to Leahy Company for

net proceeds after deduction of freight, refrigeration, inspection, etc. These cantaloupes are to be grown upon certain specified ranches, and Leahy Company agrees to ship the third car packed and loaded after the commencement of their shipping season and to ship one car each day during the next nine days and two cars thereafter until the sixty-two cars have been shipped. It is expressly understood and agreed that Eck Company has loaned to Leahy Company \$12,500 under the agreement of October 1, 1923, which said loan shall be considered and agreed made as a loan and advance of \$200 per car on the sixty-two cars herein agreed to be shipped; it being agreed that Leahy Company should pay to Eck Company \$100 to reduce the loan to \$12,400. It is understood and agreed that this contract constitutes the full agreement between the parties and supersedes and cancels the agreement of October 1, 1923, and also cancels and supersedes all riders, amendments, and supplements thereto, including a certain agreement for the cancellation of the October agreement and the agreement made at the same time to repay the loan by March 15, 1924.

Under the contract of October 1, 1923, Eck Company was to advance \$20,000. Of this amount only \$12,500 was advanced. On or about January 29, 1924, intervener's attorney wrote to plaintiff bank as follows: "Under Eck's contract there is a further advance on the cantaloupe loan due from Eck to Leahy in a very short time, and as Eck Co. does not desire that they have any friction with you or with Leahy, they are anxious to know if the Bank is going to permit Leahy to ship the cars of cantaloupes (seventy-five cars) to them. As the Bank has a chattel mortgage on all the crops to be grown by Leahy Co. you can see that it is very essential that Eck Co. have your attitude in this matter before they go further into the deal. As delay in making their next advance may not bring the best results for all concerned, we would greatly appreciate your very earliest reply."

On February 5, 1924, plaintiff replied to said letter as follows: "We have your letter relative to further advances to Leahy Co. in accordance with contract entered into by Eck Co. and Leahy Co. under date of October 1st, 1923. We knew of no reason why Leahy Co. should not carry out their contract. In other words, the Bank does not expect in any way to exercise any authority in the directing of the shipment of the crop, and as far as we are concerned, it is agreeable to us that they comply with their obligations under the contract."

Thereafter on April 4, 1924, plaintiff bank took the crop mortgage here involved which covered the produce raised on the lands in said mortgage described. On or about June 10, 1924, this action was instituted to foreclose said mortgage, and on that date a re-

celver was appointed who did enter into possession of the crop and market the same.

[1-3] It is appellant's contention that the contract of October 1, 1923, created an equitable lien in favor of appellant and against the crop to be raised by Leahy to the extent of seventy-five cars. This contention seems to open up the subject of equitable liens, their origin and purpose. But scant authority is presented, and much of this beside the point. The term "equitable lien" as distinguished from statutory or contractual liens is, like many terms of equity, not definable; that is to say, characteristic of equity itself, we cannot limit the doctrine to formula. The term, however, is somewhat to be understood from the word "lien." This word implies something specific and definite. Whenever, in law or equity, a lien is created or declared there are two things prominently concerned, namely, an obligation and a res or rem to which or upon which that obligation fastens itself. The theory of equitable lien is not devised as a substitute means of specific performance of every contract.

Let us apply these general principles to the instant case. The Leahy Company was engaged in raising cantaloupes and lettuce in the Imperial Valley. It was likewise engaged in the state of Texas. It maintained one central office and organization through which all business was done and through which all funds passed. All moneys received from any source went into the general business fund without allocation to any territory.

The contract of October 1, 1923, bound the Leahy Company to grow and ship seventy-five cars of cantaloupes, which produce was to come from any place within two specified sections. There was no contract of purchase and sale either present or in the future. The Eck Company was a selling agent receiving the cantaloupes on a consignment with an agreed compensation of 7 per cent. of gross receipts for handling. The advanced money was characterized as a loan and repayment thereof specified as of a date prior to the time the crop could possibly mature. It seems manifest that, if the terms of the agreement contemplated discharge of the indebtedness prior to the maturity of the crop, it was not the intent of the agreement to look to the crop for payment. There was no evidence that the money advanced by Eck Company ever went into the crop subsequently produced or into the cultivation of the lands from which the crop came. The cases cited by appellant do not support its claim of lien.

In *Hall v. Cayot*, 141 Cal. 13, 74 P. 299, 301, the court cites *Pomeroy's Equity Jurisprudence*, as declaring the doctrine as follows: "Equity looks at the final intent and purpose, rather than the form, and, if the intent appear to pledge certain property as security for an obligation, the lien follows."

In all of the cited cases there appears something which definitely ties the res to the obligation. Either there was a sale with deferred delivery or the thing itself came into existence through funds advanced or paid under an understanding, express or implied, that the obligation incurred should be fastened specifically to the property upon which the lien was asserted. There is, however, an equitable doctrine which seemingly disregards the notion of intent to pledge and proceeds upon the theory of general adjustment of relative rights. The basis of the doctrine is the maxim that equity will deem that done which ought to be done. Yet this doctrine is more than a mere abstraction; it does not contemplate expediency as distinguished from legal rights. In its analysis, it is merely another way of stating the older rule that there must be an intent to fasten the obligation to a given thing or the circumstances surrounding must be such that a just or equitable adjustment of the right of the parties contemplated the dedication of the property specifically to the obligation.

Summing up, we conclude that, where a commission merchant goes to a general grower, one engaged in producing crops over a large area and enters into a selling agreement on commission and as a part of the agreement loans money to the grower, which money is to be repaid at a time prior to the maturity of the crop, the one thus loaning the money assumes the position of a general creditor. And we hold this to be particularly true in a case such as the present, where the money loaned was used in the general business of the grower with no record showing that the crops upon which a lien is claimed in any wise directly benefited from the loan. *Pomeroy's Eq. Juris.*, (4th Ed.) §§ 1235 et seq.; *Jones on Liens*, vol. 1, (3d Ed.) § 32; *Bailey v. Sward*, 184 Cal. 395, 193 P. 952.

[4] Appellant urges an estoppel against plaintiff based upon the correspondence hereinbefore set forth. It will be noted that the correspondence was after the moneys had been advanced. Further, the correspondence referred only to the agreement of October 1, 1923, which agreement obligated appellant to advance \$7,500 additional to the Leahy Company. It is admitted that no such advancement was made, but that in lieu thereof a new contract was made whereby appellant rescinded entirely the first agreement and agreed to accept merely the sixty-two cars of cantaloupes to cover the loan already made. Without attempting the entire field of estoppel, we quote the trial court's finding, as follows: "That intervener did not rely upon the said statements of plaintiff or any part thereof and did not advance any money to defendants at or after the time of such communications between intervener and plaintiff nor after January 1, 1924, and did not because of any

statement or representation of plaintiff alter or change its position to its detriment."

It was further found, upon substantial testimony, that appellant could have contracted for other cantaloupes to take the place of those mentioned in the contract of October 1, 1923, although it could not have received credit thereon for the loan to Leahy Company. It was further found that plaintiff had no notice of the contract of March 21, 1924, and also that intervener has suffered no damage because of any act of plaintiff. It is not pointed out wherein these findings lack evidentiary support excepting the general statement to that effect.

The foregoing findings destroy the claim of estoppel. Complaint is made of errors of the trial court in the admission and rejection of evidence. No authority is cited, nor is any argument made in this connection other than to specify the rulings. An examination discloses that the evidence rejected was on objection going more to the form of question, and that later in the proceeding, through proper questions, the evidence was admitted. This is true excepting in two instances, and in these latter instances we agree with the trial court's ruling. We do not detail these claims further, for the very good reason that, if any error did occur, it was without prejudice.

Judgment affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

129 Cal.App. 10

KRONMAN v. KRONMAN.
Civ. 8762.

District Court of Appeal, First District, Division 1, California.
Jan. 19, 1933.

1. Judgment Ⓒ375.

Court has inherent power, not limited by statute, to vacate decree obtained by fraud (Code Civ. Proc. § 473).

2. Judgment Ⓒ388.

That notice of motion to vacate decree stated it was made under statute and for fraud did not deprive court of inherent jurisdiction to vacate decree obtained by fraud (Code Civ. Proc. § 473).

3. Divorce Ⓒ37(8).

Law favors reconciliation between separated spouses (Civ. Code, § 132).

4. Divorce Ⓒ156.

Obtaining final divorce decree, after reconciliation and resumption of marital rela-

tions following interlocutory decree, without notice or knowledge of other spouse, is extrinsic fraud as to both other spouse and court (Civ. Code, § 132).

Obtaining a final divorce decree under such circumstances is extrinsic fraud, not only as to the other spouse, but also in so far as the court itself granting such decree is concerned, since it is effected through concealment from the court in an ex parte proceeding of facts which the party requesting the final decree is bound to disclose, and which, if disclosed, would have rendered improper the granting and impossible the procurement of the final decree.

5. Appeal and error Ⓒ931(1).

On appeal from order made upon conflicting affidavits, involving fact question, affidavits favoring prevailing party must be taken as true.

6. Evidence Ⓒ471(1).

Witness or affiant must state facts and not conclusions or opinions.

The probative facts must be set forth in an affidavit, and it must appear from the facts stated that the ultimate fact may be inferred as true.

7. Divorce Ⓒ165(5½).

Affidavits supported order vacating final divorce decree, allegedly entered after reconciliation and resumption of marital relations following interlocutory decree, as against contention there was no reconciliation.

8. Divorce Ⓒ156.

Where spouses cohabit and continuously deport themselves as husband and wife after interlocutory divorce decree, law presumes reconciliation and resumption of marital relations (Code Civ. Proc. § 1963, subds. 1, 30, 33).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Divorce action by Mary E. Kronman against Andrew Kronman. From an order setting aside the final decree of divorce, defendant appeals.

Affirmed.

Hugh A. McNary and Geo. D. Richey, both of Los Angeles, for appellant.

S. S. Hahn, M. C. Spicer, and W. O. Graf, all of Los Angeles, for respondent.

JORGENSEN, Justice pro tem.

This is an appeal from an order of the court below setting aside the final decree of divorce in this action on the ground that the same was secured by fraud of the defendant.

The plaintiff obtained an interlocutory decree of divorce from defendant by default, on

her complaint alleging extreme cruelty. This decree was entered August 3, 1927. Thereafter, on the 26th day of November, 1930, the plaintiff filed a second action for divorce upon the same grounds of cruelty as alleged in the case at bar, and, in addition to the acts alleged in this case, added an additional act of cruelty stated to have been committed November 4, 1930. No final decree of divorce had been entered in the case at bar at that time. Plaintiff in the second action procured an order to show cause directed to defendant, requiring him to show cause why he should not pay certain sums as alimony and attorney fees, which order was returnable December 11, 1930.

On the 10th day of December, 1930, the court at the request of the defendant made its final decree of divorce in the case at bar. The decree recited on its face that it was made by the court of its own motion, but it appears clearly by the record and in the affidavit of defendant himself that it was made at his request.

Thereafter, on December 30, 1930, the plaintiff in the case at bar made her motion to set aside said final decree on the grounds that it was obtained by fraud of the defendant, perpetrated upon the court and upon the surprise of the plaintiff. The notice of motion stated it was made under section 473, Code of Civil Procedure, and for fraud; it appearing that plaintiff did not discover the fact that said final decree was entered until the hearing to show cause in the second action on December 11, 1930. No oral evidence was submitted at the hearing of the motion, but the evidence in support of the motion consisted of affidavits only and the records of the case. The court granted the motion, and, from the order of the court granting the motion, the defendant appealed. The affidavits in support of the motion, so far as they relate to this question, are as follows:

Plaintiff's affidavit alleges that on or about July 28, 1928, before a year expired from the entry of the interlocutory decree, the parties resumed marital relations and lived together as husband and wife, as they formerly did, until on or about November 4, 1930, and in addition alleges that an allegation made by defendant in an affidavit filed in said second action, that the parties had not resumed marital relations nor entered into an agreement to do so, and that no reconciliation of any kind or character had been had or effected, was false and untrue.

The affidavit of Ethel Coleman, an acquaintance of both before their first divorce troubles, alleges that on or about the 28th day of July, 1928, the plaintiff returned to her husband, and from that time on they resumed marital relations and lived together as husband and wife, to affiant's personal knowledge, up to the time defendant was arrested and put in jail, November 4, 1930, and that

during all of said time, from the latter part of July, 1928, up until November 4, 1930, the plaintiff and defendant, to the personal knowledge of affiant, occupied the same room, slept in the same bed, and otherwise conducted themselves as husband and wife.

The affidavit of Bessie Allen, a near neighbor, alleges that she helped plaintiff move back to where defendant Andrew Kronman was then residing on July 28, 1928. Since that time affiant had personal knowledge that the plaintiff and defendant were living together as husband and wife up to November 4, 1930. Affiant had been at the home of the parties on several occasions, and she knew of her own personal knowledge that they occupied the same room and otherwise conducted themselves as husband and wife.

The affidavit of Cecelie Day alleges that she was a personal acquaintance for ten years and knew the parties very intimately, they having come to her home two or three times a week and on many occasions during that time they would stay all night; that since August 1, 1928, they visited affiant's house on an average of two or three times a week and played cards and on many occasions they would play so late that Mr. and Mrs. Kronman would stay all night, and on each of these occasions they occupied the same room and otherwise conducted themselves as husband and wife, as they formerly did, and since August 1, 1928, up until the date of their last separation, November 4, 1930, the plaintiff and defendant had been living together and holding themselves out before the public as husband and wife.

The affidavit of Fred James and that of Charles West allege that they were acquaintances of both, and that the parties lived together as husband and wife, and held themselves out to the public as such.

The defendant filed a counter affidavit in which he sets forth that there was no reconciliation, that he was not restored to all marital rights, and that their living in the same place was a mere business arrangement to better care for the property of the parties. Defendant contends: (1) That the court had no jurisdiction to set aside the final decree on plaintiff's motion; (2) that the affidavits in support of plaintiff's motion do not set forth facts showing a reconciliation of the parties and a full restoration of marital rights, but set forth only the conclusions and opinions of the persons making them.

[1, 2] There is no merit in the contention that the court had no jurisdiction to grant the motion. The court has inherent power to set aside a decree obtained by fraud, and its right to so act is not derived from section 473, Code of Civil Procedure, or limited thereby. *Williams v. Reed*, 43 Cal. App. 425, 185 P. 515; *McGuinness v. Superior Court*, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110. The mere fact

that the notice of motion stated, among other things, that it was made under said section and for fraud does not deprive the court of jurisdiction.

[3, 4] One of the important purposes of the law (Civ. Code, § 132) requiring one year to elapse between the entry of the interlocutory decree of divorce and the granting of the final decree is to give the spouses a chance to effect a reconciliation, which the law favors. *Olson v. Superior Court*, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589. The obtaining of a final decree of divorce, after a reconciliation and resumption of marital relations subsequent to the entry of an interlocutory decree, without notice or knowledge of the other spouse, is extrinsic fraud, not only as to the other spouse, but also in so far as the court itself granting such decree is concerned, since it was effected through concealment from the court in an ex parte proceeding of facts which the party requesting the final decree is bound to disclose, and which, if disclosed, would have rendered improper the granting and impossible the procurement of the final decree. *McGuinness v. Superior Court*, supra, 196 Cal. at page 230, 237 P. 42, 45, 40 A. L. R. 1110.

[5, 6] "In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this [appellate] court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established." *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001, 1002, and cases cited. Therefore, if the affidavits in support of the motion state facts sufficient to establish there was a reconciliation between the parties and a resumption of marital relations, the judgment must be affirmed, and the fact that such facts were denied in defendant's affidavit cannot be considered here. It is a general rule of evidence that a witness or affiant must state facts and not conclusions of fact or opinions. The probative facts must be set forth in an affidavit. It must appear from the facts stated that the ultimate fact may be inferred as true. 1 Cal. Jur. 669; *People v. Yoakum*, 53 Cal. 566.

"The line between a statement of fact accepted as evidential and a statement of conclusion of fact, insufficient as a matter of evidence, is in many cases shadowy and difficult to define. There are tests, however, which assist in distinguishing the one from the other. Where, in relation to a given statement, it is apparent that there is in the mind of the witness an immediate correspondence

between the ideas expressed and the realities observed, the statement of such ideas is an evidential fact of the highest character, as the idea is intuitive and represents the reality without conscious reasoning. As observation, however, decreases in value and reasoning increases, the statement becomes of less weight evidentially, until a point is reached where the statement is rejected entirely as evidential, and is branded as a conclusion. In many cases statements which are the result of observation of realities of so complicated a nature as to be beyond the powers of description of an ordinary witness are considered evidential, where they relate to matters of common experience and are in effect the result of an intuitive inference. * * * Again, a statement is not necessarily branded as a conclusion simply because it involves some reasoning. In such case, however, as the element of reasoning increases the weight of the statement as a matter of evidence decreases." *In re Search for and Seizure of Liquors at Auto Inn*, 204 App. Div. 185, 197 N. Y. S. 758, 760.

[7, 8] Whether the parties had become reconciled and resumed marital relations are the ultimate facts to be determined by the court, and not by the conclusion of the plaintiff and her witnesses, and, if such affidavits contained nothing more than those statements of ultimate fact, they would be insufficient to sustain the order. But the record and affidavits contain probative facts as follows: The parties had been married and lived together as husband and wife previous to the filing of the complaint in this action, and they had lived together, as they formerly did, from July 28, 1928, to November 4, 1930; during all that time they occupied the same room and slept in the same bed; their cohabitation was open and avowed, and their friends and people at large were led to believe they were husband and wife, and they held themselves out to the world and deported themselves as such.

This is not a case of a single act of sexual intercourse, but a long-continued living together and cohabitation and deporting as husband and wife, and the law presumes that under such circumstances they had become reconciled and had resumed marital relations. Code Civ. Proc., § 1963, subsd. 1, 30, and 33; *In re Estate of Baldwin*, 162 Cal. 471, 490, 123 P. 267.

The affidavit contained sufficient probative facts to sustain the order, and the order appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASH, IN, J.

129 Cal.App. 156

PEOPLE v. HENDRICKS et al.
Cr. 2229.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

1. Homicide $\S$ 253(1).

Evidence sustained convictions of murder in first degree (Pen. Code, $\S$ 189).

2. Homicide $\S$ 339(3).

In murder prosecution, admitting evidence upon cross-examination of defense witness that witness was being held on homicide charge held harmless, where defense counsel later elicited same evidence from another witness and did not request admonition for jury to disregard it (Pen. Code, $\S$ 189).

3. Criminal law $\S$ 1035(3), 1163(2).

Appellate court could not consider colloquies between court and counsel allegedly audible by jurors in adjoining room without objection to such proceedings and evidence showing prejudicial effect.

4. Witnesses $\S$ 387.

Permitting district attorney to recall defense witness for further cross-examination to impeach him because his statements were contradictory to his previous testimony held discretionary.

5. Criminal law $\S$ 783½.

Requested charge that in determining whether homicide charged was committed and degree of offense jury must not consider defendant's declarations held properly refused (Pen. Code, $\S$ 189).

Such instruction was properly refused, since jury may consider all evidence in the case, including extrajudicial statements, admissions, or confessions of defendant, in determining whether all the elements of the offense charged and defendant's connection therewith have been established to a moral certainty and beyond reasonable doubt.

6. Homicide $\S$ 289.

Instructions on homicide accompanied by robbery held authorized by evidence (Pen. Code $\S$ 189).

7. Criminal law $\S$ 1144(18).

Appellate court would presume trial court performed duty in passing upon motions for new trial before pronouncing judgments, where clerk's transcript failed to show it either granted or denied them.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

John Hendricks and another were convicted of murder, and they appeal.

Affirmed.

J. Irving McKenna, Catherine McKenna, and Charles P. Temple, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and George Stahlman, Deputy Dist. Atty., both of Los Angeles, for the People.

CRAIG, Acting P. J.

Appeals were taken by each of the defendants upon the same record from judgments based upon verdicts of a jury finding them guilty of murder in the first degree and fixing the penalty at imprisonment in the penitentiary for life and from orders denying their motions for a new trial.

[1] It is contended that the evidence was insufficient to justify the verdicts and judgments, but we are impelled by a careful review of the same to hold this contention untenable and not requiring a detailed recital of the testimony. The body of an unclothed man was discovered by a road foreman in a canyon in Los Angeles county, bearing wounds upon either side of the head, and a necktie tightly drawn about the neck. It lay in a ditch which had been excavated on the preceding day, and was identified as that of a man who had been in company with the defendants at a store and drinking resort for a period of two weeks to and including the day last mentioned, by the name of Robert J. Erwin. At the request of the proprietor that Erwin be taken home and placed in bed, the defendants departed with him, an automobile horn was heard, and thereafter the defendants returned to the store without him. He was not again seen there alive. It appeared that Hendricks on the following day stored Schwartz' automobile in a garage which he locked, wherein it was washed by the former, and from which it was not for some time removed. Blood stains were found on the running board and on a cushion of the automobile, and upon a suit of clothes and overcoat belonging to Hendricks. Clothing of the deceased was discovered at a distance of two and one-half miles from the body, and all jewelry, money, and personal effects had been removed therefrom. A ring and other articles similar to those previously in the possession of the deceased were seen in Hendricks' possession soon afterwards, and it was testified that he later stated, "I have sold my ring." Each of the defendants, according to numerous witnesses, confessed to the latter that Erwin had been struck by one with a wrench and rendered unconscious, placed upon the ground in the canyon, and strangled by the other; that he "remained quiet." Further pursuing of the evidence, through about a

thousand pages of the transcript, we think unnecessary, and the appellants have indicated no substantial detail in which it was deficient.

[2] One Morgan, called on behalf of the defendants from the county jail, where he was awaiting trial upon a charge of homicide, was advised by the trial court as to his constitutional rights; and his counsel, the public defender, strenuously objected to examination of the witness and instructed him not to answer questions. Upon his expression of willingness to testify in the instant case and of a desire to have counsel for appellant Schwartz substituted as his attorney, the public defender requested that he be permitted to withdraw, which withdrawal and substitution were referred to another department of the superior court. Thereupon the witness returned, the jury were recalled to the courtroom, and he was examined at length by the defendants' counsel. The testimony of Morgan was to the effect that he and a confederate other than either of the defendants had at the time in question taken in their automobile a man who expired, that they removed his clothing, confiscated his money, and jewelry, and left the body in said canyon. This evidence was at best the basis of a possible doubt for consideration by the jury. The trial court, at the instance of the defendants, subsequently properly ordered stricken all testimony as to the fact and nature of the charges upon which the witness was being held and admonished the jury to disregard it. Thereafter and during the examination of another witness, the defendants introduced evidence of the same facts, but it is here insisted that its previous admission occurred during cross-examination by the people, and that it constituted prejudicial error requiring a reversal of the judgments. It is not suggested as to how, in such a case, any legal effect of such evidence upon the rights of the appellants should be characterized as vindictive or prejudicial according to sponsorship, nor does the distinction readily appear discernible. The defendants do not appear to have requested a like admonition as to the same evidence offered and admitted in their behalf; hence the rulings in this respect were harmless.

[3] When Morgan was called, the jury were excluded, and arguments and colloquies between the court and counsel regarding this witness and the proposed substitution of attorneys are said to have been audible in adjoining rooms and capable of prejudicially influencing the jurors. The record fails to disclose objection to the proceedings or support for such a conclusion; hence the contention does not call for consideration upon appeal.

[4] The same witness was recalled by the district attorney for further cross-examination as to his statements regarding the same occurrence to which he had testified and

which were contrary to his testimony previously given. Having thus impeached him, other witnesses were sworn who testified to such contradictory statements. It is objected that the district attorney, having made Morgan his own witness, interrogated him upon matters not theretofore in evidence, and that this was error. It lay within the sound judicial discretion of the trial court to determine as to whether or not the witness should be recalled under existing circumstances. *People v. Keith*, 50 Cal. 137.

[5] A requested instruction to the jury that, in determining whether the crime charged had been committed, the jury must draw any conclusions as to guilt from evidence wholly exclusive of any statement or declaration of the accused, and that, in determining the degree of the offense, the jury should not consider any statement or declaration of either defendant, was refused. Such refusal was proper. "When the case is submitted for their verdict, the jury may consider all the evidence in the case, including extrajudicial statements, admissions, or confessions of the accused, in determining whether or not all the elements of the offense charged and the connection therewith of the accused have been established to a moral certainty and beyond a reasonable doubt." *People v. Selby*, 198 Cal. 426, 245 P. 426, 432.

[6] The giving of instructions which were founded upon evidence before the jury tending to show that the deceased had previously been in possession of money and other personal effects, which were thereafter absent from his clothing and were discovered in possession of the defendants or either of them, and defining homicide accompanied by robbery, is assailed as prejudicially erroneous. That the evidence warranted such instructions does not require further recital of the record. And it is settled law that one who kills another in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem is guilty of murder of the first degree as provided by section 189 of the Penal Code. It is not of the slightest consequence that the conspirators may not have intended to bring about their victim's death. The killing, having occurred in the perpetration of robbery, was murder of the first degree. *People v. Witt*, 170 Cal. 104, 108, 148 P. 928; *People v. Perry*, 195 Cal. 623, 234 P. 890. Other repeatedly approved instructions are discussed in the briefs, which we do not deem it necessary to reconsider and further burden the opinion in view of preceding decisions. *People v. Valencia*, 32 Cal. App. 631, 163 P. 865; *People v. Grill*, 151 Cal. 592, 91 P. 515; *People v. Fowler*, 178 Cal. 657, 174 P. 892; *People v. Selby*, 76 Cal. App. 715, 245 P. 792; *People v. Leddy*, 95 Cal. App. 659, 273 P. 110.

[7] Concerning the motions for a new trial the clerk's transcript fails to show that the trial court either granted or denied them.

However, the motions were made, as of course they must be, before judgment was pronounced, and we may presume that the court performed its duty and acted upon them prior thereto. Since both the appellants and the respondent have treated the case as one where the motions for a new trial had been denied, we shall assume that such was the court's order in each instance.

No error appearing, the judgments and orders appealed from are affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

CONREY, P. J.

The complaint of the plaintiff stated a cause of action for recovery of damages for breach of a contract in writing for the purchase by defendants from the plaintiff of six automobiles. The defendant John H. Lindsey, answering for himself alone, admitted the execution of the contract, but denied the allegation that they had "wrongfully, failed, refused, and neglected to accept and pay for" four of the automobiles. Defendant Butler failed to answer. It should be noted, however, that the defendants were sued as copartners. The defendants as such copartners filed a cross-complaint, wherein they sought to recover damages for breach of said contract by the plaintiff, and to recover moneys paid by defendants to the plaintiff in payment for certain automobile parts which it was alleged that the plaintiff wrongfully refused and failed to deliver.

The court by its findings determined that the contract was "too uncertain to entitle either the plaintiff or the defendants to maintain their respective actions for damages thereon," but found a balance due from the plaintiff in the sum of \$7,614.73 with interest from August 13, 1927, moneys received by the plaintiff for said spare parts not delivered. Judgment was entered accordingly, and the plaintiff appeals therefrom.

The first-stated ground of appeal is that the court erred in finding that the contract is too uncertain to entitle plaintiff to maintain his action thereon.

The contract purported to grant to respondents the exclusive right to sell Hispano-Suiza cars on the Pacific coast. It also set forth the terms of sale of six cars of that make, separately described by name and by price. It is recited in the contract that plaintiff is exclusive agent for the sale and distribution in the United States of America of Hispano-Suiza automobiles and parts thereof. After providing for the agency granted to defendants the contract says: "Fourth: The party of the first part hereby sells to the parties of the second part, and the parties of the second part hereby purchase or buy from the party of the first part six (6) Hispano-Suiza automobiles of the following types, upon the terms and conditions herein-after set forth: One (1) Coupe De Ville, to be delivered F. O. B. New York, upon demand of the buyers at any time after the date hereof, at a price of \$17,500., less 25%, to be paid upon the execution of this contract. In addition thereto, the buyers agree to pay all state and federal taxes, if any." Then follow in separate paragraphs similar descriptions by name and price of five other automobiles. It was provided "that the automobiles hereby described in this contract are to be imported by the seller from Eu-

129 Cal.App. 408

PEASE v. LINDSEY et al.
Civ. 7235.

District Court of Appeal, Second District,
Division 1, California.
Feb. 2, 1933.

Sales (1) (4).

Contract for sale of automobiles *held* not too uncertain to entitle either party to sue for breach thereof.

The contract recited sale of six Hispano-Suiza automobiles of certain types, described by names and prices, to be imported by seller, without stating models or years, size, power, whether new or used, color, finish, and catalogue, engine, or other numbers, or means of identification; but seller testified that all were "32 model" cars, that named car at stated price was standard type 5-passenger touring car, with two extra seats and rear tonneau with cloth top and side curtains, and that description and price determined exact model; while defendant testified that he had data showing particular car covered by contract and conceded that every car ordered was "32 model."

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Clarke D. Pease against John H. Lindsey and Lindsey & Butler, a copartnership, in which defendant copartners filed a cross-complaint. Judgment for defendants, and plaintiff appeals.

Reversed.

Chandler, Wright & Ward and H. C. Mabry, all of Los Angeles, for appellant.

Eugene D. Williams, of Los Angeles, for respondents.

rope." Provision was also made for the sale of certain miscellaneous parts for Hispano-Suiza automobiles.

Respondent in support of the court's finding of uncertainty in the terms of the contract points out that apart from the price and from the name indicating the type "no other details are given, the contract being quite silent as to the model or year; the size or power; new or used; color or finish; catalog, engine or other number or means of identification, and other necessary matters. No method is set forth for the determination of such details."

Upon the law concerning this question, and particularly to the point that the contract is not uncertain, appellant cites: *McIlmoil v. Frawley Motor Co.*, 190 Cal. 546, 213 P. 971, 972; *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 P. 917; *Sutliff v. Seidenberg, Stiefel & Co.*, 132 Cal. 63, 64 P. 131, 469; *Noble v. Reid-Avery Co.*, 89 Cal. App. 75, 264 P. 341. In *McIlmoil v. Frawley Motor Co.*, supra, the controversy related to a contract authorizing the sale by the defendant for the plaintiff of an old Mitchell automobile, and the purchase by the plaintiff of a new Mitchell automobile. The written contract did not describe the new car except by the statement, "I will buy a new Mitchell car." Pursuant to the contract the defendant sold the old automobile of the plaintiff, and received therefor the sum of \$1,000. Plaintiff sued to recover this money on the ground that the agreement was void and unenforceable. The court found that the plaintiff failed and refused to agree upon a price for a new Mitchell car, and had failed and refused to agree on any terms or conditions on which the purchase price was to be paid by him for a new Mitchell car; that the prices of new Mitchell cars were all standard and fixed; that the selection of the car would determine the price to be paid; that there were several varieties of Mitchell cars, each variety having a different price.

In its consideration of the question thus raised on plaintiff's contention that the contract was void and unenforceable the Supreme Court declared that the law will, if feasible, so construe agreements as to carry into effect the reasonable intention of the parties if that can be ascertained; that the description of the subject-matter of agreement may be indefinite, and yet if it is capable of being identified and rendered definite and certain by evidence aliunde, the contract is enforceable. "Applying this rule to the facts of this case, we think the contention of plaintiff that the contract is void for uncertainty cannot be sustained. It is true that the written contract did not specify the particular model of new Mitchell car which the plaintiff was to purchase, nor the price to be paid therefor, nor the time of payment;

but in law 'that is certain which may be made certain.' Here the plaintiff had agreed to purchase from the defendants a new Mitchell automobile. The particular car to be taken was not thereafter a subject of negotiations, all that remained to be done in this behalf being the selection by the plaintiff of one of the various models of Mitchell cars on sale by the defendants. Nor was the price to be paid therefor a subject of future agreement, since, the prices of the various models, according to the agreed statement of facts, being fixed and standard, the selection by plaintiff of the car desired determined the price and made the contract definite in that respect also. As to the terms of payment, the written contract being silent upon this point, the law itself supplies the deficiency, and requires that payment shall be made at time of delivery." The court further said: "As we have seen, the alleged uncertainty of the contract in the matter of the particular car to be taken and the price to be paid therefor disappears upon the performance by the plaintiff of an act which he under the contract was compelled to do, namely, select the particular car desired by him. * * * It is to be noted that the defendants are not here seeking specific enforcement of the contract or damages for its breach. They are not asking the court to decree a forfeiture, or adjudge a penalty or award damages; neither are they seeking to be relieved from the contract. They have performed their part, so far as they have been permitted to do so, and they stand ready to complete their performance whenever the plaintiff will enable them to do so." The court laid stress upon the fact that the prices of the new Mitchell cars were standard and fixed. Under these circumstances the court held that there was a valid contract, and that the judgment in favor of defendant should be affirmed.

It is suggested by respondents that the decisions cited by appellant "do no more than to hold that an uncertain contract will nevertheless be enforced if the reasonable intentions of the parties can be ascertained." The trial court seems to have determined that the intentions of the parties, with respect to the identification of the automobiles named in the contract, could not be ascertained. Respondents point to the testimony of the plaintiff Pease, that "there is a 20 model, a 32 model and a 46 model Hispano-Suiza automobile; we have no 'standard' car." But Mr. Pease also testified, in substance, that all of the cars referred to in the contract, were "32 model"; for example, that a \$16,800 Torpedo Hispano-Suiza car represents a standard type of touring car, five-passenger, two extra seats facing forward, and the rear tonneau with a cloth top and side curtains. "I know of no other description to cover these cars by which they could be more certainly specified than the description contained in

the contract. The description and the price determine the exact model. I know of no way of describing the cars more accurately." Defendants did not contradict plaintiff as to this matter of certainty in the contract terms. Mr. Lindsey said: "With reference to car No. 3 covered by the contract, I had data showing the particular car there described." He conceded that every car they had ordered prior to 1928 was "a 32 car model." (This contract was made in the year 1927.) The testimony of this defendant shows, not that the contract was uncertain, but that he claimed that some of the cars which the plaintiff wanted him to accept did not comply with the contract description. Both of these parties agreed, in effect, that the descriptions were sufficient. But in addition, Mr. Lindsey said that he knew specifically the cars that were covered by the contract. If there was any conflict in the testimony of these witnesses concerning the true description of the cars sold, it was a contradiction which, however solved, did not leave the contract uncertain. We are of the opinion, therefore, that the court erred in deciding that the contract was too uncertain to entitle either party to maintain an action for damages thereon.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

129 Cal.App. 119

PEOPLE v. FRANK.
Cr. 2211.

District Court of Appeal, Second District,
Division 2, California.
Jan. 23, 1933.

1. Criminal law ⇨1036(9).

Where objection to question whether witness ever went under another name was overruled, it was not necessary to repeat objection to each similar inquiry to preserve right to review.

2. Witnesses ⇨226.

Order of examination is discretionary with trial court.

3. Witnesses ⇨349.

Whether witness ever went under assumed names held improper cross-examination of witness, who was asked nothing on direct examination which permitted such inquiry (Code Civ. Proc. §§ 2048, 2051).

4. Criminal law ⇨1170(4).

Excluding evidence as to what complaint against accused, which witness swore to, was

for, held not error, though complaint was for disturbing the peace, and accused was prosecuted for violating Firearms Law, where accused later testified to nature of charge in complaint (Gen. Laws 1931, Act 1970, § 2).

5. Criminal law ⇨1169(3).

Permitting prosecutor to cross-examine accused as to use of other names held harmless, where accused admitted two felony convictions (Code Civ. Proc. § 2065).

6. Criminal law ⇨730(11).

That prosecutor commented on defendant's failure to produce certain witnesses held not error, where trial court properly instructed jurors concerning comment.

7. Criminal law ⇨706, 1171(1).

In prosecution for possessing pistol, that prosecutor produced unexplained revolver and, in response to question on possession, defense witness admitted its ownership, held misconduct, but not prejudicial under evidence (Gen. Laws 1931, Act 1970, § 2; Code Civ. Proc. § 2051).

8. Criminal law ⇨958(6).

Trial court's refusal to grant new trial for newly discovered evidence on conflicting affidavits held conclusive.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Louis Frank was convicted for violating the Firearms Law, and, from the judgment and from an order denying his motion for new trial, he appeals.

Affirmed.

William I. O'Shaughnessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and William R. McKay, of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

The information filed accused the defendant of a violation of section 2, chapter 339, approved June 13, 1923, as amended in 1931 (section 2, Act 1970), in having in his possession a pistol capable of being concealed upon the person; defendant having been theretofore twice convicted of a felony in the state of Illinois, in 1908 and 1913, respectively. Defendant pleaded not guilty, but admitted the two convictions charged. The jury returned a verdict of guilty, and, from an order denying his motion for a new trial and the judgment entered upon said verdict, defendant has appealed.

No question is raised as to the sufficiency of the evidence to support the verdict.

[1] On cross-examination of a witness named Walden, he was asked by the district

attorney if he ever went under the name of Wallace. Over appellant's objection that nothing was asked on direct examination which permitted such inquiry, the witness testified that he had gone under the name of Charles B. Wallace. He was then asked, without further objection, if he had gone under the following names: Charles Washburn, Charles Warden, Charles H. Monroe, Clarence Greenslit, and Charles B. Warren—to each of which questions he answered affirmatively. In addition, he testified that he could not recall if he had ever used the name Clarence Brockman. The objection to the first question of this series having been overruled by the court, we are of the opinion that it was not necessary for counsel to repeat it to each similar inquiry in order to preserve appellant's right to review any claimed error on appeal. *Green v. Southern Pacific Co.*, 122 Cal. 563, 565, 55 P. 577; *People v. Driggs*, 12 Cal. App. 240, 243, 108 P. 62, 64. It is now urged that it was error to permit such inquiry.

[2, 3] The examination was permitted by the court on the theory that the testimony was relevant and affected the credibility of the witness. No attempt was made by the district attorney to make the witness his own, the answers being given on cross-examination. The order of examination is discretionary with the court, and, if the evidence was material, no harm would be done by permitting the answers to be given during cross-examination, as the same questions would undoubtedly have been permitted on examination in chief. That the answers given tended to affect the credibility of the witness, there can be no doubt. The jury might well conclude that a witness who admitted using so many different names, without giving satisfactory explanation therefor, was neither a truthful nor an honest character. Under section 2065, Code of Civil Procedure, the witness was not required to answer, but he seemed perfectly willing so to do, as he partially answered the first question interposed along that line before an objection could be made. Such privilege, however, "is personal to the witness, and is not in any sense the privilege of the party calling him." *Clark v. Reese*, 35 Cal. 89, 95. The objection interposed here did not involve the question of privilege, but was solely on the ground of improper cross-examination. Section 2051 does not by its terms prohibit impeachment by evidence that merely tends to discredit the character of a witness in the minds of jurors, but is not evidence of particular wrongful acts not amounting to conviction of a felony. Whether on cross-examination such may be done by the introduction of matter not connected with the direct examination is a serious question upon which the courts are not in accord.

In the case of *People v. Crandall*, 125 Cal. 129, 57 P. 785, 788, the questions so asked re-

flected on the character of the witness and showed particular wrongful acts within the prohibition of section 2051, Code of Civil Procedure. After the witness had answered in the negative, plaintiff proceeded to prove by other witnesses that the answers were not truthful. The majority opinion held very properly that under section 2051 such cross-examination was prohibited. Justice Temple, in a concurring opinion, says that he does "not agree that questions irrelevant to the issues in a case, asked for the purpose of discrediting the witness, can never, in the discretion of the trial judge, be asked of a witness;" that "as a general rule, the cross-examination should be confined to the subject-matter of the direct examination, but this rule necessarily cannot apply to matters of impeachment"; and he seems to say that questions may be asked on cross-examination to discredit a witness and the answer compelled, however irrelevant to the fact in issue, except where the answer might expose the witness to a criminal charge or tends to prove particular wrongful acts. The cases presented by appellant as authority on the point involved, while they contain language supporting the proposition that such questioning is erroneous, seem to involve particular wrongful acts, which brings them squarely within section 2051, Code of Civil Procedure. In view, however, of the fact that, although it was perhaps dictum, the majority of the court in *People v. Crandall* seemed to be opposed to the reasoning of the concurring opinion, and in view of the strong statements of the Supreme Court and the limitations on cross-examination that section 2048, Code of Civil Procedure, seems to impose, we are of the opinion that such questions should not have been permitted. See, also, *People v. Sherman*, 100 Cal. App. 587, 592, 280 P. 708.

The evidence in this case was direct and not circumstantial. There were two other witnesses besides appellant and Walden whose testimony was to the effect that appellant had no gun in his hand on the occasion in question. One was the third occupant of appellant's car; the other was the witness MacLean, whose automobile collided with that of appellant, after which the latter got out of his car and struck MacLean. This witness testified that he was standing right behind "old Mr. Hapgood's shoulder"—this Mr. Hapgood being the principal witness for the prosecution—about a foot and a half or perhaps two feet from the car, and saw the gun in Walden's hand but did not see any in appellant's hand. This undoubtedly would have been persuasive evidence to the jury on the disputed point, but for the admitted fact that appellant had twice been convicted of a felony, coupled with the unusual actions of appellant and Walden on the night in question, as shown by the evidence, which must certainly have had a strong effect on the credibility of the testimony of the three occupants of

appellant's car. After an examination of the entire cause, including the evidence, we cannot believe the result would have been different if the objectionable questions had not been asked and the answers given.

[4] The witness MacLean was asked on cross-examination if he swore to the complaint against the defendant, to which he answered in the affirmative. He was then asked, "For what?" to which an objection that the same was incompetent, irrelevant, and immaterial was sustained. It was defendant's theory that, inasmuch as the complaint was for disturbing the peace, there was no thought of preferring any other charge. Such conclusion does not necessarily follow, because there would not seem to be much doubt from the evidence that at the time in question Frank was fighting MacLean. We see no error in the ruling. In any event, the nature of the charge was later testified to by appellant himself.

[5] Appellant also urges that the court erred in permitting the district attorney to question him on cross-examination as to the use of the names Armstrong and Ahrnsdorff, which appellant admitted he had done, "but not in California." The record is silent as to any objection to such cross-examination, and we fail to see how any harm resulted, in view of defendant's admission that he had been twice convicted of felony—a much more serious impeachment.

[6] Complaint is also made that the district attorney was guilty of misconduct in commenting to the jury on the failure of defendant to produce certain witnesses before them, but the record discloses that the court, when its attention was called to the circumstance, properly instructed the jurors concerning same.

The district attorney recalled the witness Walden for further cross-examination and directed his attention to an automatic revolver, which was produced, asking him if he was not in possession of that particular gun on the evening in question. To this question the witness answered, "No sir," but he did admit that he was the owner of such weapon. The objection of immateriality to the question which brought such admission follows the answer made. It is impossible to judge from a transcript the close sequence such occurrences sometimes have, but it is evident that the court treated the objection as having been timely made, and therefore ruled upon it, and we think it must be given the same effect on appeal as though a motion had been granted to strike the answer for the purpose of interposing the objection. Certainly it was immaterial whether Walden owned the gun exhibited unless it was the gun used by him at the time in question. It appears from affidavits presented on the motion for new trial that the automatic so presented was

taken from the possession of Walden prior to the affair in question here, and that it probably had been in the possession of the district attorney's office continuously since. No evidence was introduced at the trial to show where the gun came from. Counsel for defendant apparently did not know anything about the automatic and asked no questions of the witness in regard to it. The witness immediately after testifying left the court, and counsel did not ascertain the facts concerning the weapon until after the conclusion of the trial, when they were urged as newly discovered evidence.

[7] We cannot condone the use of such tactics by the deputy district attorney who tried the case. Such procedure was unfair and clear misconduct in the light of all the facts; and, if the facts so presented might have changed the result of the trial, a new trial should have been granted. Two witnesses had testified on direct examination that the gun which the witness Walden had was an automatic and not the six-shooter which was introduced as Exhibit I, and which Walden, the defendant and the witness Osborne who was in the car with them testified was the only gun in the machine that night. Several other witnesses testified that Walden and the defendant each had a gun, and identified Exhibit I as the weapon defendant had. Evidently the prosecuting attorney made no comment to the jury on the gun produced. Why it was produced we cannot conceive, unless the prosecutor hoped to bring out some voluntary explanation by the witness which would have shown that the latter was at the time being prosecuted for a criminal offense and thus impeach him by a showing of other wrongful acts, which he could not do directly under section 2051 of the Code of Civil Procedure. The jury must have thought such action peculiar, but we fail to see how it would have had any other effect under the evidence. Had defendant made a motion to strike the evidence the court would most certainly have granted it. However, we cannot see how the verdict would have been changed if the history of the gun had been brought to the attention of the jury, nor do we see how appellant was prejudiced by the misconduct referred to.

[8] The only other newly discovered evidence shown by the affidavits upon which the motion for a new trial was based related largely to conversations with the witness Elwood Hapgood, in which it is claimed that Hapgood stated that they (referring to himself and his father) "could not honestly say that they had seen any gun in the hands of Louis Frank; that they had seen something either in his lap or on the seat which was dark and cast a reflection as of metal of some kind—they could not say whether it was a gun or a flashlight or what it was," and also statements to the same effect so far as the witnesses Bestwick and Sawyer were con-

cerned. The other matters shown by the affidavits seem to relate to matters known to the defendant, Frank, and consequently, if true, should have been brought out on the trial. The statements were pure hearsay, so far as any witnesses except Elwood Hapgood are concerned, and are positively denied by the affidavits of Elwood Hapgood and the others. The lower court having determined the motion for a new trial on the ground of newly discovered evidence on conflicting affidavits, we are not authorized to interfere with its decision. *Kataoka v. Hanselman*, 150 Cal. 673, 89 P. 1082.

Judgment and order affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 369

HUTCHINSON v. TAYLOR.
Civ. 7508.

District Court of Appeal, Second District,
Division 1, California.

Jan. 31, 1933.

1. Appeal and error $\hookrightarrow$ 907(2).

Where bill of exceptions on plaintiff's appeal contained part of defense counsel's opening statement, but set forth no evidence, appellate court must assume evidence established facts stated in counsel's statement contained in bill of exceptions.

2. Husband and wife $\hookrightarrow$ 332.

Complaint alleging defendant estranged plaintiff's husband from plaintiff and persuaded him to live with defendant stated cause of action for alienation of affections and not for criminal conversation (Code Civ. Proc. § 370; Civ. Code, § 155).

Complaint alleged that defendant gained affections of plaintiff's husband, prejudiced him against plaintiff, and persuaded him to leave plaintiff and surreptitiously live with defendant, and made no reference to any criminal conversation, except by inference, while claim for damages set forth in complaint was that by defendant's acts husband became estranged from plaintiff, that his affections for plaintiff had been destroyed, that plaintiff had been, and still was, deprived of her husband's aid, support, and society she otherwise would have received from his hands, and had suffered great humiliation, and distress of mind, body, and estate, to her damage in a certain sum.

3. Husband and wife $\hookrightarrow$ 335.

Where wife's complaint alleged solely cause of action for alienation of affections,

refusal to instruct regarding her damages for criminal conversation between her husband and defendant *held* not error (Code Civ. Proc. § 370; Civ. Code, § 155).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Mattie Dean Hutchinson against Edith P. Taylor. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hill, Morgan & Bledsoe and W. M. Farrer, all of Los Angeles, for appellant.

Hanna & Morton, of Los Angeles, for respondent.

CONREY, P. J.

In this action the plaintiff seeks to recover damages for wrongs committed by the defendant which were injurious to the rights of the plaintiff as wife of one Samuel S. Hutchinson, to whom plaintiff was married in the year 1893. The complaint alleged that until October, 1927, Hutchinson was deeply attached to the plaintiff, and they lived happily together "and but for the wrongful and malicious acts of the defendant heretofore set forth would have continued so to live together"; that during a long period of time, both subsequent and prior to September, 1927, the defendant wrongfully and maliciously, etc., sought to prejudice Hutchinson against the plaintiff, and by subtle contrivances, etc., gained his affections; that on or about October 1, 1927, the defendant willfully, etc., enticed away the said Hutchinson from the plaintiff, and persuaded him to leave the plaintiff and go to live surreptitiously with the defendant as her husband. The circumstances and consequences of said acts are set forth in much detail in the complaint. Upon the issues raised by the complaint and amended answer, the case went to trial before a jury. The verdict was in favor of the defendant, with judgment accordingly. The plaintiff appeals from the judgment.

The appeal is presented on the judgment roll and a bill of exceptions. In substance, the bill of exceptions contains only three things, viz., part of an opening statement made by defendant's counsel; certain instructions given by the court to the jury; and certain instructions requested by the plaintiff and refused by the court. The assignments of error relate solely to instructions given and the refusal of others. It is claimed by appellant that the facts which, by not denying in her answer, are admitted by the defendant, and the admissions made by her counsel in said statement to the jury, left the case in a condition which entitled the plaintiff to have the jury instructed in

accordance with plaintiff's requested instructions and not upon the theory declared by the court in the instructions which it did give to the jury; and that, at all events, the plaintiff was entitled to at least nominal damages. For these reasons it is claimed that the judgment should be reversed.

According to the above-mentioned statement of defendant's counsel to the jury, the intimacy between S. S. Hutchinson and the defendant began in the year 1912, and it was not until after July, 1914, when a child was born to them, that the defendant first learned that he was a married man. Nevertheless the intimate relations between defendant and said Hutchinson continued from time to time so that in the year 1919 a second child was born to them. In the year 1925 Hutchinson came to California, and soon thereafter induced the defendant to join him there, and they continued to live together as husband and wife in the state of California during a large part of the time until the time of commencement of this action. These admissions of fact made by defendant's counsel were intermingled with statements that the defendant expected to prove that, after defendant learned that Hutchinson was a married man, he led her to believe that his relations with his wife were not cordial or intimate; and further would show that during the period of time of defendant's association with said Hutchinson there was no affection between him and the plaintiff; and that the defendant never enticed said Hutchinson from the plaintiff, never induced him to leave the plaintiff, or to associate with the defendant; and that in all of her contacts with the defendant said Hutchinson was the one who wooed the defendant and was the aggressor in originating and maintaining the relations that existed between them.

[1] In view of the fact that the plaintiff has not brought into the bill of exceptions any of the evidence actually produced before the jury, we must assume that the evidence fully established the facts last above mentioned, including the fact that the defendant did not entice Hutchinson from the plaintiff or induce him to leave her or to associate with the defendant, and that in all respects Hutchinson was the "aggressor" in respect to his said relations with the defendant.

The grounds of appeal and the questions of law involved therein are sufficiently indicated in the statement of points contained in the opening brief of appellant, that is to say, that the court erred in its instructions to the jury by failing to recognize that the pleadings and proofs in this action entitled the appellant to recovery as for criminal conversation, and that the court erred in refusing to instruct the jury in accordance with that theory. In other words, it is the claim of the plaintiff, and was so indicated in the

requested instructions, that, when the defendant once admitted that she had improper sexual intercourse with the plaintiff's husband, that fact alone was sufficient to establish the plaintiff's right to an action for damages "regardless of which party is the seducer."

[2, 3] It will thus be seen that, although the cause of action pleaded in plaintiff's complaint is complete as a statement of a cause of action for alienation of affections, the plaintiff is now contending that the facts alleged constitute a cause of action for "criminal conversation" between the defendant and the plaintiff's husband, whereby the plaintiff was injured. Appellant directs attention to the code division of injuries, as injuries to property and injuries to the person, and claims that the cause of action upon which she relies is for injury to her person. In this she relies upon section 370 of the Code of Civil Procedure, wherein it is provided that a married woman may sue without her husband being joined as a party in all actions, "including those for injury to her person, libel, slander, false imprisonment, or malicious prosecution. * * *" Reference is made also to section 155, Civil Code, as follows: "Husband and wife contract towards each other obligations of mutual respect, fidelity, and support."

In the plaintiff's complaint, the theory indicated is that of an action for wrongful alienation of affections. No reference is made therein to the birth of children above mentioned, or to any criminal conversation between the defendant and the husband other than by the inference which arises by the statement that defendant maliciously induced the said Samuel S. Hutchinson to live with her as her husband, wrongfully intending to injure the plaintiff, etc. The claim for damages set forth in the complaint reads as follows: "That by reason of the premises the said Samuel S. Hutchinson has become estranged from the plaintiff and his affections and regard for the plaintiff have been destroyed and plaintiff has been and still is wrongfully deprived of her said husband's aid, support, protection, fellowship, comfort, company, society and the happiness she otherwise would have received from his hands and has suffered great humiliation, dishonor, disgrace and distress of mind, body and estate, to her damage in the sum of \$300,000.00." In the absence from the record of the evidence produced by plaintiff at the trial or of the proceedings therein other than those above mentioned, it is by no means certain that the case was tried upon the theory of a claim for damages on account of criminal conversation. If the case was tried along the lines indicated in the complaint, the case presented would have been that of a claim resting upon alleged alienation of affections. In another action where the complaint was substantially similar to that of

the plaintiff here, this court said: "It is contended by appellant that the action is one for criminal conversation, and that alienation of affections is but incidental thereto. However, the quoted portion of the complaint, which is the only portion thereof setting forth the amount of damage sustained or an estimate of the damage sustained by plaintiff does not refer to the criminal conversation as an element of financial detriment." *Harp v. Ferrell*, 115 Cal. App. 160, 300 P. 973, 979. The comment thus made is applicable to the present case, and we think that the cause of action may properly be construed as solely a cause of action for alienation of affections. Based upon this construction of the complaint, and the incomplete record of proceedings at the trial, we are of the opinion that appellant has failed to show that any prejudicial error was committed by the court, or that there is any sufficient reason for reversal of the judgment.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

RHINOCK v. PRICE et al.*

Civ. 7506.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1933.

Hearing Granted by Supreme Court March 30, 1933.

Pledges ⇨24.

Plaintiff, who delivered ownership certificate and automobile to salesman who pledged it to defendant making advances to salesman, held not entitled to possession of automobile as against defendant.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Emma L. Rhinock against M. H. Price and others. From a judgment in favor of plaintiff, defendants appeal.

Reversed.

Samuel W. Newman, of Los Angeles, for appellants.

McAdoo, Neblett & Clagett and Frank G. Swain, all of Los Angeles, for respondent.

YORK, J.

Plaintiff brought an action in claim and delivery to recover possession of a Lincoln automobile or its value which was alleged

to be \$5,000. Judgment was rendered in her favor, and the defendants appeal therefrom.

It is shown by the record that, prior to January, 1929, the plaintiff was the registered owner of the automobile here in controversy. E. L. Butler was a salesman employed by appellant corporation engaged in the sale of Hispano Suiza automobiles. Plaintiff entered into some sort of arrangement with Butler whereby she delivered the Lincoln car to him, and shortly thereafter she indorsed in blank and delivered to the said Butler the "pink certificate" of ownership issued by the motor vehicle department of the state of California. About this time, Butler told appellant Zuckerman, an officer of Parisian Motors, Inc., that he had a prospective buyer for an Hispano Suiza car, but, in order to consummate the sale thereof, that it would be necessary for Butler to buy a car belonging to the daughter of the prospective buyer. During the latter part of January, 1929, Butler told said Zuckerman that he had made a deal, that he had bought the Lincoln car and needed \$500 to close the deal, which sum Parisian Motors, Inc., advanced to Butler. About February 15, 1929, Butler again borrowed money from appellant corporation and offered the Lincoln car as security, which he delivered together with the pink slip to Zuckerman. Zuckerman agreed on behalf of Parisian Motors, Inc., to loan against the security of the said automobile and the pink certificate an amount up to the sum of \$1,500, including the advancements made before that time. The sum of \$1,131 was advanced in checks of the company, none of which was repaid.

The day after the delivery by Butler of the car to Zuckerman, the latter redelivered the Lincoln car to Butler for purposes of sale. On March 22, 1929, while driving the car in question, Butler was killed, and Parisian Motors, Inc., took possession of the said car and stored it in the Auto Center Garage in its own name, where it was located at the time this action was commenced. From February 15, 1929, until date of trial, the pink certificate remained in the possession of appellant Parisian Motors, Inc.

As ground for reversal of the judgment, appellant invokes the theory of estoppel to the effect that, where one gives the indicia of ownership to another, together with the possession of the car itself, he is estopped, as against an innocent purchaser or pledgee, from claiming the true ownership thereof. In support of this theory appellant cites the case of *Rapp v. Fred W. Hauger Motors Co.*, 77 Cal. App. 417, 246 P. 1067. In order to invoke the theory of estoppel against the plaintiff here, it must appear that appellant was without knowledge of the true situation existing between its agent Butler and the

plaintiff; in other words, that appellant was an innocent pledgee, and parted with value on the strength of indicia of ownership given to Butler by said plaintiff.

The record shows that Butler was a salesman employed by appellant, and that he received as compensation one-half of the profits on automobiles sold by him for said appellant. During the course of trial, the witness Zuckerman, an officer of appellant corporation, testified as follows:

"He (Butler) came to me and told me that he had a good prospect to sell one of the Hispano Suiza automobiles that he had, and that it would be necessary for him to buy a car that belonged to the daughter of this fellow that he was going to sell the car to. And some time during the latter part of January, he told me that he had made a deal, that he had bought the car—

"Mr. Swain: What car? A. The Lincoln town car, from a Mrs. Rhinock. I had seen him driving in the car prior to that time.

"Q. By Mr. Newman: Just state the conversation, please. A. Yes. He said he would need \$500.00, might need \$500.00, to go and close up the deal, and could not need more than \$250.00; so he asked me to make out two checks for \$250.00 each, which I did, and he said that if he wouldn't need both checks he would use one, and I gave him the \$500.00 on the same date, in two different checks.

"Q. * * * Have you stated all of the conversation that took place at that time? A. At that time, yes; I gave him that as a loan against the car."

The record also shows that on the 15th day of February, 1929, Butler owed the appellant the sum of \$700, upon which date appellant Zuckerman advanced \$200 more, and Butler delivered the car and the pink certificate to Zuckerman at his house.

It clearly appears from the evidence that the defendant corporation did not have knowledge of the true facts, and therefore that plaintiff, by her act of indorsing and delivering to Butler of the pink certificate and the Lincoln car, is estopped to assert her title as against appellants.

The judgment is reversed.

I concur in the judgment: HOUSER, J.

CONREY, P. J.

I concur in the judgment. A finding on the issue of estoppel was not necessary, since that defense was not pleaded. This was not a case in which such plea was necessary. *Kenny v. Christianson*, 200 Cal. 419, 424, 253 P. 715, 50 A. L. R. 1297. Moreover, the facts in support of the estoppel were received in evidence without objection, and, as against

appellant Parisian Motors, Inc., they are sufficient to defeat the finding that plaintiff is entitled to possession of the automobile. There is no conflict in the evidence relating to this question.

I think that there is no merit in the contention of respondent that Butler's agency as a salesman for Parisian Motors, Inc., was an agency which charged said corporation with Butler's knowledge that plaintiff was the true owner of the car. Also I am of the opinion that defendants' right of lien and right of possession of the automobile was not lost by its temporary redelivery of the automobile to Butler for the particular purposes shown in the evidence.

129 Cal.App. 214
LANGENSAND et al. v. OBERT et al.

ZANDRINO v. SAME.

Civ. 4774.

District Court of Appeal, Third District,
California.

Jan. 25, 1933.

1. Witnesses ⇨389.

Complaint in justice's court for reckless driving and docket showing plea of guilty *held* admissible, in action for resulting injuries, to impeach defendant, who denied making statement in such court (Code Civ. Proc. § 2052).

2. Witnesses ⇨389.

Witness testifying that he made no statement regarding his conduct may be impeached by proving statement by him at time and place specified in designated parties' presence (Code Civ. Proc. § 2052).

3. Witnesses ⇨379(2).

Proof of witness' statement, contrary to his testimony that he did not drive automobile recklessly, is admissible to impeach him (Code Civ. Proc. § 2052).

4. Evidence ⇨207(4).

Record showing defendant's plea of guilty of reckless driving in justice's court *held* admissible as admission against interest in action for resulting injuries.

5. Evidence ⇨158(7).

Justice's docket, showing defendant's plea of guilty of reckless driving, *held* admissible as best evidence, not of his negligence, but of his declarations or admissions, in action for resulting injuries.

6. Appeal and error ⇨216(1).

Automobile owner, present in car, recklessly driven by joint adventurer, and repre-

sented by same counsel as driver in action for resulting injuries to others, cannot urge on appeal that justice's record of driver's plea of guilty of reckless driving was inadmissible against owner, in absence of such objection or request for limiting instruction in trial court.

7. Witnesses ⇨330(1).

Impeaching questions, affecting credibility of defendant testifying for himself and co-defendant, apply equally to each.

8. Automobiles ⇨245(78).

Motorist, exceeding speed permitted in going around curves when driver's view is obstructed within 200 feet at time of collision with approaching automobile, *held* not contributorily negligent as matter of law, in view of testimony that his view was unobstructed for over 200 feet (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120, § 34).

9. New trial ⇨77(2).

Judge may set aside jury's verdict as awarding excessive damages only when so grossly disproportionate to reasonable compensation warranted by facts as to shock sense of justice and raise strong presumption of prejudice and passion.

10. Damages ⇨132(7).

Jury's award of \$7,800 damages for injuries impairing use of ankle by 50 per cent., causing temporary brain concussion and two months' confinement in bed, and compelling artificial aid in walking for 7 months, *held* not excessive.

Appeals from Superior Court, Lake County; Benjamin C. Jones, Judge.

Consolidated actions by Peter Langensand and wife and by Rico Zandrino against Arthur L. Obert and another. Judgments for plaintiffs, and defendants appeal.

Affirmed.

H. G. Crawford, of Lakeport, for appellants.

Walter McGovern and Ernest I. Spiegl, both of San Francisco, and Herbert V. Keeling, of Lakeport, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

The actions above entitled arose out of one automobile accident, and were therefore consolidated for trial.

The plaintiffs in the action first above are husband and wife, and the plaintiff Zandrino, in the second action, was a passenger in the automobile driven by Peter Langensand. The case was tried by a jury, and verdicts were returned in favor of the respective plaintiffs, in different amounts. Motion for new trial

was denied and judgments entered. The appeal follows.

It is admitted there was a collision between the car driven by Langensand and the car owned by Obert and driven by Wester. Likewise, it is admitted that as a result of said collision the several plaintiffs each sustained personal injuries. The accident occurred in Lake county upon a stretch of road common to the foothill country.

It was the claim of plaintiffs that the car was being operated at a speed of twenty-five miles per hour, and in all respects in a careful and prudent manner—the usual claim of all plaintiffs; that defendant, approaching at a speed of forty or forty-five miles per hour, suddenly and without warning, left his side of the road and smashed directly into the course of plaintiffs, thereby causing the collision.

The evidence adduced supported plaintiffs' claim, and, accordingly, the verdict against defendants.

On the issue of defendant's negligence there can be no question (and none is seriously raised) that the finding of such negligence has abundant evidentiary support.

[1] At the time of the accident defendant Wester was driving the car of Obert. Both defendants were in the car, though Obert was asleep and has no knowledge of any of the facts prior to the collision. At the trial the defendant Wester, called as a witness, testified that the accident happened just as he was coming around a curve; that his car was out too far, and he did not have time or space sufficient to permit him to get back on his side, after seeing the car of plaintiffs. He fixed the speed of his car at 20 per hour. He was asked if it were not the fact that he was going 40 miles an hour, and his answer was in the negative. He was then asked this question: "Is it not a fact that the accident was due to your reckless driving?" His answer was, "No sir." He was then questioned about his appearance in the justice's court upon a charge of reckless driving. He denied making any statement in said court, and in fact denied saying one word there. He did admit, however, that he was in said court, represented by counsel, and that anything that was said, his attorney said for him. The details of the appearance were sufficiently shown as to time, place, and parties present.

Thereafter, plaintiff called as a witness Hon. Fred Fuller, justice of the peace, before whom the proceedings referred to were had. Upon the objection of the appellants that the criminal complaint in the justice's court was the best evidence, the said complaint was produced and offered and received in evidence. This complaint charges Wester with the crime of misdemeanor, committed as follows: "That

said defendant, on or about the 2nd day of August, 1931, at and in the County of Lake, State of California, did wilfully and unlawfully drive and operate a certain motor vehicle, to-wit: a Dodge Coupe, over and upon a public highway leading from Elk Mountain to Upper Lake, in a careless and imprudent manner, and at a rate of speed greater than was reasonable and proper, and without due regard to the traffic and use of said highway, to-wit, in so negligent a manner as to indicate a wilful and wanton disregard to the safety of persons or property upon said highway." This complaint was verified by Peter Langensand, one of the plaintiffs. The justice of the peace produced his docket, which showed as follows: "Defendant waived time in which to plead, and entered his plea of guilty as charged in the complaint."

Appellant urges, as practically the main ground of this appeal, that the admission of this evidence was erroneous and prejudicial. It is unnecessary to detail the arguments made to sustain the claim of error. It will suffice to give the reasons sustaining the trial court's action.

[2, 3] A witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony. Code Civ. Proc. § 2052. Under the rule, when the witness stated that he had never made any statement regarding his conduct (the foundation being properly laid), it is permissible, by way of impeachment, to prove any statement made at the time and place specified; the designated parties being present. Further, when a witness testifies that he was not driving in a reckless manner, proof of a statement by him to the contrary (conceding a foundation for the proof) becomes admissible.

[4] Also, there is another reason for the trial court's ruling. An exception to the rule that a judgment in a criminal prosecution cannot be received in a civil action to establish the truth of the facts in which it was rendered has been held to arise where the defendant in the criminal case pleaded guilty, and the record showing such plea is offered in a civil action against him growing out of the same offense, such a record being admitted not as a judgment establishing the fact, but as the deliberate declaration or admission against interest that the fact is so; in other words, a solemn confession of the very matter charged in the civil action. 31 A. L. R. 278; 57 A. L. R. 504, with authorities therein cited; *Risdon v. Yates*, 145 Cal. 213, 78 P. 641; *Gates v. Pendleton*, 71 Cal. App. 752, 236 P. 365; *Card v. Boms*, 210 Cal. 200, 291 P. 190, 192. Quoting from the last-cited case: "Any statement made by a party to an action may be considered, not only for the purpose of impeachment of his testimony or

credibility as a witness, but as an admission against interest."

If the defendant, in the case before us, had stated to any person that he was driving his car in a reckless manner and without due regard for the safety of others, and regardless of traffic, there would be little question as to the admissibility of the statement; again assuming the foundation laid. Under conditions much more solemn, the defendant did so state, and under pain of penalty, when his every interest lay in stating to the contrary, were it not for the pains of perjury.

[5] Some argument is made as to the manner of proving the statements. It is contended that the record of the justice of the peace was not admissible. However, appellant insisted, in the court below, upon the complaint being the best evidence. By the same token, the docket of the justice would be the best evidence. No objection was made in the court below as to the form of proof. The law requires the justice of the peace to keep a docket and to enter his proceedings therein. The justice of the peace was personally present, with his docket, and if defendant had any claim against the verity of the entry, an abundant opportunity was afforded him to go fully into the matter. *Risdon v. Yates*, supra. The error into which appellant has fallen is that he contends that the evidence was admitted on the theory of independent proof of defendant's negligence. The fact is that its admission was limited to proof of declarations or admissions of a party. In this connection we note in passing that the appellant makes no criticism of any instruction given by the court to the jury. We therefore assume that the jury were fully and fairly instructed on all phases of the case.

[6, 7] Finally, in this branch of the case, it is urged that if this testimony might be admissible against Wester, the driver of the car, it was inadmissible as against Obert, the owner. There are many answers to this contention. The owner was present, though asleep; the operation of the car was a joint enterprise at the time, from the facts of the case. Without analyzing the arguments, and even conceding the merit therein, the record before us discloses that both defendants were represented by the same counsel, and there was no objection made by or on behalf of defendant Obert; nor was there suggestion of limiting the evidence to Wester. Had the defendant Obert requested an instruction to the jury, on the effect of the testimony as to him, no doubt the court would have granted it. He cannot sit quiet in the trial court, and for the first time urge the point here. Another answer is that Wester was a witness for both defendants, and, considering him as such, any impeaching questions affecting his

credibility would apply equally to each defendant.

[8] The appellants next urge that plaintiff Langensand was guilty of contributory negligence as a matter of law. That this negligence, proximately contributing to the accident, bars recovery by the plaintiff, and likewise bars recovery by the wife. One ground of this contention is the claimed fact that plaintiff Langensand was operating his car at a speed in violation of the statute, which fixes fifteen miles per hour as the maximum in traversing or going around curves or corners of a highway when the driver's view is obstructed within a distance of 200 feet along such highway in the direction in which he was driving. Section 113, California Vehicle Act (as amended by St. 1931, p. 2120, § 34).

It is undisputed that plaintiff's car was going in excess of 15 miles per hour. However, there is ample evidence to negative the claim that plaintiff's car was traversing an area wherein the speed limit applied.

Appellants lay much stress on the phrase "along such highway," and argue that this means that the view must be open every inch of the 200 feet. Conceding this to be a correct construction, the record before us contains affirmative testimony that at the place of the accident the view was unobstructed for a distance in excess of 200 feet and throughout the entire distance. Still, on this subject of contributory negligence, appellants repeat the argument which we may assume was addressed to the jury and to the trial court on motion for a new trial; namely, an argument based upon appellant's own view of the facts, regardless of the conflict.

Aside from the general argument, we are directed to no facts which sustain the claim of contributory negligence.

Lastly, appellants attack the verdict in favor of plaintiff Zandrino as being excessive. The jury awarded Zandrino \$7,800 general damages. Appellants argue the phase of this case somewhat perfunctorily. It is stated: "It is useless to quote the medical testimony of the doctors as to Rico Zandrino." This seems to parallel the claim that it does not matter how serious the injuries, the damages awarded were excessive.

[9] Next appellants state: "We fully realize that there is no hard and fast rule to follow in determining the question of excessiveness of damages in a particular case." In

this they are half right; there may be no hard rule, but there is a rule somewhat fast (in the sense of being binding). The rule has often been announced. It is only where the verdict is so grossly disproportionate to any reasonable amount of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice and passion, rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury. *Zibbell v. Southern Pac.*, 160 Cal. 255, 116 P. 513; 20 Cal. Jur. 101; *Driscoll v. California St. R. R.*, 80 Cal. App. 208, 250 P. 1062; *Anstead v. Pacific G. & E. Co.*, 203 Cal. 634, 265 P. 487, 490. In the last-cited case it is said: "The verdicts of juries are rarely interfered with upon this ground, and only when, as has been repeatedly stated, the verdict is so grossly excessive as to suggest at first blush, passion, prejudice, or corruption on the part of the jury."

[10] It might be noted here that in the instant case the jury brought in three separate verdicts awarding damages to the various plaintiffs separately. No complaint is made as to the awards to the Langensands being excessive. This in itself would indicate that the jury carefully considered the damage in each case, and to some extent would negative the idea of prejudice and passion. The injury sustained by Zandrino affected his ankle. The use of the ankle will always be impaired to an extent as high as 50 per cent. Motion is accompanied by pain, and this condition is anticipated to continue for some years. He will require further medical attention for some time. As a result of the accident he suffered from concussion of the brain for a short time, and was confined to bed for two months. He was compelled to use artificial aid in walking, up to and including the time of the trial, being a period of some seven months.

In view of these facts, we cannot say that the verdict of the jury suggests passion or prejudice, or that it is grossly disproportionate to any sense of justice. The trial judge evidently thought the jury fair in awarding damages.

We find no error in the order denying appellants' motion for a new trial.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

129 Cal.App. 374

CALISTOGA VINEYARD CO., Limited, v. LUCHETTI.

Civ. 4717.

District Court of Appeal, Third District,
California.

Jan. 31, 1933.

Rehearing Denied March 2, 1933.

Hearing Denied by Supreme Court March 30,
1933.

1. Parties ⇨59(2).

Permitting substitution, at opening of trial, of corporation assignee as party plaintiff in place of copartnership assignor, *held* not error.

2. Appeal and error ⇨1036(4).

Defendant who obtained no judgment cannot complain of error in permitting substitution of party plaintiff because substituted plaintiff could not be made liable for any judgment defendant might obtain.

3. Factors ⇨38.

Generally, factor cannot commingle principal's grapes with grapes of other shippers and dispose of entire shipments commingled at average price, in absence of custom or usage justifying such course.

4. Customs and usages ⇨19(3).

Evidence established custom justifying factor in commingling principal's grapes with grapes of other shippers and disposing of entire shipments commingled at average price.

5. Factors ⇨42.

Evidence *held* not to show that factor delegated his authority to ship and market grapes of principal.

6. Fraud ⇨52.

Absent evidence of fraudulent representations made to defendant, excluding testimony of representations plaintiff made to others *held* not error.

Appeal from Superior Court, Napa County;
Percy S. King, Judge.

Action by the Calistoga Vineyard Company, Limited, against A. Luchetti, wherein defendant filed a cross-complaint. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Thomas C. Anglim and Mervin C. Lernhart,
both of Napa, for appellant.

Wallace T. Rutherford, of Napa, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The action was commenced to recover a sum of money received by defendant for the use and benefit of plaintiff. The complaint was on such a common count.

Defendant answered, specifically denying allegations of complaint, and interposed a cross-complaint in three counts. First he alleges lack of capacity of plaintiff to maintain the suit. This count was subsequently stricken, and, as no point is urged on the correctness of the ruling, we will give no future notice to this phase of the case. In detailing the cross-complaint, we will refer to the parties as plaintiff and defendant, meaning thereby the original plaintiff and defendant, rather than to designate them as cross parties.

The cross-complaint then alleges:

That one T. A. Turner was the agent of plaintiff, and as such agent represented plaintiff in negotiations with third persons for the sale and marketing of grapes.

That Turner did willfully, falsely, deceitfully, and fraudulently represent to defendant that plaintiff had made arrangements with Eastern buyers for the sale of a large quantity of grapes, and that persons marketing grapes through plaintiff would receive for the grapes so marketed not less than \$32 per ton over and above marketing costs.

That said Turner further willfully and deceitfully and fraudulently represented to defendant that, in order to take advantage of this favorable arrangement, it would be necessary for defendant to agree in writing to deliver not less than one hundred and ten tons of grapes to plaintiff, and said Turner produced a writing fraudulently representing to defendant to contain an agreement for defendant to deliver one hundred and ten tons of grapes, which agreement Turner fraudulently represented to be a mere matter of form.

It is then alleged that the representations were false and fraudulent and known by Turner so to be, and were made by Turner for the purpose of inducing defendant to market grapes through plaintiff; that in truth and in fact the agreement signed by defendant was a consignment contract whereby defendant consigned his grapes to plaintiff under an ordinary form of consignment agreement.

It was alleged that defendant was illiterate and unfamiliar with business, and that he relied absolutely upon the false representations of said Turner, and that thereafter he delivered to plaintiff some one hundred and thirteen tons of grapes of a market value of \$3,380.

As a further ground of cross-complaint, it is alleged that plaintiff received for said grapes the sum of \$3,380 over and above all expenses, and refuses to account to defendant therefor, save that there has been paid to defendant the sum of \$2,500, leaving the balance of \$880 for which defendant prays judgment.

Plaintiff answered the cross-complaint. In the answer plaintiff admitted making the representation that arrangements had been made with Eastern buyers for the sale of a large quantity of grapes, and alleges the statement

to have been true. The answer sets up the fact to be that plaintiff had Eastern contracts for grapes at from \$50 to \$57.50 per ton f. o. b. Calistoga at the time the contract with defendant was executed. But, alleges the answer, the arrangements with the Eastern buyers required such grapes to be free from rain damages; that all of the grapes delivered to plaintiff by defendant were rain damaged; that the rains, aside from deteriorating the grapes, delayed the harvesting and marketing, and plaintiff was unable to fill its Eastern contracts. Admits the receipt of one hundred and thirteen tons of grapes from defendant, and rests upon the pleaded contract of assignment.

Denies that plaintiff ever paid defendant the sum of \$2,500 on the contract, but alleges that this amount of \$2,500 was due from defendant to the bank on a promissory note of defendant, and that plaintiff paid said note for the defendant, regardless of the contract.

Upon the issues thus joined the parties went to trial before a jury.

At the opening of the trial, plaintiff sought and obtained leave to amend by substituting Calistoga Vineyard Company, Limited, a corporation, as party plaintiff in the place and stead of Calistoga Vineyard Company, a copartnership. Appellants here strenuously maintain that error of a prejudicial nature was committed in permitting the change. It was shown that the copartnership had assigned the claim and cause of action to the corporation, and had, in fact, made a full and complete assignment and transfer of all of its assets to the latter. It was also shown that the corporation was the copartnership under different form of entity. It was composed of the identical persons theretofore constituting the partnership and carrying on the same business at the same place. In open court the corporation assumed liability for any demand defendant might prove or any judgment he might obtain.

[1] Much discussion of a more or less highly technical nature accompanies appellant's claim for error on this phase of the appeal. We see no error in the substitution. As an assignee, disregarding for the moment appellant's claim for affirmative relief, the corporation had the legal right to pursue the cause of action. *Giselman v. Starr*, 106 Cal. 651, 40 P. 8.

[2] As to appellant's claim that the substituted plaintiff could not be made liable for any judgment defendant might obtain, the fact remains that, after trial, defendant obtained no judgment, and consequently any error could not have prejudiced him.

Assuming, however, that defendant has or had a valid claim, the corporation, through its president and attorney, in open court accepted liability and pledged payment. Surely the practice of law is conducted on an honorable

basis, and where, as here, the corporation was but a change of organization, it would be bound, and could not in any future proceeding repudiate the liability assumed.

And, in furtherance of this, the defendant was permitted to and did change and amend his cross-complaint to include as party defendant the corporation, the copartnership, and the individuals comprising both organizations.

These preliminaries being disposed of, we may consider the facts as developed at the trial which followed. It was shown that plaintiff and defendant entered into a contract by the terms of which Luchetti agreed to pick, ship, and market his entire crop of grapes for the season of 1930 through plaintiff as distributor. Luchetti agreed to care for the fruit until ready for harvest and to prepare and pack and deliver the same in quality and condition suitable for Eastern markets.

The plaintiff was to ship and market the fruit in such manner, for account of grower, at such time and place and upon such terms and conditions as would, in plaintiff's judgment, yield the highest maximum returns.

The plaintiff, as distributor, was to pay to the grower the total amount received for sale of the fruit after deducting the charges, listed in detail, and including freight, storage, icing, etc., and the distributor to receive for services 10 per cent. on all sales made f. o. b. and 7 per cent. on the gross of all delivered sales. Other terms contained in said agreement became immaterial. The evidence disclosed that defendant delivered to plaintiff about one hundred and fourteen tons of grapes. The plaintiff received the same, and under adverse market conditions, due in part to seasonal rains and damaged product, the total net to the grower was something less than \$250.

While the season was on, the defendant, being in need of money through the falling due of his note at the bank, requested the plaintiff to take up and pay the note. Said note was in the amount of \$2,500, and plaintiff paid this sum to the bank, and defendant's said note was canceled.

The verdict of the jury and the judgment thereupon entered in favor of plaintiff was for the difference between the amount advanced on the note and the amount found due defendant on the contract.

[3] Appellant urges several grounds for a reversal: First he argues that the plaintiff, in handling the grapes of defendant, did so mix and intermingle defendant's said grapes that an unfair price was obtained therefor. The argument of appellant is that plaintiff, as a consignee or factor, without authorization of defendant, and without a showing of custom or usage, commingled the grapes of defendant with the grapes of other shippers, and dis-

posed of entire shipments thus commingled at an average price. Appellant urges that such conduct amounts to a conversion, rendering plaintiff liable for value of the goods converted.

The general rule is that a factor has no right to do this. However, if custom and usage justify such a course, the rule yields. *Imperial Valley, etc., Ass'n v. Davidson*, 58 Cal. App. 551, 209 P. 58.

[4] There is sufficient evidence in the record here to establish the custom. Delivery of the grapes was in unmarked lugs or boxes, and the method of shipment was in carload quantities. It seemed to be unquestioned at the trial that such was the general usage, and no claim of conversion was made in the court below.

[5] Appellant also urges that the power or authority of a factor may not be delegated. No evidence before us supports the claim of delegation to any independent brokers or other persons or firms. It is true that in the course of business many buyers were contacted and various branch houses doing business with plaintiff attended to handling, but in no case does there appear any delegation of authority to act save under the express management and control of plaintiff.

The next branch of the appeal is designated by appellant as "Errors assigned as preventing defendant from having the jury properly determine the issues." This branch is again subdivided, and we will take up each division as presented.

1. The court erred in refusing to allow evidence of other similar fraudulent representations. In presenting the point for consideration, appellant offers portions of the transcript which show an attempt to prove the fraudulent representations claimed to have been made to other parties. Likewise does he present his offer in the court below. But nowhere in his brief nor in any appendix thereto does he show what representations were made to the defendant. Therefore we have no way of knowing whether or not the trial court erred. Regardless of what representations were made to others, if they were not made to defendant they would be immaterial.

Further, the pleadings set up specifically that defendant turned over his grapes to plaintiff upon the fraudulent representation that the plaintiff had many Eastern contracts, and that defendant would receive not less than \$32 for grapes consigned to plaintiff.

On the trial, however, defendant testified that there was no consignment. His testimony was that Turner, on behalf of plaintiff, bought the grapes outright for \$32 a ton. The only possible imaginable fraud was in procuring defendant's signature to the contract, and in this connection no representations were made. The testimony of defendant was that Turner never explained what was in the pa-

per to be signed; he just made defendant sign because he wanted the grapes and was afraid defendant might dispose of them elsewhere.

[6] There being then no evidence of fraudulent representations made to defendant, the trial court did not err in excluding testimony of representations made to others. Further, there was not a syllable of testimony that any of the claimed or alleged representations was false or fraudulent.

The most that defendant can possibly claim is that Turner bought the grapes from him and fraudulently procured his signature to a contract of consignment. Evidence that Turner tried to buy grapes from other persons would not be relevant to any issue nor would it be indicative of any fraudulent scheme or plan.

Had there been an attempt to show that Turner had bought grapes from other persons and had thereafter procured signatures to consignment or shipping contracts, the situation would more closely approach the rule permitting testimony of similar frauds. But nothing of this nature is even hinted at. From the record before us and under the issues joined we find no error in this phase of the case.

2. The court erred in granting the motion of cross-defendant for a nonsuit upon the cross-complaint for damages for fraud.

We are of the opinion that the motion was properly granted. The showing of fraud upon which defendant seems to rely is the fact that Turner bought the grapes for \$32 a ton, and that defendant mistakenly signed a contract of consignment. This was not the cause of action pleaded. When the court granted a nonsuit on the cross-complaint, it necessarily addressed the order to the pleading and not the proof. Whatever else defendant's testimony might indicate, it did not support the allegations of his cross-complaint and there was no attempt to amend to conform to the proof.

3. The court committed error in refusing to allow counsel for defendant to argue matters in issue to the jury. The holding of the trial court restricting argument was on the ground that the subject of argument was matter involved in the cross-complaint on which nonsuit was granted.

But, argues appellant, conceding that the attempted argument may have applied to matters already out of the case, at the same time these same matters had equal application to the general issues.

The record discloses little more for complaint. It may be that the trial court was unduly strict, but the fact is the argument had been made when objection was interposed and the ruling of the trial judge was that no further argument along these lines be presented. Yet, in the very next statement

of counsel, he argues in a different form, without objection, the subject previously ruled on.

Summing up the entire case after a close analysis of the record, we find that in the presentation of the facts an extreme liberality was allowed each side. Defendant pleaded one defense and tried to prove another. Yet, withal, every fact having any bearing on the issues was brought out.

The jury were fairly and fully instructed, inasmuch as not a single argument is made in that connection. From a purely academic standpoint, we might concede some error creeping in throughout the record.

The argument was made that defendant was a foreigner entirely ignorant of our language and a man who might be an easy prey for designing persons. The evidence, however, was such that the jury might readily conclude that he was just the opposite, and a man in all respects more than competent to take care of his own affairs and most capable of understanding exactly the present transaction.

We think that the case was fairly decided, and that a reversal here would be contrary to the demand of the constitutional provision.

Section 4½ of article 6 provides that no judgment shall be set aside or a new trial ordered, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

In the instant case the fullest inquiry was had into every possible defense presented, whether pleaded or not, and, after the verdict of the jury, the case was again presented to the trial judge on motion for a new trial. The issue was simple and, we repeat, the verdict amply supported.

Judgment affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

SYMONDS v. SHERMAN (two cases).*

Civ. 631.

District Court of Appeal, Fourth District, California.

Jan. 31, 1933.

Hearing Granted by Supreme Court March 30, 1933.

1. Contracts ⇨164.

Several papers relating to same subject-matter and executed as part of substantially one transaction must be construed together (Civ. Code, § 1642).

2. Bills and notes ⇨134.

Document in payee's handwriting of same date as and attached to note, to effect that note should be returned to maker on payee's death, should be construed with note as one contract (Civ. Code, § 1642).

3. Bills and notes ⇨527(1).

Evidence warranted court's finding that payee had agreed for ample consideration that note should be canceled on payee's death.

4. Wills ⇨440.

Testator's intention should ordinarily be ascertained from words of will alone.

5. Wills ⇨478.

To create implied gift, probability of testator's intention to make it must appear so strong that intention to contrary cannot be supposed to have existed.

6. Wills ⇨488.

Where terms of will are clear, extrinsic evidence is inadmissible to show intent different from that disclosed.

7. Wills ⇨715.

Legacy to one who at date of will is indebted to testator does not release debt, unless it appears to be so intended on face of will.

8. Wills ⇨488.

Will bequeathing sum to debtor and directing that it be paid before any other bequests held not to contain latent ambiguity which would permit introduction of extrinsic evidence showing testatrix intended cancellation of notes.

Will provided that in recognition of services shown testatrix by care and attention which she had received from legatee, testatrix bequeathed to legatee sum of \$3,000, to be paid to her before any of bequests thereafter named had been paid. Legatee had executed notes to testatrix, for \$5,000 and \$400, and after testatrix' death there was found a memorandum written and signed by her to effect that any notes held by her against legatee at death should be canceled, but there was nothing to show when memorandum was written, or the circumstances, or that there was any consideration therefor.

9. Wills ⇨715.

\$3,000 bequest to maker of \$5,000 and \$400 notes held not to discharge notes.

Appeals from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Two actions by H. C. Symonds, as executor of the last will and testament of Jerusha W. Garrison, deceased, against Nettie N. Childs, in which Grace C. Sherman, as administratrix of the estate of Nettie N. Childs, de-

ceased, was substituted as defendant after defendant's death. The two actions were consolidated, and from a judgment for defendant, plaintiff appeals.

Affirmed in part, and reversed in part with directions.

Kirkbride, Wilson & Brooks, of San Mateo (John D. Willard, of Redwood City, of counsel), for appellant.

U. F. Lewis, of Riverside, and Fred A. Wilson, of San Bernardino, for respondent.

BARNARD, P. J.

On January 3, 1929, an action was begun by H. C. Symonds, as executor of the will of Jerusha W. Garrison, against Nettie N. Childs, seeking to recover on a promissory note for \$5,000, dated May 15, 1925, with a second cause of action based on a note for \$400 dated June 1, 1926. On May 23, 1929, another action was filed upon a note for \$2,500, dated August 12, 1924. All of these notes were signed by Mrs. Childs and payable to Mrs. Garrison. Subsequently Mrs. Childs died and her administratrix has been substituted as defendant in both cases. The two actions were consolidated for trial, and one set of findings and one judgment was entered in favor of the defendant, from which judgment the plaintiff has appealed.

Mrs. Garrison was an invalid, quite elderly, and for many years she and Mrs. Childs had been very close friends. About the time the \$2,500 note was executed, Mrs. Childs took Mrs. Garrison into her home and, in order to make this possible and to provide comforts and conveniences for her, remodeled her house, making rather extensive alterations for the purpose. From that time until the death of Mrs. Garrison, Mrs. Childs not only furnished her board and lodging at an agreed price which was paid, but rendered to her unusual services which she required as she became more feeble, giving her almost constant care and attention, day and night, during most of that period. The rendering of these additional services is not disputed and the trial court has found that they were of a value very considerably in excess of the monthly amounts paid to Mrs. Childs. On March 27, 1927, Mrs. Garrison died, leaving a will executed on January 21, 1927, which contained the following: "Item 2. In recognition of the kindness shown me by care and attention which I have received from Mrs. Nettie N. Childs, of Redlands, California, I will devise and bequeath unto her, the said Nettie N. Childs the sum of three thousand dollars to be paid to her before any of the bequests hereinafter named have been paid."

This is followed by "Item 3," making several specific bequests totaling \$3,980, and by "Item 4," giving the residue of her estate to her nephew H. C. Symonds, who is also appointed executor.

The controversy here is as to whether or not Mrs. Childs was entitled to a cancellation of the three notes sued on, in addition to the bequest of \$3,000 provided in the will.

[1-3] We will consider first the \$2,500 note involved in the second action filed. In her answer, in addition to a general denial, Mrs. Childs alleged as a separate defense that in the year 1924 she entered into an agreement with Mrs. Garrison by the terms of which Mrs. Garrison agreed to furnish to her the sum of \$2,500, and she agreed to make such changes and alterations in her dwelling house as Mrs. Garrison desired for her own accommodation and comfort; that the money was furnished and the alterations made; that it was further agreed that she should execute a note for \$2,500 and pay interest thereon as long as Mrs. Garrison lived and that at her death the note should be canceled; and that concurrently with the execution of the said note Mrs. Garrison executed an instrument in writing in which she agreed that the note should be canceled upon her death. The court found in accordance with the allegations of this separate defense, also finding that Mrs. Childs would not have made the changes and alterations in her home for the accommodation of Mrs. Garrison had not this agreement been made.

We think these findings are supported by the evidence. After the death of Mrs. Garrison the \$2,500 note was found and pinned to it, and folded therewith, was found another document of the same date, entirely in Mrs. Garrison's handwriting, reading as follows:

"August 12, 1924.

"To whom it may concern:

"This note of Nettie N. Childs is to be given back to her at the time of my death as compensation for kindness shown to me.

"Mrs. J. W. Garrison.

"Redlands, California.

"This is my own handwriting."

The deposition of Mrs. Childs was admitted in evidence at the suggestion of the appellant, with no objection made thereto, and in fact the appellant relies upon considerable portions thereof in the arguments here made. In this deposition Mrs. Childs testified that before she took Mrs. Garrison into her home it was agreed between them that this amount was to be advanced to her; that she was to take Mrs. Garrison, look after her, and see that she was not put in an institution; that the \$2,500 was not to be repaid, but that she should pay interest thereon during the lifetime of Mrs. Garrison; and that the obligation was to be canceled upon her death. She also testified that she spent a large share of the money in remodeling her home for the accommodation of Mrs. Garrison, and that thereafter until her death she took care of her, waiting upon her both day and night, and giving details of a most exacting and arduous

attention required of her by Mrs. Garrison. A letter from Mrs. Childs to Mr. Symonds, the executor appellant, dated May 5, 1924, was received in evidence. In this letter Mrs. Childs explained that she proposed to take Mrs. Garrison and look after her for a named amount per month, with an additional \$2,500, that she was to pay interest on this amount during her lifetime so that her income would not be reduced, and that this note was to be canceled upon the death of Mrs. Garrison, "whether it be this year or several years hence"; and closing by asking Symonds' approval of the plan. Another letter from Mrs. Childs to Mr. Symonds, received by him in September, 1924, was introduced, in which she told of the reorganization of her household and the taking of Mrs. Garrison into her home, that "she has loaned me and has my note for \$2,500 which I spoke to you about," and said, "I trust this will meet with your approval, otherwise I will have to give it up." The appellant now claims that the two letters last referred to were not admissible in evidence. Not only is no sufficient reason pointed out why these letters were not admissible upon the issues raised as to the agreement in connection with this note, but the record shows that at the time these letters were offered and received in evidence, no objection thereto was made, and the letter of May 5, 1924, was read into evidence by the appellant in response to a question asked by his own attorney.

It is a general rule that several papers relating to the same subject-matter, and executed as parts of substantially one transaction, are to be construed together as one contract. 6 Cal. Jur. 298; 19 Cal. Jur. 832; Civ. Code, § 1642; *Goodwin v. Nickerson*, 51 Cal. 166. We think this rule applies under the circumstances here shown, and that these findings and judgment, in so far as this particular note is concerned, are supported by the evidence, which shows an agreement, on ample consideration and evidenced by a written memorandum, that the principal sum of the note is not to be paid.

A different situation appears with respect to the first action filed, involving the other two notes. There is neither evidence of any agreement entered into contemporaneously therewith nor of any other agreement for the cancellation of these notes. After the death of Mrs. Garrison, a memorandum written and signed by her was found, reading as follows:

"For value received.

"This is to certify that any notes held by me against Nettie N. Childs at my death shall be cancelled.

"Jerusha W. Garrison."

It does not appear when this was written or under what circumstances, nor does it appear that there was any consideration therefor. As is conceded by the respondent, the

problem of whether or not these two notes are to be considered as canceled resolves itself into the question as to whether or not a testamentary discharge thereof was effected by Mrs. Garrison's last will.

The respondent contends that a bequest to a debtor, coupled with evidence establishing an intent on the part of the creditor to release the debt, effects a testamentary discharge thereof, citing in support thereof such cases as *Ziegler v. Eckert*, 6 Pa. 13, 47 Am. Dec. 428; *Sharp v. Wightman*, 205 Pa. 285, 54 A. 888, 889; *Daugherty v. Rogers*, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847. It is then contended not only that a latent ambiguity appears in this will justifying the admission of other evidence tending to show such an intent on the part of the testatrix, but that such an intention conclusively appears from the language used in the will. It is argued that an intention to release these notes appears upon the face of the will since the will fails to recognize the existence of the indebtedness, since uniform language is used in referring to Mrs. Childs and other devisees, since \$3,000 is to be "paid" to Mrs. Childs, and, finally, since the bequest to Mrs. Childs is given priority over the other specific bequests amounting to \$3,980. It is argued that this priority provision was useless if the notes be not considered as canceled, since the amount of the notes, irrespective of other portions of the estate, is larger than the total amount of all specific bequests. This argument is not conclusive since it could well be that Mrs. Garrison, having made the contract with reference to the \$2,500 note, did not consider that a part of her estate and, with that note eliminated, the amount of the remaining notes was not sufficient to cover the \$3,000 bequest to Mrs. Childs and the other specific bequests made. In addition, it appears that Mrs. Garrison's estate, aside from these notes consisted of only about \$500 at the time the will was drawn. In view of her condition, the amount required to care for her, and the uncertainty as to the length of her life, she could well have anticipated and provided for a situation in which all of her specific bequests could not be paid. The fact that the bequest of \$3,000 to Mrs. Childs was prefaced by the statement that it was made "in recognition" of the kindness and care she had received from Mrs. Childs, indicates that she intended no further or additional testamentary provision for her, in recognition of those attentions.

[4] In *Sharp v. Wightman*, supra, cited by the respondent, it is said: "A legacy by a testator to his debtor does not operate as a release or extinguishment of his debt, unless it clearly appears that it was the intention of testator that it should so operate." From some of the authorities cited by the respondent, it would appear that in those jurisdictions such an intention may be gathered from the will itself or, in the absence of any clear-

ly expressed or implied intention in the will, may be gathered from outside evidence. In this state, even in case of an uncertainty arising upon the face of a will, the testator's intention is ordinarily to be ascertained from the words of the will, exclusive of his oral declarations, and evidence of his declarations as to his intention cannot be received. In *Estate of Tompkins*, 132 Cal. 173, 64 P. 268, 269, a letter releasing an indebtedness was held not to be admissible; the court saying: "The instrument of release was executed in 1886, and, whatever motive may have then prompted her to give it, she was not thereby precluded from making in 1892 such testamentary disposition of her property as she desired. * * * Whether such was her intention must be determined from the terms of the will itself. The will must be interpreted by the language which she has used therein, and cannot be affected by an instrument made by her several years previous, and to which she makes no reference. The circumstances under which the will is made are to be taken into view only when there is an uncertainty 'arising upon the face of the will,' and only for the purpose of ascertaining 'from the words of the will' the intention of the testator."

[5] In *Estate of Franck*, 190 Cal. 28, 210 P. 417, 418, the court said: "It is equally well settled that a devise or bequest may arise by implication. To warrant the court in so declaring there must be something more than conjecture. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind."

In *Estate of Donnellan*, 164 Cal. 14, 127 P. 166, 168, the court said:

"Again, it is fundamental that in all cases where extrinsic evidence is admissible to aid in expounding the will the evidence is limited to this single purpose. It is considered for the purpose of explaining and interpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed, though, perhaps, obscurely, by the language of the will itself. * * *

"Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which ambiguity resort to extrinsic evidence is permissible. The one class is where there are two or more persons or things exactly measuring up to the description and conditions of the will. * * *

"The other class is where no person or thing exactly answers the declarations and descriptions of the will, but where two or more per-

sons or things in part, though imperfectly, do so answer."

[6, 7] It is equally well settled that when the terms of a will are clear and not ambiguous, extrinsic evidence may not be received to show an intent different from that disclosed on the face of the will. *Estate of Spencer*, 181 Cal. 514, 185 P. 474; *Estate of Donnellan*, supra. The general rule as to whether a legacy extinguishes a debt is thus stated in 23 *Ruling Case Law*, 298: "A legacy to one who at the date of the will is indebted to the testator does not release or extinguish the debt, unless it appears to be so intended on the face of the will."

[8, 9] It cannot be assumed that Mrs. Garrison had forgotten the existence of these notes, as it fully appears that she and Mrs. Childs settled their accounts each month, making the proper allowance for interest and indorsing the payment of such interest on the notes at frequent intervals. An intention to cancel the notes does not clearly appear from the face of the will and it certainly cannot be said that such an intention so strongly appears therefrom that it cannot be supposed that a contrary intention existed in the mind of the testatrix. In our opinion, no such latent ambiguity exists as, under our rules, would permit the introduction of extrinsic evidence to show that such a cancellation of the notes was intended. The language used in making the bequest to Mrs. Childs is clear and unequivocal and requires no explanation. The bequest was specifically made in appreciation of the kindness and attention shown to the testatrix by Mrs. Childs, and to permit other evidence to establish an additional gift, in appreciation of the same kindness and attention, could amount to nothing other than the making of a new will, a thing which may never be done. We therefore conclude that a testamentary discharge of the two notes involved in the first action filed was not effected by this will.

A number of other points are raised by the appellant which need not be considered in view of the conclusion reached upon the main point urged.

For the reasons given, that portion of the judgment denying recovery to the appellant on the first action filed, involving the notes for \$5,000 and \$400 respectively, is reversed, with directions to the trial court to enter judgment therein in favor of the plaintiff. That portion of the judgment involving the second action filed, denying recovery on the \$2,500 note therein mentioned, is affirmed.

We concur: MARKS, J.; JENNINGS, J.

129 Cal.App. 232

WEAVER et al. v. SHELL OIL CO. et al.

Civ. 8431.

District Court of Appeal, First District,
Division 2, California.

Jan. 26, 1933.

Hearing Denied by Supreme Court March 27,
1933.**1. Appeal and error ⇨933(1).**

On appeal from order granting new trial, presumption is in favor of order.

2. Appeal and error ⇨854(6).

Order granting new trial will be affirmed if it may be sustained on any ground.

3. Appeal and error ⇨901.

Burden is on appellant to show error in ruling granting new trial.

4. Appeal and error ⇨925(3).

Where argument of counsel was highly improper, it must be presumed that trial court granting new trial determined that such misconduct was prejudicial.

5. Appeal and error ⇨978(2).

New trial ⇨29.

Granting of new trial on ground of counsel's misconduct is largely within trial court's discretion, and its ruling will not be disturbed unless there is abuse of discretion.

6. New trial ⇨29.

In action for death wherein plaintiff's counsel stated in argument that some one must take care of widow and children and that defendant was great, rich corporation, and could afford to take care of them, court properly granted new trial.

7. Appeal and error ⇨261.

That no exception was taken to attorney's misconduct at time cannot be considered in determining whether trial court abused discretion in granting new trial.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Alice Weaver and others against Shell Oil Company of California and another. The jury returned a verdict in favor of plaintiffs, and from an order granting a new trial, plaintiffs appeal.

Affirmed.

See, also (Cal. App.) 12 P.(2d) 167.

Vincent W. Hallinan and O. K. Bonestell, both of San Francisco, and James H. Gillard, of Oakland, for appellants.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondents.

SPENCE, J.

Plaintiffs sought damages for the death of Lincoln Weaver, deceased, alleged to have been caused by the negligence of defendants. Deceased was employed in a filling station owned by his employer, the Pacific Gas & Electric Company, and his death resulted from a gasoline explosion on the premises of his employer while defendants were making a delivery of gasoline thereto. Notice of the pendency of this action was given to the employer under section 26 of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 854, as amended). The jury returned a verdict in favor of plaintiffs in the sum of \$35,000. Defendants made a motion for new trial, which motion was granted in general terms without specifying the grounds upon which it was granted. From the order granting the new trial, plaintiffs appeal.

[1-3] At the outset we may state that appellants' opening brief is inadequate to show error in the order granting the new trial. It is well settled that upon an appeal from an order granting a new trial, the presumption is in favor of the order and against the verdict (*Wulbern v. Gilroy Express*, 116 Cal. App. 222, 2 P.(2d) 508; *Scott v. Southern Pac. Co.*, 100 Cal. App. 634, 280 P. 996; *Roberts v. Southern Pac. Co.*, 54 Cal. App. 315, 201 P. 958; *Marr v. Whistler*, 49 Cal. App. 364, 193 P. 600; 2 Cal. Jur. 887), and the order will be affirmed if it may be sustained on any ground. *Tasker v. Cochrane*, 94 Cal. App. 361, 271 P. 503; 2 Cal. Jur. 891. In the present case twelve grounds were specified in the motion for new trial and said motion was supported by affidavit. The argument in the opening brief is confined to four headings selected by appellants from the numerous possible grounds upon which the order may have been granted while other grounds are ignored. None of the evidence is printed therein and no reference is made to alleged errors in the admission and rejection of evidence other than a bald statement that "there were no errors on the part of the court in ruling upon the admission or rejection of evidence." The charge to the jury is not printed in full nor are any of the instructions which were requested by respondents and refused by the court. Misconduct on the part of counsel for appellants was one of the grounds specified in the motion, but no mention whatever is made thereof in the opening brief. We fully appreciate the difficulty confronting the writer of an opening brief when the appeal is taken from an order granting a new trial, but the burden is upon appellants to show error in the ruling. In other words, it is incumbent upon appellants to overcome the presumption in favor of the order and this cannot be done by merely giving consideration to some of the grounds upon which the motion was based.

We have, however, examined the record as well as all of the briefs on file. Respondents contend that the order may be sustained on several grounds. It is claimed that the order was proper because of errors in denying respondents' challenges for cause to four jurors who were stockholders in the Pacific Gas & Electric Company and also because of errors in admission and rejection of evidence and of errors in the giving and refusing of various instructions. They further contend that the motion was properly granted on the ground that the verdict was against law and also because of misconduct on the part of counsel for appellants. We need not discuss the merits of all of respondents' contentions, for if any one of them may be sustained, the order must be affirmed.

[4-6] The record shows that in the closing argument to the jury counsel for appellants made the following statement: "Someone must take care of this widow and those four children, and the Shell Company is a great big, rich corporation, has millions, and it can afford to take care of them." In this connection it may be stated that two of the four children referred to were not children of the deceased, but were children of his wife by a former marriage; but regardless of this fact, the statement was highly improper. It must be presumed that the trial court determined that such misconduct was prejudicial to respondents. The granting of a new trial upon the ground of misconduct is largely within the discretion of the trial court, and its ruling should not be disturbed unless it is so plainly wrong as to indicate an abuse of such discretion. *Mangino v. Bonslett*, 109 Cal. App. 205, 292 P. 1006; *Loggie v. Interstate Transit Company*, 108 Cal. App. 165, 291 P. 618. It cannot be said in the present case that the ruling was wrong nor that the trial court abused its discretion.

[7] In the reply brief counsel for appellants call our attention to the fact that no exception was taken to said statement at the time it was made and no request was made to the trial court to admonish the jury to disregard it. We believe that counsel for appellants has lost sight of the nature of this appeal. This is not an appeal from the judgment after an order denying a new trial. It is an appeal from the order granting a new trial, and the question before us is whether the trial court abused its discretion. The distinction between the two situations is suggested in *Merralls v. Southern Pacific Co.*, 182 Cal. 19, at page 24, 186 P. 778. We are of the opinion that where the appeal is from an order granting a new trial and counsel for appellants has been guilty of misconduct, the fact that counsel for respondents may have failed to take exception to the misconduct at the time is not to be considered in deter-

mining whether the trial court abused its discretion in granting the motion.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

129 Cal.App. 337

BERLIN v. VIOLETT et al.

Civ. 7493.

District Court of Appeal, Second District,
Division 1, California.

Jan. 30, 1933.

Hearing Denied by Supreme Court March 30,
1933.

1. Appeal and error ⇨1060(1).

Admission of evidence as to statement, signed by one defendant in action for injuries in automobile collision, to show that insurance company might be interested, *held* not prejudicial to codefendant.

There was no evidence that any insurance company was interested in case or would pay judgment.

2. Automobiles, ⇨246(20).

Instruction that automobile operator, though running at lawful speed, must anticipate vehicles at any point of street and keep machine under such control that he can avoid collision with carefully driven automobile, *held* proper.

3. Automobiles ⇨246(19).

Instruction that vehicle driver's failure to keep vigilant lookout ahead for other vehicles, or to see what may readily be seen, constitutes negligence as matter of law *held* not error.

4. Trial ⇨260(1).

Refusal of instruction involving points covered by instructions given was not error.

5. Automobiles ⇨246(56).

Instruction that driving of automobile at not exceeding 40 miles per hour at point not within business or residence district is not negligence *per se held* properly refused as unsupported by evidence.

There was no evidence that district was neither business nor residence at point of accident.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Mrs. Blanch Berlin against C. C. Violet and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Forgy, Reinhaus & Forgry, of Santa Ana, (Paul Nourse and Forrest A. Betts, both of Los Angeles, of counsel), for appellants.

Nathan O. Freedman, A. Wm. Christlieb, and Harry D. Hottel, all of Los Angeles, for respondent.

YORK, J.

This is an appeal from a judgment rendered in an action brought by the plaintiff for damages for personal injuries resulting from an automobile accident. The automobile in which plaintiff was riding was being driven by defendant Mrs. Cross, when it came into collision with the automobile being driven by defendant Dr. C. C. Violet. An examination of the evidence discloses sufficient evidence to justify the court in refusing to grant defendants' motions for nonsuit and directed verdict. An examination of the record discloses sufficient evidence to sustain the verdict.

[1] As to the alleged error by the court in permitting plaintiff's attorney to show that an insurance company might be interested in the case, the evidence was merely that a certain statement was made at the Long Beach office of the Automobile Club of Southern California. The record does not show that any insurance company was interested in the matter, nor that insurance had been issued, nor that the judgment would be paid by any insurance company. There was no prejudicial error in allowing the introduction of evidence complained of on this point, nor in requiring a foundation to be laid for the admission of the statement which the codefendant admitted that she had signed.

[2] Appellant objects to certain instructions. He contends that the first instruction objected to was erroneous, in that it does not provide that appellant was required to anticipate only those things which were reasonable, and that it places upon the appellant an absolute duty to anticipate vehicles at any point on the street, and to keep his car under such control as to avoid colliding with such vehicles, regardless of where they might be. In other words, that it takes from the jury the question of whether or not the matter to be anticipated was reasonably to be anticipated, and places upon the defendant the duty to anticipate all matter, whether reasonable or not. He also contends that it takes from the jury the right to consider whether or not he had his automobile under such control as to anticipate those things which were reasonable, and states that he must have his automobile under such control as to avoid colliding with all things which might be in his way, whether reasonably to be anticipated or not.

The instructions objected to are as follows: "You are instructed that even though you find that the statutory limit of speed of 40 miles per hour has not been exceeded, the rate of

speed at which an automobile may be traveling may be held under some circumstances to be negligent. That is to say, the operator of an automobile is not necessarily exempt from liability for injuries to other persons occurring in public streets by showing simply that at the time of the accident he was running at at a rate of speed allowed by law. He still remains bound to anticipate that he may meet persons or vehicles at any point of the street, and he must in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another automobile driven with care and caution as reasonably prudent person would do under similar conditions." This instruction is proper under the facts and circumstances in evidence in this case. *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125.

[3] Appellant objects to the giving immediately thereafter of the following instruction: "All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking, would constitute negligence as a matter of law." We find no error in this instruction.

The appellant contends that these instructions are misleading to the point where they practically direct a verdict against Dr. Violet. This could not be so, unless the jury considered that Dr. Violet violated the law as laid down in these instructions, as modified by all of the other instructions given by the court to the jury.

[4] The appellant contends that the court erred in refusing to give the following instruction: "I further instruct you that if you find that the plaintiff and the defendant, Mrs. Florence Cross, both undertook to see that the turn into the ice plant could be made in safety before turning, and that the plaintiff, Mrs. Blanch Berlin, advised Mrs. Florence Cross that the turn could thus be safely made, when if she had properly looked she could have seen that the turn could not be safely made because the Violets' car was in such close proximity, and if you further find that this act on the part of the plaintiff contributed proximately in any degree, no matter how slight, to the happening of the accident and to her injuries, then the plaintiff cannot recover from the defendants, C. C. Violet and Mrs. C. C. Violet, and your verdict must be in their favor." A sufficient reply is that the court did give other instructions which covered the points involved in the instruction so refused.

[5] He also contends that the court erred in refusing to give the following instruction: "I instruct you that the evidence in this case

discloses that at the point of the accident it was neither a business district nor a residence district as defined by the California Vehicle Act and therefore the maximum speed limit at that point was 40 miles per hour and if you find that the defendant, C. C. Violet, was driving his automobile at a speed not greater than 40 miles per hour that such speed would not of itself constitute negligence." As there was no evidence as to whether at the point where the accident occurred, the district was neither "business" nor "residence," the instruction was properly refused.

Since there was legally sufficient evidence upon which to base the verdict, and as we find no error in the instructions given or the rulings objected to, the verdict of the jury will have to be sustained.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

129 Cal.App. 342

SARKISIAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8829.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1933.

1. Pleading ⇨238(4).

That oral order refusing leave to file amended complaint and dismissing action was not entered in minutes held not to render order ineffective.

2. Pleading ⇨238(4).

Error in basing order, refusing leave to file amended complaint, upon view that pleading was insufficient for want of facts, would not render order void.

In absence of appeal or of some other legal attempt to set aside or vacate order, it would be a judgment terminating action and finally adjudicating rights of parties upon all issues presented by it.

3. Pleading ⇨238(4).

Judge, after refusing leave to file fourth amended complaint and granting motion to dismiss, cannot set aside order merely because he changed mind upon question of law impelling making of order (Code Civ. Proc. §§ 473, 663).

4. Appeal and error ⇨113(1), 436.

Where trial court set aside order refusing leave to file amended pleading and granting motion to dismiss action, second order held appealable, and appeal therefrom deprives

trial court of jurisdiction pending appeal (Code Civ. Proc. § 963, subd. 2).

Proceeding on the petition of S. A. Sarkisian for a writ of prohibition directed to the Superior Court of California in and for the County of Los Angeles and Lucius P. Green as one of the Judges thereof, to restrain respondents from further proceeding in an action wherein Jack Sarkisian is plaintiff and petitioner defendant.

Peremptory writ granted.

George Acret, of Los Angeles, for petitioner.

Martin E. Geibel and Harry K. Cohen, both of Los Angeles, for respondents.

WORKS, P. J.

There was pending in respondent court a certain action in which Jack Sarkisian, incorrectly named as a respondent in this proceeding, was plaintiff, and S. A. Sarkisian, petitioner herein, was defendant. This action, during its progress in respondent court, suffered various vicissitudes, the character of all of which it is not necessary here to delineate. Suffice it to say that such proceedings were had that on October 25, 1932, the action came on for trial on a third amended complaint and the answer thereto. Objection was made to the admissibility of evidence in the cause on the ground that the third amended complaint did not state a cause of action. The objection was sustained, a mistrial was declared, and the cause was ordered off calendar. Thereafter plaintiff filed notice of motion, supported by affidavits, for leave to file a fourth amended complaint, tendering with his motion a copy of the proposed pleading. This motion came on for hearing on November 10, 1932, and such proceedings were had that on that date respondent court refused leave to file the new pleading for the reason that it stated no cause of action, and at the same time granted a motion made by defendant, pursuant to due notice, to dismiss the action. This order, in both its branches, was stated orally from the bench but was not entered in the minutes of the court. Thereupon counsel for the defendant left the court room, the hearing apparently being at an end. Later on the same day, in the absence of the defendant's counsel and without notice, the court made a further order, which was couched in part in these terms: "Upon reconsideration, it is found that the proposed Fourth Amended Complaint states a cause of action. The order heretofore made denying motion for leave of court to file said Amended Complaint and granting motion to dismiss said action and all minute entries in relation thereto are set aside and in lieu thereof leave is hereby given to file said fourth amended complaint and the mo-

tion to dismiss said action is denied." These orders of November 10 will hereafter be referred to, respectively, as the first order and the second order. After the making of the latter order the fourth amended complaint was served and filed. This was on or about November 21.

In due time, and within a few days after it was made, the defendant appealed from the second order and thereafter gave notice of motion to stay proceedings under it pending the appeal. On November 25 this motion came on for hearing and it was by respondent court denied.

On November 28 the defendant in the action filed his petition in the present proceeding, asking that respondent court be restrained by the writ of prohibition from proceeding further with the action until the final determination of his appeal, or that a writ of supersedeas be granted to the same end, whereupon an alternative writ of prohibition issued. In its answer to the petition for the writ respondent court frankly avers "that if petitioner fails to avail himself of his privilege to plead or answer to said Fourth Amended Complaint within the time as required by law, then and in that event the plaintiff will become privileged to cause his default to be entered in said action," thus repeating in effect the threatened continuance of proceedings which is to be inferred from its order refusing to stay such proceedings pending petitioner's appeal.

[1] The first order was not ineffective because not entered in the minutes. It was said in a comparatively early case: "The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. * * * That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity." * * * "The judgment is a judicial act of the court. * * * The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute." * * * There is no statutory provision for the signing of a judgment by the judge, either before or after entry; and his signature gives it no additional solemnity or validity. *Clink v. Thurston*, 47 Cal. 29. Where that practice is adopted it is merely to give the clerk surer means of correctly entering what has been adjudged. But when, after the trial and final submission of the case, the court pronounces a judgment in apt language which finally determines the rights of the parties to the action, and leaves nothing more to be done except the ministerial act of the clerk in entering it, * * * then the judgment has been rendered, and the rights of the parties established. * * * "When a judge orders a judgment in a cause * * * and no further facts are to be ascertained

to determine the exact amount and character of that judgment, but there simply remains the clerical duty of entering in the judgment-book that which the court has determined and ordered to be entered, this, in our opinion, is a final judgment from which an appeal lies." *Estate of Cook*, 77 Cal. 220, 17 P. 923, 19 P. 431, 434, 1 L. R. A. 567, 11 Am. St. Rep. 267. The rule thus announced has been followed in later cases, among them *Barbee v. Young*, 79 Cal. App. 119, 249 P. 15, where many cases are cited.

[2] It will be observed that it is said in the minute entry which evidences the second order that the first order was "null and void," and the same view is pressed upon us here. This is a great mistake. It is too plain for argument that if respondent court was wrong in basing the first order upon the view that the fourth amended complaint was insufficient for want of facts, the order was but the result of error and it was far from void. In the absence of appeal or of some other attempt to set aside or vacate it, some attempt known to the law, it is a judgment, terminating the action and finally adjudicating the rights of the parties upon all the issues presented by it. Nor do we say that, even if the first order were invalid, respondent court had the power to end its apparent existence by the summary method evidenced by the making of the second order.

[3] The second order was not made upon motion for a new trial; by it the first order was not attempted to be set aside pursuant to proceedings under either section 473 or section 663 of the Code of Civil Procedure; the first order was not attempted to be set aside or corrected because entered through inadvertence and to make it speak the truth. It is indubitably settled that it is only by methods such as these, all duly authorized by law, that the judgments of courts may be set aside or vacated. Here the judge of respondent court, after rendering judgment by the first order, merely changed his mind upon the question of law which had impelled the making of the order and for that reason alone made the second order. There is no statute or rule of law which sanctions such a procedure.

[4] The first order being a final judgment, it is obvious that the second order is one made after final judgment within the meaning of the statute (Code Civ. Proc. § 963, subd. 2), providing for appeals from such orders. As an appeal from the second order is now pending—an order attempting to vacate the final judgment in the action—it is equally obvious that jurisdiction over the cause is for the time being reposed in the tribunal of appeal and that respondent court can have no further concern with its merits.

A peremptory writ of prohibition will issue.

We concur: CRAIG, J.; STEPHENS, J.

PEOPLE v. FERGUSON.
Cr. 2225.

District Court of Appeal, Second District,
Division 2, California.
Jan. 28, 1933.

Hearing Denied by Supreme Court Feb. 27,
1933.

1. Constitutional law §70(3).

Where power to legislate exists, court is not concerned with wisdom or expediency of the law.

2. Weapons §3.

It being common knowledge that metal knuckles, slung-shots, sandbags, and black-jacks are of no use to good citizens, Legislature may act on such knowledge and prohibit without exception their possession (St. 1923, p. 695, as amended).

3. Constitutional law §42.

Person not a museum keeper cannot complain that law making possession of metal knuckles illegal would apply to museum keepers (St. 1923, p. 695, as amended).

Appeal from Superior Court, Ventura County; William D. Dehy, Judge.

On rehearing.

Former opinion and judgment and order of trial court affirmed.

Prior opinion, 14 P.(2d) 311.

See, also, 11 P.(2d) 636.

Jarrett Beckett, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and James C. Hollingsworth, and Burton L. Rogers, both of Ventura, for the People.

STEPHENS, J.

[1] This case was decided by this court September 19, 1932. Later a rehearing was granted and we now, after a thorough re-examination of the case and authorities, arrive at the same conclusion that we heretofore announced. In granting a rehearing we were impressed with the idea that the decision was harsh and that it was entirely possible that a man with innocent intent might be sent to the penitentiary. We have ever had this in mind during our re-examination. We cannot, however, avoid the rule as expressed in the opinion, upon ample authority and reason, that "where the power exists to legislate, the court is not concerned with the wisdom or expediency of the law." [(Cal. App.) 14 P.(2d) 311, 312.] We have also had in mind the circumstance that the minimum punishment for the offense is incarceration in the state penitentiary and that the court is without the power to consider or grant probation. The underlying difficulties of this case are in

principle thoroughly discussed and considered in *People v. O'Brien*, 96 Cal. 171, 31 P. 45, and we think our opinion is in accord therewith. As suggested in the last cited case, there is a remedy for relief if the severity of the law visits an undeserved punishment upon a defendant. The pardoning power is available to him. If, as a matter of fact, the evidence points to the entire innocent intent of defendant, while the fact that he violated the law is undisputed, he will unquestionably be accorded the chief executive's consideration. We express no opinion upon the merits of this phase of the case. We adopt our former opinion with some minor deletions and additions.

Defendant below, appellant here, was convicted by a jury of the possession of "metal knuckles" (Stats. 1923, p. 695; Stats. 1925, p. 542, and Stats. 1931, p. 2316), and appeals from the judgment and from the denial of a motion for new trial. Several specifications of error are presented to us for consideration.

The specification that the verdict is contrary to the evidence cannot be sustained, for the reason that the evidence is conclusive even to the extent of the admission by appellant himself that he was the owner and possessor of the knuckles for a long time prior to and at the time of his arrest.

The specification that the statute is invalid as an ex post facto law cannot be sustained. *People v. McCloskey*, 76 Cal. App. 227, 244 P. 930.

The specification that the district attorney was guilty of misconduct is without merit.

The specification that section 417 and section 467 of the Penal Code repeal the statute here invoked is without merit as they concern the use rather than the possession of certain weapons.

The specification that the court erred in refusing a new trial should be denied upon our reasoning as to the next point treated.

Appellant claims that the statute should be construed so as not to cover possession of metal knuckles as an heirloom, keepsake, or curio; and, if not so limited, it is unconstitutional as being unreasonable and arbitrary.

Briefly, the testimony is as follows: Officers in searching the house in which appellant lived found the knuckles. One officer testifies that appellant while in the doorway of one room reached around into another room and that he (the officer) followed appellant's arm and hand with his hand to a shelf where he found the knuckles and they were warm. Another officer says he felt them immediately and they were warm.

The evidence of appellant is that he acquired the knuckles from his father and brought them to California several years ago; that he has never carried them on his person, although he has moved them with him when re-

moving from one residence to another; that during the last few months prior to his arrest they were kept in a dresser drawer or upon a shelf in the house where he was living; and that he had always kept them as a keepsake or curio. The trial judge permitted this testimony over objection, but instructed the jury that possession was the test of guilt and declined to instruct that their use or lack of use, or their being kept as a keepsake or curio, would affect the guilt or innocence of the accused.

In principle the question has been conclusively answered by the appellate courts of this state. In *People v. Gonzales*, 72 Cal. App. 626, 237 P. 812, the constitutionality of the so-called Firearms Act (Stats. 1923, p. 695) was under consideration. In that case as in the instant case the conviction was sought to be reversed because the statute made criminal the mere possession of a weapon. Likewise in each case the appellant claims an entire lack of criminal intent. The court in the case cited, quoting from page 630 of 72 Cal. App., 237 P. 812, 813, said: "In the case of *People v. Wolfrom*, 15 Cal. App. 732, 115 P. 1088, it is said: 'When the intent is not made an affirmative element of the crime, the law imputes that the act knowingly done was with criminal intent, and it need not be alleged nor proven.' A perusal of the statute which is the subject of appellant's attack shows that the mere possession of a firearm by any person described in the act is sufficient to constitute a criminal offense. The language of the statute is that: '* * * No person who has been convicted of a felony against the person or property of another or,' etc., 'shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person.' By the statute, intent on the part of a defendant accused of the commission of the offense is not made an essential to the completion of the criminal act; and whether or not the act was committed knowingly would necessarily be a question of fact for determination by the jury." See *Ex parte McClain*, 134 Cal. 110, 66 P. 69, 54 L. R. A. 779, 86 Am. St. Rep. 243. For a very able exposition of the law on intent see *People v. O'Brien*, 96 Cal. 171, 31 P. 45.

The general subject under discussion is treated in the following cases: *People v. Gonzales*, supra, 72 Cal. App. 626, 237 P. 812; *People v. James*, 71 Cal. App. 374, 235 P. 81; *People v. Camperlingo*, 69 Cal. App. 466, 231 P. 601; *People v. McCloskey*, 76 Cal. App. 227, 244 P. 930, and *People v. Rogers*, 112 Cal. App. 615, 297 P. 924. We find the following in section 64, volume 5, California Jurisprudence: "Where the power exists to legislate, the court is not concerned with the wisdom or expediency of the law. If there is any theory upon which the provision might reasonably have been concluded by the legislature to be essential, the court may not interfere."

[2] Firearms have their legitimate uses; hence the law regulates their use and prescribes who shall be prohibited their possession. But there is impressed upon slungshots, sandbags, black-jacks, and metal knuckles the indubitable indicia of criminal purpose. To every person of ordinary intelligence these instruments are known to be the tools of the brawl fighter and cowardly assassin and of no beneficial use whatever to a good citizen or to society. The Legislature may take note of and act upon such common facts. *Ex parte Yun Quong*, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969. It can regulate and proscribe the use of a thing so that its beneficial use may be enjoyed and its detrimental use prohibited. It follows that, if the beneficial use of a thing is entirely lacking or grossly disproportionate to its harmful use, the police power may absolutely prohibit its possession. *Ex parte Yun Quong*, supra.

There is no question of mistake or unwilling or unwitting possession in this case. Appellant intentionally brought this weapon into this state and moved it about with him as he removed from place to place. Should he have resolved to use it for the cruel purpose for which it was made it was ever in easy reach. A defense of innocent intention in its possession as an heirloom, curio, or otherwise would, in the main, necessarily be dependent upon the testimony of the accused as to his intention. The almost impossibility of proof in such a case is obvious, and in good reason may have been one of the causes for making "possession" the gravamen of the offense.

[3] Whether or not the law would apply to a museum keeper is outside of this case, for the reason that there is no evidence that puts appellant in the category of a museum keeper. It may well be added, however, that the legality of statutes is not measured by extreme or unlikely situations. *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *In re Reineger*, 184 Cal. 97, at page 104, 193 P. 81. When the statute is read as a whole it seems clear that the Legislature meant to enact no half-way measure, for it is therein provided that "blackjacks, slungshots, billys, sandclubs, sandbags, and metal knuckles are hereby declared to be nuisances and shall be subject to confiscation and summary destruction whenever found within the state." It is evident to us that the effective prohibition of the criminal use of weapons of this sort depends upon the right to prohibit possession thereof, and that the law does not intend to and does not in fact make any exception of heirlooms, curios, or keepsakes of individuals. As to museum keepers we have already said we make no expression of opinion.

The statute does not offend against the state or the national Constitutions, and we think the trial court was right in instructing the jury that possession under the facts of this case was the essence of the offense and in

refusing to give instructions in conflict with that principle.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

129 Cal.App. 430

WASHINGTON NAT. INS. CO. v. SUPERIOR
COURT IN AND FOR RIVERSIDE
COUNTY et al.

Civ. 1415.

District Court of Appeal, Fourth District,
California.

Feb. 2, 1933.

1. Mandamus ☞31.

Where Superior Court has wrongfully divested itself of jurisdiction of cause, mandate is correct remedy to cure error.

2. Justices of the peace ☞159(12).

Where one appealing from judgment of justice's court has in good faith attempted to file undertaking on appeal which is defective in form, but not void, application to amend undertaking or file another undertaking should be granted (Code Civ. Proc. §§ 978, 982a, 985).

3. Justices of the peace ☞159(9, 12).

Undertaking conditioned for payment of costs of appeal to Superior Court from judgment of justice's court of Riverside township, but not conditioned for payment of damages, held not void, but merely defective, and could be corrected by amendment or by filing another undertaking (Code Civ. Proc. §§ 982a, 985).

Application by the Washington National Insurance Company for a writ of mandate to compel the Superior Court in and for Riverside County, O. K. Morton, Judge, and another, to vacate an order dismissing an appeal from the justice's court.

Writ granted.

Kemp, Partridge & Kemp, of Los Angeles, and Estudillo & Schwinn, of Riverside, for petitioner.

Harmon C. Brown, of Riverside, for respondents.

MARKS, J.

This is an original proceeding instituted here to compel, by writ of mandate, the respondent court and judge to vacate an order dismissing an appeal from the justice's court of Riverside township, and permitting peti-

tioner to either amend its undertaking on appeal or file another undertaking.

Riverside township has a population in excess of thirty thousand. Petitioner brought suit in the justice's court of Riverside township against Guy E. Farmer. Judgment was rendered for defendant, and petitioner appealed to the Superior Court of Riverside county. The record was prepared and transmitted to the clerk of that court, and the case set for trial on October 28, 1932. On the day of trial, without giving notice of his intention so to do, Farmer moved to dismiss the appeal on the ground that the undertaking on appeal was void and did not confer jurisdiction upon the Superior Court. Appellant there, petitioner here, asked leave of court to either amend its undertaking on appeal or to file another undertaking. The request was denied, and the appeal dismissed.

The sole question before us is whether or not the undertaking was void or merely defective, so that it could be corrected by amendment or by filing another undertaking.

The penalty of the undertaking was as follows: " * * * Does hereby undertake and promise on the part of the Appellant, that said appellant will pay all costs which may be awarded against the defendant on the appeal, or on a dismissal thereof, not exceeding the sum of one hundred & no/100 (\$100.00) dollars, to which amount it acknowledges itself bound."

It is admitted that the undertaking was sufficient under the provisions of section 978 of the Code of Civil Procedure, providing for bonds on appeal from certain justice's courts to Superior Courts. Section 982a of the same Code makes the provisions of the chapter in which section 978 is found inapplicable to appeals from justices' courts in townships having a population of thirty thousand or more. Appeals from these courts must be taken in the manner prescribed for appeals from municipal courts.

Section 985 of the Code of Civil Procedure provides that in appeals from the municipal courts the undertaking on appeal must be "conditioned for the payment of all costs of appeal and *any damages that may be awarded against the appellant on the appeal.*" The italicized portion of the quotation does not appear in the undertaking in question.

[1] Where a Superior Court has wrongfully divested itself of jurisdiction of a cause, mandate is the correct remedy to cure the error. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978; Peacock v. Superior Court, 163 Cal. 701, 126 P. 976; Hellner v. Superior Court, 61 Cal. App. 785, 215 P. 709; Pacific States Corp. v. Superior Court, 72 Cal. App. 241, 236 P. 938; Jacques v. Superior Court, 114 Cal. App. 644, 300 P. 472.

[2] Where an appellant, from a judgment of a justice's court, has in good faith attempted to file an undertaking on appeal which is defective in form, but is not void, so that it must be regarded as no undertaking, an application to amend the undertaking or file another undertaking should be granted, though section 954 of the Code of Civil Procedure does not apply to appeals to Superior Courts. *Gray v. Superior Court*, 61 Cal. 337; *Werner v. Superior Court*, 161 Cal. 209, 118 P. 709; *Cohen v. Connick*, 26 Cal. App. 491, 147 P. 479.

The facts in the case of *Jarman v. Rea*, 129 Cal. 157, 61 P. 790, are so similar to those of the instant case that its decision is determinative of the question before us. In the *Jarman* Case, the undertaking on appeal did not bind the sureties to pay all damages and costs "on a dismissal thereof," as was then required by section 941 of the Code of Civil Procedure. In holding that the undertaking was merely defective and could be corrected, the Supreme Court said:

"On the other hand, the undertaking may be defective in the form in which it is framed, and yet sufficiently indicative of an intent to comply with the terms of the statute to be binding upon the sureties; or it may be defective in that it indemnifies the respondent against only a portion of the costs and damages that may be awarded him. * * *

"It cannot be said in the present case that there is an entire want of the undertaking provided by section 941. The sureties undertake that the appellant 'will pay all damages and costs which may be awarded against him on the appeal.' The omission of a similar provision in case of a dismissal of the appeal does not defeat or impair the undertaking in case there should be an affirmance of the judgment. The undertaking is merely defective in failing to provide for indemnifying the respondent in case the appeal should be dismissed. This must be held to be only an 'insufficiency,' which may be remedied by the filing of another undertaking."

[3] We are of the opinion that the undertaking on appeal furnished by petitioner was defective only, and that the respondent judge should have permitted petitioner to amend its undertaking on appeal or to file another undertaking, and, upon this being done, should have denied the motion to dismiss the appeal.

It is ordered that a peremptory writ of mandate issue, directing the respondent court and judge to annul and vacate the order dismissing the appeal in the case of *Washington National Insurance Company, a Corporation, v. Guy E. Farmer*, bearing No. 23290 of the Superior Court of Riverside county, and permit the plaintiff to either amend its undertaking on appeal or file another under-

taking on appeal, conditioned as required in the first paragraph of section 985 of the Code of Civil Procedure.

We concur: BARNARD, P. J.; JENNINGS, J.

129 Cal.App. 399

**LINCOLN HOLDING CORPORATION v.
UNION INDEMNITY CO.**

Civ. 4720.

District Court of Appeal, Third District,
California.

Feb. 1, 1933.

1. Pleading $\hookrightarrow$ 360(1).

Demurrer filed at same time held not waiver of motion to strike amended complaint (Code Civ. Proc. §§ 431, 472).

2. Estoppel $\hookrightarrow$ 52.

To constitute "waiver" there must be existing right, knowledge thereof, and intention or conduct warranting inference thereof, to relinquish it.

[Ed. Note.—For other definitions of "Waiver," see Words and Phrases.]

3. Pleading $\hookrightarrow$ 350(3).

Order that judgment on pleadings be denied on condition that plaintiff amend complaint within 5 days became equivalent to judgment, where plaintiff did not so amend, and could only be reviewed as statute prescribed.

4. Pleading $\hookrightarrow$ 238(4).

Order granting leave to file amended complaint after expiration of time fixed held void.

5. Appeal and error $\hookrightarrow$ 959(1).

Pleading $\hookrightarrow$ 236(1).

Motion for permission to amend complaint under statute is addressed to sound discretion of trial court whose action will not be set aside unless abuse clearly appears (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Lincoln Holding Corporation against the Union Indemnity Company. From a judgment on the pleadings, from an order striking from the files a second amended complaint, and from an order denying relief to plaintiff under Code Civ. Proc. § 473, plaintiff appeals.

Affirmed.

William W. Bearman and A. Feldman, both of Los Angeles, for appellant.

Janeway, Beach & Hankey and Kidd, Schell & Delamer, all of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by plaintiff from a judgment on the pleadings and also from an order striking from the files the second amended complaint and from an order denying relief to plaintiff under section 473, Code of Civil Procedure. Plaintiff went to trial October 11, 1929, upon his first amended complaint. During the trial defendant moved for judgment on the pleadings, and the following order was then made: "Motion for judgment on the pleadings is denied on condition that plaintiff amend its complaint within five days; leave to file second amended complaint within five days is hereby granted."

On November 7, 1929, no amended complaint having been filed, defendant moved for the entry of judgment on the pleadings in accordance with the order previously made and fixed the time for hearing said motion for November 13th. On the day prior to the hearing thereof, plaintiff filed its second amended complaint.

Upon the hearing of the motion for judgment on the pleadings and to strike the amended complaint from the files, motion for judgment was denied, but permission to file the second amended complaint was granted, without prejudice.

On November 19th, defendant renewed its motion to strike the second amended complaint and at the same time filed its demurrer thereto. Upon the hearing, the court vacated the order granting permission to file the second amended complaint and granted the motion for judgment on the pleadings. Thereafter plaintiff moved for relief under section 473, Code of Civil Procedure, which after consideration was by the court denied.

[1, 2] Appellant's ground for reversal is that defendant waived its objection to the filing of the second amended complaint after the expiration of the time granted by the court by filing a demurrer thereto contemporaneously with a motion to strike said amended complaint from the files. In this plaintiff is in error. The demurrer being filed at the same time the motion to strike the amended complaint was filed is not a waiver of the right to move to strike from the files. Section 431, Code of Civil Procedure, provides that the defendant may demur and answer at the same time, and section 472, Code of Civil Procedure, provides that such a demurrer is not waived by the filing of an answer. A motion is not an appearance and the purpose of a demurrer filed at the same time that a motion to strike is filed is to prevent default in case the motion is not well taken. Furthermore, the only theory upon which the filing of a demurrer could be construed as affecting the

right to urge the motion would be that of waiver, and to constitute waiver there must be, first, an existing right, benefit, or advantage; secondly, a knowledge, actual or constructive, of the existence of such a right; and, lastly, an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment.

"In no case will a waiver be presumed or implied contrary to the intention of the party unless, by his conduct, the opposite party has been misled to his prejudice with the honest belief that such waiver was intended or consented to." 25 Cal. Jur. 926.

In the case before us there could have been no waiver, because there was no such intention manifested, but also the order of the court provided: "Motion for judgment on the pleadings is denied on condition that plaintiff amend its complaint within five days."

[3] When plaintiff failed to amend its complaint within the time specified, the right of the plaintiff so to do ceased. The order became equivalent to a judgment and could be reviewed only in the modes prescribed by statute. This has frequently been so held, as in the case of *Holtum v. Greif*, 144 Cal. 521, 78 P. 11, where, as set forth in the syllabus, the court held: "The superior court has unquestioned power to make an order granting a new trial conditional upon the payment of costs by the moving party, and a failure to perform the condition converts the order into a denial of the motion. The condition is an essential part of the order. If the order is regularly entered, and the power of the court to set it aside as an award of a new trial is at an end it has no power to change it by eliminating the condition, so as to make the order for a new trial absolute, and an order purporting to make such change is void."

[4] The order granting leave to file the amended complaint after expiration of the time fixed by the court and contrary to the provisions of its terms, was void.

[5] Appellant also moved, after entry of judgment, for relief under section 473, Code of Civil Procedure. Appellant claims that by accident or mistake it failed to set forth a good cause of action in its complaint. Such a motion is addressed to the sound discretion of the trial court, whose action will not be set aside upon appeal unless abuse of discretion clearly appears.

It appears from the record that the order permitting appellant to file an amended complaint was made October 11th, and no amendment was offered for filing until November 9th. It was not until December 3d that the appellant obtained an order to show cause why its default should not be vacated, which motion was by the court dismissed without prejudice.

On December 30th, for the first time, appel-

lant moved under the provisions of section 473, Code of Civil Procedure, to be relieved of its default. Affidavits and counteraffidavits were submitted and the matter was there thoroughly presented to the trial court.

We find no adequate reasons set forth in the affidavits for granting the relief sought and no abuse of discretion is manifested by the trial court.

The judgment appealed from is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

129 Cal.App. 261

CLASSROOM TEACHER, Inc., v. SUPERIOR COURT IN AND FOR GLENN COUNTY.

Civ. 4835.

District Court of Appeal, Third District, California.

Jan. 27, 1933.

Corporations §677½.

Statute authorizing defendant, in action by foreign corporation, to require security for costs, *held* applicable to proceedings in justices' courts (Code Civ. Proc. §§ 890, 890a, 923, 925, 1036, 1037).

Certiorari to Superior Court, Glenn County; R. N. Rankin, Judge.

Application by the Classroom Teacher, Inc., for certiorari to review and annul an order of the Superior Court sustaining a judgment of the Justice's Court dismissing an action.

Order affirmed.

Fred M. Harter, of Marysville, for petitioner.

Milton M. Hogle, Dist. Atty., of Willows, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The Classroom Teacher, Inc., a foreign corporation, commenced an action in the justice's court of Glenn county to recover from defendant a balance due for books sold upon a written contract. Defendant appeared by demurrer, and at the same time demanded that plaintiff file an undertaking in the sum of \$100 as security for costs, as provided in section 1036 of the Code of Civil Procedure. Upon refusal to comply with such demand within thirty days, judgment of dismissal was entered against the plaintiff.

An appeal was thereupon taken by plaintiff to the superior court upon the question of

law thus tendered, and, upon the hearing thereof, the judgment of dismissal by the justice court was sustained. Thereupon the Classroom Teacher, Inc., as plaintiff, brought this petition to review the order and proceedings of the superior court, and asks that the same be annulled.

Section 1036, Code of Civil Procedure, reads as follows: "When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceeding must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed."

The order of the justice's court in dismissing the action is based upon section 1037, Code of Civil Procedure, which reads: "After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action or special proceeding to be dismissed."

The question here involved is whether or not section 1036, Code of Civil Procedure, is applicable to actions in the justice's court. If it does apply, then the court had jurisdiction under section 1037 to dismiss the action after the lapse of thirty days if the undertaking was not filed. If section 1036 is not applicable to proceedings in the justice's court, then petitioner must prevail.

The applicability of section 1036 to justices' courts does not appear to have been heretofore considered by our courts of review, although the section has, inferentially at least, been applied to a recorder's court in the case of *Gadette v. Recorder's Court of East San Diego*, 53 Cal. App. 72, 199 P. 817. In that case, one Ava C. Roberts brought an action in the recorder's court of East San Diego against L. Gadette. In due time defendant demurred and at the same time filed and served a demand for security for costs, as provided in section 1036, Code of Civil Procedure. Thereafter notice was served on defendant of the time set for hearing on the demand and also on the demurrer. Defendant failed to appear, and the demand was, on

motion, stricken from the files upon the ground that no proof was offered in support thereof that plaintiff was a nonresident of the state. The demurrer was thereupon overruled, and, defendant failing to answer, judgment was entered against him. Thereupon, plaintiff being about to proceed to enforce the judgment, petitioner applied to the Appellate Court for a writ of prohibition. The Court of Appeal did not discuss the application to a recorder's court of the right conferred by section 1036, nor was it argued in the briefs of counsel, but all of the facts necessary to a determination of the question were apparent on the record, and the court fully construed sections 1036 and 1037, Code of Civil Procedure, and, unless the Appellate Court considered these sections as applicable to a recorder's court, it could not have reached the conclusion it did. If these sections are applicable to a recorder's court, it is obvious they must also apply to proceedings in a justice's court. Furthermore, there is nothing inherent in the sections that would indicate that they are not applicable to justices' courts, either in the organization, powers, or course of proceedings of such courts.

"Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein." Section 925, Code Civ. Proc.

Also the location of section 1036 in the arrangement of the Code of Civil Procedure lends weight to the contention of respondent. It is found in chapter 6 relating to costs, which is under title 14 covering miscellaneous provisions and embraced in part 2, entitled Civil Actions, which applies to all courts.

Petitioner claims that the only power a justice's court has to dismiss an action without prejudice is found in sections 890 and 890a, Code of Civil Procedure. These Code sections are found in the chapter pertaining to judgments (other than by default) in justices' courts. The judgment in the instant case was predicated solely upon the default of the nonresident plaintiff in failing to file an undertaking as security for costs.

Petitioner maintains that the only power invested in a justice of the peace to require a bond for costs from a party to an action is found in section 923, Code of Civil Procedure, but this section refers to a guaranty for costs which the justice may exact before issuing summons, whereas here we are dealing with costs incurred by a party after summons is issued. Section 923, Code of Civil Procedure, and section 1036, Code of Civil Procedure, are not similar, and are designed to care for distinguishable situations.

Petitioner has cited the case of *Vignolo v. Superior Court*, 85 Cal. App. 461, 259 P. 491, and *Peacock v. Superior Court*, 163 Cal. 701, 126 P. 976. Both the *Peacock Case* and the *Vignolo Case* hold a justice of the peace has no authority to pass upon or grant a motion for a nonsuit, but must decide the case upon its merits, which has no application to the case here presented.

We are of the opinion that section 1036, Code of Civil Procedure, is by its nature applicable to proceedings in the justices' courts, and therefore the order is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

129 Cal.App. 395

In re FINGLAND'S ESTATE.

SMYTH et al. v. FINGLAND et al.
Civ. 4671.

District Court of Appeal, Third District,
California.

Feb. 1, 1933.

Hearing Denied by Supreme Court March 30,
1933.

1. Husband and wife $\S$ 14(3).

Deposit payable to husband and wife or either of them or to survivor on death of either created joint tenancy entitling wife, on husband's death, to deposit by virtue of survivorship, not community interest.

2. Husband and wife $\S$ 266.

Stock certificates issued to husband and wife in joint tenancy, and canceled and reissued to wife alone, became wife's separate property on husband's death whether transfer from joint tenancy was effectual or not.

3. Husband and wife $\S$ 266.

Realty that husband duly conveyed to wife and recorded before his death did not belong to community at time of husband's death.

Appeal from Superior Court, Yolo County;
W. A. Anderson, Judge.

Proceeding by Howard I. Smyth, administrator of the estate of Sarah Edna Fingland, deceased, and others, proponents, opposed by James C. Fingland and others, contestants. From an order and decree of distribution, contestants appeal.

Affirmed.

J. J. Henderson and W. A. Green, both of
Sacramento, for appellants.

G. P. Hurst, of Woodland, and Marshall Z.
Lowell, of Auburn, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an appeal from an order and decree of distribution. The controversy is between the heirs of Sarah Edna Fingland, deceased, and the heirs of John Fingland, her predeceased spouse. The dispute involves the character of the property owned or held by Sarah Edna Fingland at the time of her death.

John Fingland and Sarah were married in 1901 and lived together until the death of John on or about April 9, 1925. There were no children. The heirs of the wife, to whom the decree appealed from awards her estate, are her brothers, sisters, and the son of a deceased sister. The heirs of the husband, claiming a one-half of the estate, are his brothers and a sister. It is admitted by all parties that the entire estate was originally the community property of John and Sarah Fingland, the fact being that the accumulated assets represented the earnings of the husband.

[1] These earnings were placed in a savings bank at Woodland where the parties resided for a number of years. From the record before us the first definite evidence with this bank account appears as of the year 1912. On March 21, 1912, we find evidence of the deposit and on the ledger sheet of the bank we find the notation: "This deposit and the increase thereof is payable to the undersigned or either of them, or to the survivor in case of the death of either of them." There is nothing on the ledger sheet to indicate at whose request or suggestion the notation was made. There is, however, an undated signature card containing the same notation and signed by both of the spouses. While the card is undated there is evidence to support the conclusion that the same was executed at a date prior to the year 1915 and that subsequent to that time the account was carried as on the card indicated.

As much of the controversy seems to hinge upon this mode of account, we may stop here and answer the respective contentions of the parties to the litigation.

Respondents, heirs of the wife, argue that the mode of deposit as evidenced by the card and the agreement of the spouses, created as between the husband and wife, a joint tenancy in the moneys then on deposit and the accruals thereto; that upon the death of John Fingland the wife took the money as the survivor of the joint tenancy with no reference to nor connection with the marital community.

The authorities support this contention. The effect of the agreement was to create a joint estate in the property to which it re-

lates. The title to the money deposited passed out of the community at the time of the deposit and it then became the joint property of the husband and wife, invested with all the attributes of such property whether the wife understood its exact nature when she signed the agreement and accepted its benefits or not. In *re Estate of Gurnsey*, 177 Cal. 211, 170 P. 402; *McDougald v. Boyd*, 172 Cal. 753, 159 P. 168, 169; *Hill v. Badeljo*, 107 Cal. App. 598, 290 P. 637; *Kennedy v. McMurray*, 169 Cal. 287, 146 P. 647, Ann. Cas. 1916D, 515.

We therefore hold that upon the death of the husband the wife succeeded to the moneys deposited not by virtue of any community interest but as the survivor of the joint tenancy. As was said in *McDougald v. Boyd*, supra, "she took by virtue of her estate originating at the time of creation of the joint tenancy."

[2] At a time prior to the decease of the husband a sum of money was withdrawn from the deposit and invested in certain bank stocks. The certificates were issued to the husband and wife by name as joint tenants and so remained until about nine days before the death of the husband, when the certificates in joint tenancy were canceled and the stock reissued to the wife alone. It seems clear from the authorities cited that had there been no transfer out of the joint tenancy and the stock had remained as issued, the wife, upon the death of the husband, would have been entitled thereto as the surviving joint tenant. *Hurlbert v. Title Ins. & Trust Co.*, 181 Cal. 692, 186 P. 142. The transfer then from the joint tenancy to the wife was either effectual or noneffectual. If effectual, it vested the wife with a complete title as her separate property; if noneffectual, it left undisturbed the previous estate upon the termination of which the wife, as survivor, would take. In either case the trial court's finding that upon the death of the husband the stocks were the separate property of the wife must be upheld.

In passing we note that no claim of fraud arises in the case.

[3] There remains to be considered the real estate. The trial court's finding is that the husband conveyed the property to his wife "by deed duly executed, certified and delivered to Edna Fingland and placed on record prior to the death of the husband." This finding is not seriously questioned and at the oral argument appellants did not press the claim that the realty belonged to the community at the time of the husband's death.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

129 Cal.App. 324

In the Matter of the Application of Alfred J. HENNESSY for a Writ of Habeas Corpus for and in behalf of James Brady.

Cr. 1718.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1933.

Application for writ of habeas corpus prayed to be directed to the sheriff of the city and county of San Francisco, to secure release of petitioner from custody on ground of illegal detention.

Writ denied.

Alfred J. Hennessy and K. B. Dawson, both of San Francisco, for petitioner.

PER CURIAM.

Petition for writ of habeas corpus.

It appears therefrom that petitioner is being held on a statutory complaint which charges him with a felony, to wit, grand larceny, committed in the state of New York, and that thereafter petitioner fled from said state and is now a fugitive from justice. It is here claimed in support of the writ that petitioner is held illegally, for the reason that the complaint is void on its face, and petitioner is held without reasonable or probable cause. There is no merit in the petition. Sections 1548-1551 of the Penal Code authorize the holding of petitioner pending the arrival of the sheriff from the state of New York.

The application is denied.

129 Cal.App. 187

BECK v. BARNES et al.

Civ. 8297.

District Court of Appeal, First District, Division 1, California.

Jan. 25, 1933.

1. Appeal and error ⇨612(2).

Court has no authority to certify to clerk's transcript under alternative method of appeal, but matters included in transcript should be certified by court (Code Civ. Proc. § 953a et seq.).

2. Appeal and error ⇨641.

Certification by officers of portions of record which they were not required to certify was mere surplusage, and did not vitiate record (Code Civ. Proc. § 953a et seq.).

3. Appeal and error ⇨553(2).

Where parties stipulated that transcript contained all documentary records, and court

certified that transcript was true and correct, appellate court would consider record as one presented under alternative method, although law was not strictly followed (Code Civ. Proc. § 953a et seq.).

Record disclosed that clerk of court, in addition to certifying to judgment roll and notice of appeal, had also certified to correctness of documents that were introduced in evidence, and which should have been part of reporter's transcript; that the entire transcript, including judgment roll, and all other documents were certified to by judge who tried cause as being true and correct, and that parties stipulated that foregoing was full, true, and fair transcript and contained all the documentary record.

4. Appeal and error ⇨684(2).

Error in overruling continuance to obtain delinquent tax lists could not be reviewed, where testimony taken at trial had not been brought up to reviewing court.

5. Appeal and error ⇨863.

Where trial court refused continuance to permit plaintiff to obtain delinquent tax lists in evidence, reviewing court could not consider matter in light of an offer of evidence made and refused.

6. Constitutional law ⇨62.

Taxation ⇨37.

Statute authorizing tax levy for international exposition which did not fix amount of delinquency held not unconstitutional as delegating legislative functions to board of equalization, when construed with act fixing penalty for delinquency (St. 1911, p. 277, § 16; Pol. Code, § 3696).

St. 1911, p. 277, § 16, provided that such amount of tax should be levied on all taxable property in state as when levied on all property mentioned, after making due allowance for delinquency, should raise for each of fiscal years mentioned sum of \$1,250,000, and, although amount of delinquency was not fixed in act, Pol. Code, § 3696, fixes penalty for delinquency at 5 per cent. of total amount to be raised, and this section, read in connection with act of 1911, as it must be, left nothing to be done by board of equalization except to compute amount of tax after allowing 5 per cent. for delinquency.

7. Taxation ⇨734(1).

Tax levy for international exposition held not invalid because amount raised exceeded amount fixed by statute, so as to make tax sale void (St. 1911, p. 277, § 16).

8. Appeal and error ⇨714(3).

Stipulation made or default entered, on which appellant relied, could not be considered by reviewing court, where not embodied in record.

9. Appeal and error ⚡854(1).

Where record was silent regarding court's reason for denying application for continuance to produce delinquent tax list, court's action was not properly before reviewing court on motion for new trial.

10. Municipal corporations ⚡581.

Where affidavit of posting of notice to redeem from sale for nonpayment of street improvement bond stated only that notice was posted "in conspicuous place on property," such statement was too general (St. 1893, p. 33, as amended).

11. Quieting title ⚡10(1).

In action to quiet title, party may not have decree because of weakness of his adversary's title, but must prove title in himself.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Jessie Beck against A. J. Barnes and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Harold H. Schulenberg, of Los Angeles, for appellant.

E. L. Williams and John Barnes, both of Los Angeles, for respondent.

PER CURIAM.

This action was brought to quiet plaintiff's title to two parcels of land. A trial was had, and evidence both oral and documentary introduced. Findings of fact and conclusions of law were waived and a decree was entered adjudging that the defendant A. J. Barnes was the owner in fee of one of said parcels of land. This is an appeal by the plaintiff from said judgment.

[1-3] It is the contention of the respondent Barnes that this is an appeal upon the judgment roll alone, while appellant claims that the record is presented in accordance with the provisions of section 953a et seq. of the Code of Civil Procedure. An examination of the record discloses that the clerk of the court, in addition to certifying to the judgment roll and to the notice of appeal, has also certified to the correctness of about twelve documents that were introduced in evidence and which should be part of the reporter's transcript. It has been held that such certification by the clerk is unauthorized and insufficient to justify an examination of said documents by the appellate court. *Jeffords v. Young*, 197 Cal. 224, 239 P. 1054; *Lake v. Harris*, 198 Cal. 85-89, 243 P. 417. The entire transcript, including the judgment roll, the notice of appeal, and all other documents in the record are certified to by the judge who tried the cause in the following man-

ner: "I hereby certify that the foregoing transcript consisting of 67 pages is true and correct, and the same is hereby settled and allowed this 4 day of Dec. 1929."

The court has no authority to certify to the clerk's transcript, but as to the other matters included in the transcript they should be certified by him. Code Civ. Proc. § 953a et seq. However, the officers, in addition to certifying to the correctness of such portions of the record as the law requires them to certify to, have also certified to the correctness of other portions of the transcript. The certification to the latter is mere surplusage, and does not vitiate the record. It is true that the record before the court discloses many departures from the provisions of the law relating to records on appeal under the alternative method. Had counsel for respondent made timely objections thereto, the trial court would no doubt have corrected such errors. We find in the record that counsel entered into the following stipulation: "We hereby stipulate that the foregoing is a full, true and fair transcript and contains all the documentary record." We have concluded that under the stipulation of counsel and the certificate of the court we will consider the record as one presented under the alternative method and pass upon such questions as are properly before us. *Pierce v. Works*, 171 Cal. 684, 154 P. 852; *Lake v. Harris*, supra.

[4] It is assigned as error that the court should have granted the appellant a continuance for the purpose of obtaining and introducing in evidence the published delinquent tax list of the county of Los Angeles for the year 1913, which covers the property in controversy and upon which respondent's title is based. This alleged error cannot be reviewed, because the testimony taken at the trial has not been brought to this court; hence there is nothing to show that such application was ever made to the court, or the ground upon which the continuance was refused, or that the court abused its discretion.

[5] It is next urged that said delinquent tax list, as published, failed to state the amount of penalties due, and for that reason the tax deed of defendant Barnes, which is based upon the sale for the year 1913, is void. As the court refused a continuance to permit the plaintiff to obtain and offer such delinquent tax list in evidence, we cannot consider it in the light of an offer of evidence which was made at the trial and refused admission by the court. Such offer, so far as the record before us is concerned, was never made.

[6] A portion of the taxes levied against this property for the years 1913 and 1914

was for the maintenance of the Panama Pacific International Exposition held in San Francisco in 1915. It is claimed that the law under which said tax was levied is unconstitutional, and therefore the tax deed issued to the respondent Barnes is void because the property was sold for a sum of money in excess of the amount actually due. This contention is based upon the fact that the act providing for the levy (Stats. of 1911, chap. 109, p. 273) provides in section 16 thereof (page 277) that such an amount of tax shall be levied upon all the taxable property in the state "as when levied upon all the property in this section mentioned, after making due allowance for delinquency, shall raise for each of said fiscal years, the sum of one million two hundred fifty thousand dollars." It is argued by appellant that, as the amount of delinquency is not fixed in the act, but is left to the judgment of the board of equalization, it confers on the latter body a legislative function. He cites in support of this view *Houghton v. Austin*, 47 Cal. 646, wherein it is held that section 3696 of the Political Code is unconstitutional because that section leaves the amount of delinquency to be levied to the discretion of the board of equalization, when as a matter of fact such delinquency must be fixed by the Legislature. Since the above-cited decision was rendered, and at the time of the enactment of the act of 1911 above referred to, section 3696 of the Political Code as amended fixes the penalty for delinquency at 5 per cent. of the total amount to be raised. This section must be read in connection with the act of 1911, *supra*, and leaves nothing to be done by the board of equalization, except to compute the amount of tax after allowing 5 per cent. for delinquency.

[7] It seems to be a further contention that, as shown by a letter from the controller of the state of California, the amount of taxes raised in 1913, for exposition purposes, was about \$23,000 in excess of the \$1,250,000 fixed by the act, and about \$20,000 in excess of the \$1,250,000 provided for the year 1914; that the property here in issue was therefore sold for a sum in excess of the amount actually due, and for that reason the respondent's tax deed based upon such sale is void. To give full force to the contention of appellant, it would mean that, where an estimated delinquency was too large and more money was collected than the exact amount required, the whole tax would be void. The result would be that any tax levy would be invalid where a greater amount was raised than that actually called for. There is no merit in the contention.

[8] Appellant also complains that during the progress of the trial the respondent, Barnes, admitted the record title to the parcel of land in dispute was vested in defend-

ant Hannah Metzler; that appellant made a motion to enter the default of said Hannah Metzler, which motion was granted by the court; that through this stipulation and the entry of the default as above stated the appellant became vested with all of the title to said land. It is a sufficient answer to say that the record fails to disclose any such stipulation or any default of said Hannah Metzler, but, on the contrary, it does appear from the judgment roll that there is an answer on file by said Hannah Metzler in which she denies that appellant is the owner of said land and claims ownership in herself. If any such stipulation was made or default entered, and it was the desire of the appellant to rely upon them, it was his duty to see that they were embodied in the record so that the court could consider them.

[9] Appellant also complains of the order of the court denying his motion for a new trial. He claims that the court erred in not permitting him to produce the published delinquent tax list of Los Angeles county for 1913 and introduce the same in evidence. We have already adverted to the fact that the record is silent as to the reason of the court in denying his application for a continuance to produce said record. Such action of the court is therefore not properly before us on this motion for a new trial. There was no error in denying the said motion.

[10] There is one other reason why the appellant cannot prevail in this action. Plaintiff's alleged title to the land is based upon a deed from N. T. Powell, treasurer of the city of Los Angeles, executed and delivered after a sale of the property for nonpayment of a street improvement bond, after the Street Improvement Act, approved February 27, 1893, and all acts amendatory thereof (St. 1893, p. 33, as amended). It is admitted that by said act a purchaser must give notice to redeem, which notice must, where the premises are unoccupied (and the premises in question were unoccupied), be posted on the premises in a conspicuous place, and that proof must be made that the notice was so posted. In *Thomas v. Peterson*, 213 Cal. 672, 674, 3 P.(2d) 306, 307, where the property was sold under the same act, it is said: "The rule that proceedings for the sale of property for default in taxes or local assessments must strictly comply with the statutory requirements is settled. * * * It further appeared that the affidavit of posting of notice to redeem, filed by the purchaser, did not show that the notice was posted in a conspicuous place on the property, as required by section 5, subdivision j, of the act. The affidavit states only that the notice was posted 'in a conspicuous place upon the property,' and it has been held that such a statement is too general to meet the requirements of the statute. See *Hindle v. Warden*, 50 Cal. App.

356, 195 P. 428; *Hennessy v. Hall*, 14 Cal. App. 759, 113 P. 350."

[11] An examination of the proof of posting in the case at bar shows that it is identical with the proof made in the *Thomas Case*. It is also settled that in an action to quiet title a party may not have a decree because of the weakness of his adversary's title. He must prove a title in himself. *Biaggi v. Mainero*, 60 Cal. App. 608, 213 P. 541. This plaintiff has failed to do.

The judgment is affirmed.

129 Cal.App. 136

DALTON et al. v. CLARK et al.
Civ. 8768.

District Court of Appeal, First District,
Division 1, California.
Jan. 24, 1933.

Rehearing Denied Feb. 23, 1933.

1. Quieting title $\S$ 10(1).

In action to quiet title, plaintiff must show title in himself and cannot rely upon lack of title in adversary.

2. Mines and minerals $\S$ 38(2).

Although fee to mineral lands is in United States, in contest between private claimants, lesser interests and estates therein are treated as estates in fee, as respects action to quiet title.

3. Mines and minerals $\S$ 29(6).

Continuous possession of mining claim for five years before adverse rights exist is equivalent to "location" (30 USCA $\S$ 38).

[Ed. Note.—For other definitions of "Location," see Words and Phrases.]

4. Mines and minerals $\S$ 9, 23(1).

Mill site for reduction of ore from nearby mine is a "mining location," on which no annual expenditure or assessment work is required; it being sufficient if work indicates present and continuous use (30 USCA $\S$ 38).

[Ed. Note.—For other definitions of "Mining Location," see Words and Phrases.]

5. Mines and minerals $\S$ 17(1).

To constitute a valid "location" of a lode of quartz, "discovery" of a vein or lode of quartz is necessary (Civ. Code, $\S$ 1426).

A "discovery" is the actual finding of mineral-bearing rock in place, the discovery of mineral-bearing ore within the crevices of the rock, or incased within defined boundaries, or such indications of the presence of ore within rock in place as an experienced miner would feel justified in expending his time and money upon with

the reasonable expectation of finding ore in paying quantities.

[Ed. Note.—For other definitions of "Discovery," see Words and Phrases.]

6. Mines and minerals $\S$ 29(2).

Payment of taxes against mining claim and other acts necessary to prescriptive title are unnecessary to acquire title to claim; it being sufficient, as against rival claimant, that claim be held and worked, where work is required, for period prescribed by local statute of limitations applicable to mining claims (30 USCA $\S$ 38; Act Cong. Sept. 9, 1850 [9 Stat. 452]).

7. Mines and minerals $\S$ 29(6).

Persons in possession, as adjunct to mine, of mill site on nonmineral land for more than five years before attempt by others to locate it as part of lode claim, acquired title thereto subject to paramount interest of United States (30 USCA $\S$ 38; Act Cong. Sept. 9, 1850 [9 Stat. 452]; Civ. Code, $\S$ 1426).

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Edward Dalton and Paul Fox against Charles R. Clark and Hazel D. Clark. From judgment for plaintiffs, defendants appeal.

Affirmed.

A. H. Ricketts and W. H. Metson, both of San Francisco, and F. J. Feeney, of Santa Maria, for appellants.

Griffith & Thornburgh and Wm. G. Griffith, all of Santa Barbara, for respondents.

JAMISON, Justice pro tem.

This is an action for the possession of a certain tract of land consisting of five acres to which plaintiffs claim to be entitled for a mill site for the reduction of quicksilver ore from a nearby cinnabar mine owned by them.

The amended complaint contains two counts, in the first of which it is alleged that plaintiffs are the owners of said five-acre tract and entitled to the possession thereof, and that defendants claim and assert some interest therein but that said claim is without right. They allege in the second count that they are the owners in fee of said five acres by virtue of a location notice filed in accordance with the laws of the United States on January 16, 1915, by respondents' predecessors in interest, and relocated as a mill site on October 27, 1924, by respondent Edward Dalton and his grantors; that ever since January 16, 1915, plaintiffs and their predecessors in interest have in good faith used and occupied the said tract as a mill site, until November, 1929, when the defendants wrongfully entered upon said mill site and took pos-

session of same, and ever since said last-named date have continued in possession of same against the will, without the consent of plaintiffs, and against their protest; that defendants have no right, title, or interest in said mill site, or any right to the possession thereof; that plaintiffs have demanded from defendants the possession of said mill site, but defendants have refused and still refuse to deliver possession of the same to plaintiffs; and that by such dispossession plaintiffs have been damaged in the sum of \$30,000. Defendants answered, denying the allegations of the complaint. Plaintiffs had judgment decreeing them to be the owners of said five-acre mill site subject to the paramount title of the government thereto, and adjudging them entitled to the possession of said five-acre tract. From the judgment defendants appeal.

It appears from the evidence produced by respondents that on April 3, 1905, one Weldon was issued a patent from the government for three quicksilver mines known as the "Red Rock Consolidated Mine." In 1904, one Reddington leased this mine and worked it until 1907, and in connection therewith he built the necessary camp buildings, cabins, stables, and retorts to be used in the reduction of ores produced from said mine, these structures being placed upon the five-acre tract now in controversy. In 1907 Reddington surrendered his lease and turned over to his lessor the possession of said mine, together with the structures he had erected on the said five-acre tract.

On January 20, 1916, respondent Dalton, together with Wood and Vincent, acquired the interest of Weldon in said mine and appurtenances. There is some evidence that at this time Wood placed monuments marking the boundaries of said mill site and filed and recorded a notice of the location of said five-acre tract for a mill site. Appellants objected to the receipt in evidence of the said mill site location notice, apparently upon the ground that it did not comply with the regulations governing the location of mill sites. The objection was by the court sustained.

From 1915 to 1921 Dalton and Wood worked the said mine, taking the ore mined therefrom to the retorts on the mill site and there reducing same, and during this period of over five years resided on the mill-site tract.

In 1921, owing to the low price of quicksilver, they ceased working the said mine, but left their mining tools and equipment on the mill site, closing the doors of the buildings thereon and placing a sign, with their names on it, requesting that all doors be kept closed. Thereafter, from 1921 to 1923, Wood continued to visit the mine and mill site, remaining there from a few days to a week on each occasion.

Wood died in 1923 and his son continued to visit and look after the mining property until 1925. Respondent Fox acquired Wood's in-

terest in the mine in 1925, and that of Vincent in 1927. From 1925 until November, 1929, Dalton made trips each year to the mine and mill site, looking after said property and staying at the mill site from one day to some weeks, and during all this time he found no one in possession of the property, and said sign placed on said property continued to remain there.

Appellant owned a mining claim adjoining the said mill site. He was given permission by Dalton to occupy one of the cabins on the mill site while doing his annual assessment work on his said claim. It appears that appellant Charles R. Clark had in July, 1924, filed a lode-mining location notice which included the said five-acre tract upon which said mill site was located, and that in November, 1929, he took possession of the buildings and property on said mill site and ousted respondents therefrom.

Appellants contend that this is an action to quiet title and that it is well settled that in this kind of an action respondents must rely upon and must show title in themselves in order to recover, and that they have failed to do so, citing numerous authorities.

[1, 2] The trial court in its findings and judgment acted upon the theory that this was an action to quiet title. Assuming this is an action to quiet title, it is a well-established principle that the plaintiff must show title in himself, and cannot rely upon lack of title in his adversary. But it is also well settled that, although the title in fee to mineral lands is vested in the United States, yet as between the claimants of said lands, all rights, interests, and estates in the mines are treated as being an estate in fee, vesting in such claimants a right of property therein, founded upon their possession or appropriation of the land containing the mine, and they are treated as between themselves and all persons but the United States as the owners of the land and mines thereon. *Buchner v. Malloy*, 155 Cal. 253, 100 P. 687; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Gwillim v. Donnellan*, 115 U. S. 45, 5 S. Ct. 1110, 29 L. Ed. 348; *Merritt v. Judd*, 14 Cal. 59; *Hughes v. Devlin*, 23 Cal. 502; *Spencer v. Winselman*, 42 Cal. 479.

Respondents claim title to the five-acre mill site by possession, under the provisions of section 2332 of the Revised Statutes of the United States (30 USCA § 38), which provides: "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

[3] In *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100, 45 P. 1047, it was held that under said section 2332, when possession has continued for five years, before adverse rights exist, it is equivalent to location. *Humphreys v. Idaho Gold Mines, etc., Co.*, 21 Idaho, 126, 120 P. 823, 40 L. R. A. (N. S.) 817; *Upton v. Santa Rita Mining Co.*, 14 N. M. 96, 89 P. 275.

[4] A mill site is a mining location. *Cleary v. Skiffich*, 28 Colo. 362, 65 P. 59, 89 Am. St. Rep. 207. No annual expenditure or assessment work is required upon a mill site. *Ricketts American Mining Law* (3d Ed.) 454. It is sufficient if the work or improvement indicates a present and continuous use, such as placing monuments to mark the boundaries, erecting buildings, appliances for milling ore, etc. 1 *Snyder on Mines*, §§ 324, 326; *Valcalda v. Silver Peak Mines* (C. C. A.) 86 F. 90.

In the case at bar the evidence is undisputed that Dalton and Wood resided on the mill site for a period of more than five years, from 1915 to 1921, under a claim of title to it, and thereafter Dalton and the grantors of Fox and Fox continued in such possession until ousted by appellants in 1929.

[5] Appellants' claim to the ownership of the mill site is based upon their location of same as a lode mining claim in July, 1924. To constitute a valid location of a lode of quartz, a discovery of a vein or lode of quartz is necessary. Civ. Code, § 1426; 2 *Lindley on Mines* (3d Ed.) § 335; *McElligott v. Krogh*, 151 Cal. 126, 90 P. 823; *Brown v. Luddy*, 121 Cal. App. 494, 9 P.(2d) 326.

Snyder, in his work on mines (volume 1, § 344), defines the word "discovery" as follows: " * * * The actual finding of mineral-bearing rock in place, * * * the discovery of mineral-bearing ore within the crevices of the rock, or incased within defined boundaries, or such indications of the presence of ore within rock in place, * * * as an experienced miner would feel justified in spending his time and money upon with the reasonable expectation of finding ore in paying quantities."

In *United States v. Iron Silver Mining Co.*, 123 U. S. 673, 683, 9 S. Ct. 195, 199, 32 L. Ed. 571, the court said: "It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

Respondents produced substantial evidence that when appellants made their location in July, 1924, they had made no discovery of a lode or vein of quartz as a basis for that location; that no mineral or mineral-bearing

rock existed on said mill site. By the finding of the trial court that respondents were the owners of the five-acre mill site it necessarily found that the said location of appellants was on nonmineral land.

[6] Appellants maintain that section 2332 of the Revised Statutes of the United States (30 USCA § 38) does not support respondents' claim that they have acquired title to said mill site by five years' occupation of it, for the reason that there is no evidence that they have paid all taxes levied or assessed against the property, or that none were assessed against it. We do not so construe said section 2332. It does not require that respondents should do all things necessary to acquire a prescriptive right to the mining claim under the laws of the state where the mine is located, but only that the claimant has held and worked (where work is required) for a period equal to the time prescribed by the statute of limitations for mining claims of the state wherein the mine is located.

The Act of Congress of Sept. 9, 1850, 9 United States Statutes, page 452, expressly prohibits this state from interfering with the primary disposal of the public lands, or passing laws whereby the right of the United States to dispose of same shall be impaired or questioned. Therefore, if the United States sees fit to vest an interest in the public lands in a claimant who occupies the claim for a period of five years, the state cannot nullify that interest by requiring that the claimant shall perform additional act or acts.

In *Cleary v. Skiffich*, supra, 28 Colo. at page 369, 65 P. 59, 61, 89 Am. St. Rep. 207, it is said: "Works for the reduction of ores are necessary. They must be located in the near vicinity of mines. Land for such purposes may be utilized, provided it is nonmineral. When that question is raised by those locating a lode claim embracing land already taken as a mill site, and upon which many thousands of dollars have been expended in the erection of mills, and which the claimant has taken up in good faith, the test must be, does such land contain minerals of a quantity and quality which can be extracted at a profit? 1 *Lindl. Mines*, § 98. If not, they are valueless for the extraction of minerals, and therefore nonmineral in their character, when previously claimed as a mill site. * * * To permit a claimant, under the guise of locating a lode claim to take from another land already utilized for mill-site purposes which contains no minerals of sufficient value to justify extraction, and which would give to the lode claimant that which is of no value to him, except as he may convert it into a means to extort from the mill-site owner the payment of money to prevent the loss of improvements erected in good faith, would certainly be inequitable and unjust."

[7] We are of the opinion that respondents were the owners of and in possession of the

five-acre mill site at the date of appellants' attempted location of it as a lode claim; that the said lode claim is invalid for the reason that said mill site is nonmineral land; that appellants are therefore trespassers upon said property; that under section 2332 of the Revised Statutes of the United States respondents, by their occupancy of the mill site, under the circumstances shown, for more than five years, acquired the same title to the mill site that they would have acquired by a formal and regular location of same; and that the interest thus acquired vested title to said mill site in them, subject to the paramount title of the government.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

129 Cal.App. 282

THOMAS v. SUPERIOR COURT IN AND
FOR BUTTE COUNTY et al.

Civ. 4818.

District Court of Appeal, Third District,
California.

Jan. 28, 1933.

Prohibition ☞5(3).

Minute order, directing divorced husband's commitment on failure to arrange for payment of alimony, *held* not final judgment authorizing writ of prohibition (Code Civ. Proc. §§ 577, 1003).

Application by Clyde Thomas for an alternative writ of prohibition to the Superior Court, in and for Butte County, and J. O. Moncur, Judge, sitting therein.

Respondents' demurrer to the petition sustained, and writ dismissed.

Willebrandt, Horowitz & McCloskey, of Los Angeles, for petitioner.

W. E. Lady, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Following an action in divorce an order was made and entered directing petitioner to make certain payments of alimony. The payments as directed not having been made, an affidavit was filed purporting to show such nonpayment, and based thereon an order was issued by respondent herein and served upon petitioner directing that he show cause, if any, why he should not be punished for contempt. The matter came on for hearing

before Hon. J. O. Moncur, Judge of the Superior Court, one of the respondents herein, who caused to be entered by the clerk of the court, a minute order reciting that no legal excuse for said nonpayment had been shown and that the petitioner herein be adjudged in contempt for his failure to make such payments and further directing that he be imprisoned until compliance with said order, and then the order continued: "It is provided, however, that before commitment issue for the execution of judgment on this order that he be given an opportunity to make such arrangement as may be satisfactory to this court for the payments of all amounts due under said order. And upon failure to so arrange, commitment shall issue forthwith. It is directed that counsel for plaintiff prepare findings, judgment and commitment in accordance herewith."

Thereupon and before any other or further finding, judgment, or commitment had been prepared or signed, petitioner applied to this court for an alternative writ of prohibition directed to respondents requiring that they show cause why they should not be restrained from proceeding further in said matter. Respondents appeared by demurrer, alleging that the petition did not state facts sufficient to constitute a cause of action nor grounds for issuance of a writ of prohibition. In support thereof defendant argued that no final order had been made by the court, and until findings and commitment had been issued as directed by the court there was nothing toward which a writ could be directed.

We believe that the objection is valid. While it is true that a minute order might be sufficient to carry out the directions of the court, nevertheless the order here made shows upon its face that it was not intended as a final judgment of the court.

In the Estate of Spreckels, 165 Cal. 597, 133 P. 289, 293, the trial judge directed the clerk of the court to enter a minute order wherein it was recited that a certain disposition should be made as to the estate and ordered that findings and decree of distribution be prepared. Upon the motion to settle the findings pursuant to the foregoing order, certain of those interested in the estate obtained a writ of supersedeas enjoining the trial court from signing the findings or a decree of distribution, insisting that the minute order was itself a judgment determining the rights of the parties in the estate, and the court having disposed of the rights of the parties, was without jurisdiction to enter the decree applied for; the court then proceeded:

"Little need be said on this point. The minute order which is claimed by appellants to have the force of a judgment followed the announcement in its written opinion of the views of the superior court on the question of

advancements. * * * But such order was not a final judgment or decree nor intended to be such or so considered by either court or counsel when it was entered. * * * On its face the minute entry claimed to be in effect a judgment, is designated as an order, and its terms show that it could not have been intended as a decree of distribution. * * * But, as convincing proof that it was not intended to be and was not a final decree, it ordered 'that findings and a decree of final distribution be prepared accordingly.' The order at most, taken in connection with the circumstances under which it was made, shows that it amounted only to an opinion of the court as to how the estate should be distributed * * * and that the distribution of the estate would only be had on findings, and a decree of final distribution to be thereafter prepared and signed."

A judgment is defined by section 577, Code of Civil Procedure, as "the final determination of the rights of the parties in an action or proceeding." And an order is defined by section 1003, Code of Civil Procedure, as "every direction of a court or judge, made or entered in writing, and not included in a judgment."

An inspection of the minute order entered in the instant case shows that it does not cover certain matters essential to a determination of the matter, and inasmuch as the order contains the proviso set forth above, we are of the opinion that the minute order in question is not a final judgment and that the proceedings herein having been premature, the demurrer should be sustained and the writ dismissed. It is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

129 Cal.App. 786

Clyde THOMAS, Petitioner, v. SUPERIOR COURT of the State of California, in and for BUTTE COUNTY, and the Hon. J. O. Moncur, Judge, Respondents.

Civ. 4843.

District Court of Appeal, Third District,
California.

Jan. 30, 1933.

Application for writ of prohibition prayed to be directed to the Superior Court of Butte County, J. O. Moncur, Judge, to restrain respondent from further proceeding against petitioner for contempt for failure to pay alimony. Demurrer sustained; writ dismissed.

Willebrandt, Horowitz & McCloskey, of Los Angeles, for petitioner.

W. E. Lady, of Los Angeles, for respondents.

PER CURIAM.

This petition for a writ of prohibition is based upon the same order and the identical facts which are disclosed in a similar petition between the same parties, in which previous proceeding an opinion of this court was filed January 28, 1933, except that this petition involves the nonpayment of installments of alimony which occurred subsequent to those which were involved in the former proceeding.

To the petition in the present proceeding a demurrer was filed. It is asserted the petition fails to state facts sufficient to constitute a cause of action.

Upon the authority of *Thomas v. Superior Court* (Cal. App.) 18 P.(2d) 755, the demurrer to the petition for a writ of prohibition in the present proceeding is sustained and the writ is discharged.

ANDERSON et al. v. SUPERIOR COURT IN
AND FOR LOS ANGELES
COUNTY et al.*

BENJAMIN FRANKLIN BOND & INDEMNITY CORPORATION v. MITCHELL,
Commissioner of Insurance.

Civ. 8805, 8821.

District Court of Appeal, Second District,
Division 2, California.

Jan. 31, 1933.

Rehearing Granted March 3, 1933.

Insurance ⇨ 20.

Statute providing that surety company's right to do business "shall remain unimpaired" pending court review of insurance commissioner's action in suspending its license for violation of rules specified therein, does not grant right to do business pending court review of commissioner's action in suspending license for insolvency (Pol. Code, §§ 596b, 625a, 631, 633d; Code Civ. Proc. § 1056).

Original applications by Walter N. Anderson and another, and by the Benjamin Franklin Bond & Indemnity Corporation, for writs of mandate prayed to be directed to the Superior Court in and for Los Angeles County, Harry R. Archbald, Judge, and to E. Forrest Mitchell, Commissioner of Insurance, to compel acceptance of surety bond.

Writ denied.

F. E. Davis, of Hollywood, Edward V. Jones, of Los Angeles, and Milton H. Silverberg, of San Francisco, for petitioners.

Everett W. Mattoon, County Counsel, and Fred M. Cross, Deputy County Counsel, both of Los Angeles, and Frank L. Guereña, of San Francisco, for respondents.

WORKS, P. J.

Civil No. 8805 is an original application for the writ of mandate. Civil No. 8821 is also an original application of the same nature.

In each of these proceedings the writ of mandate is demanded. In each, upon presentation of petition therefor, and ex parte, an alternative writ was issued. The two proceedings present the same legal questions and both therefore may be determined by a single opinion. Throughout the opinion petitioner Benjamin Franklin Bond & Indemnity Corporation will be referred to as the bond company.

In the first of the two proceedings, Civil No. 8805, it is alleged in the petition that the bond company exists for the purpose, "among others, of making, guaranteeing or becoming a surety" on bonds and undertakings, and that it had, prior to July 1, 1932, "fully complied with all the requirements of the law" of California regulating its formation and its right to transact business within the state, and that, since the date mentioned, it has regularly done business therein; that petitioner Anderson has been appointed a notary public and that it is necessary for him to qualify himself for the office by giving bond to be approved by a judge of respondent court; that on July 1, 1932, respondent insurance commissioner issued to the bond company the certificate of authority to do business provided for by law; that on November 9, 1932, the insurance commissioner "undertook to and did issue an order of suspension and revocation of said certificate of authority" and that he gave due publicity thereto; that on the last-mentioned date the bond company commenced in respondent court an action against the insurance commissioner, and five days later filed an amended and supplemental complaint in the action, all "under section 631 of the Political Code * * * for the purpose of cancelling the said action of the Commissioner in issuing, filing and circulating the said order of suspension and revocation." Section 631 of the Political Code reads, so far as it is material here, as follows: "If at any time the insurance commissioner revokes the certificate of authority theretofore granted to any insurance company, * * * any interested person or company may commence an action against the insurance commissioner for the purpose of reviewing the facts and the law pertinent to the controversy and for the purpose of obtaining the relief refused or for canceling the action of the commissioner. In any such action the court shall have full power to investigate all the facts de novo

without regard to the determinations previously made by the commissioner."

A copy of the amended and supplemental complaint is made part of the petition in this proceeding, and it is alleged in the petition that due service of the pleading was made upon the insurance commissioner, service of summons and of the complaint theretofore having been made, and that the action is still pending and undetermined. It is also alleged that on November 16, 1932, the bond company issued to petitioner Anderson a bond in the amount required by law, to qualify him as a notary public, that the same was presented to a judge of respondent court for his approval but that the judge refused and still refuses to approve it, and that he "will, unless compelled so to do, now and continuously hereafter 'pending final determination by the courts of such controversy' refuse to approve any and all bonds or undertakings issued by the" bond company. Speaking with reference to the action above mentioned it is alleged in the petition that "all of the allegations in the original and supplemental complaints or petitions on file therein are true; and no notice or publication as required by section 1056 of the Code of Civil Procedure was ever given or made, and the liabilities of the said plaintiff, Benjamin Franklin Bond and Indemnity Corporation have never exceeded and do not now exceed its assets; it has never conducted and does not now conduct its business fraudulently, but is carrying out and always has carried out its contracts in good faith and has been guilty of no act, thing or deed, either as specified in section 596b of the Political Code, or otherwise or at all, that would justify the suspension or revocation of its said certificate of authority; and said plaintiff Benjamin Franklin Bond and Indemnity Corporation has never been cited to show cause why its certificate of authority should not be suspended or revoked either as provided by said section 596b of the Political Code or otherwise or at all." It is further alleged that "the said action of the said Insurance Commissioner in suspending and revoking said Certificate of Authority was taken wholly without notice, citation, publication, justification or excuse whatsoever, but was done and taken extra-judicially and without probable cause and with malicious intent."

It was and is now the theory of the bond company that, because of the action begun by it against the insurance commissioner in respondent court, its right to do business in California has been restored and that, therefore, it is entitled to the mandate of this court, in effect undoing what the commissioner did in issuing the alleged order of suspension and revocation, and to that end requiring respondent court hereafter to approve bonds or undertakings issued by the bond company. This theory is based upon lan-

guage of section 633d of the Political Code, which, after referring to actions "against the Insurance Commissioner for the purpose of reviewing the facts pertinent to the controversy and for the purpose of obtaining relief or cancelling the act of the Insurance Commissioner," reads: "Pending final determination by the courts of such controversy, the right of the company or other insurer whose license to do business in the State of California has been revoked or suspended, shall remain unimpaired."

To the petition in Civil No. 8805 respondents presented return that the only "order" made by the insurance commissioner, affecting the bond company and derogating from the certificate of authority issued to it by him on July 1, 1932, was in the form of a letter, copy of which was addressed to the county clerk of every county in the state. The body of this widely circulated letter reads: "In pursuance of the provisions of section 625a of the Political Code of the state of California, this is to certify that the certificate of authority to transact in this state the business of fidelity and surety insurance, heretofore granted to Benjamin Franklin Bond and Indemnity Corporation, has been suspended as provided in section 1056 of the Code of Civil Procedure of California." This letter was dated November 10, 1932. Section 625a of the Political Code reads in part as follows: "Whenever the certificate of authority of any such corporation to do business in this state shall for any reason be surrendered, revoked, canceled, or annulled, or whenever the said certificate of any such corporation has been suspended as provided in section one thousand fifty-six of the Code of Civil Procedure of this state * * * the insurance commissioner of this state shall forthwith certify to the county clerk of each county of this state, the name of such corporation, and the date of such surrender, revocation, cancellation, annulment or suspension. * * *"

It is unnecessary to state the facts involved in Civil No. 8821. As already observed, the same questions of law are presented in both proceedings, and the facts of Civil No. 8805 are sufficient as a foundation for the consideration and solution of them.

Upon the return day, both proceedings having been set down for the same date, petitioners in each offered no evidence whatever. Respondents offered and the court received in evidence a lengthy report, of date October 8, 1932, to the insurance commissioner, signed by one designated as "Principal Examiner" and approved by one styled "Supervising Examiner." This report relates to the financial standing of the bond company, includes a mass of figures, is accompanied by a number of pertinent exhibits, and ends with this conclusion: "On the basis of this examination and of the financial statement

herein presented, the company's capital stock was impaired on July 31, 1932, to the extent of at least \$190,795.09, and may in fact be impaired to a still greater extent determinable only upon findings with respect to which the foregoing report contains specific reservations."

No mention of any revocation or suspension of authority to do business, strictly and properly so called, is made in section 1056 of the Code of Civil Procedure. However, in both sections 631 and 633d of the Political Code a revocation or suspension of authority is referred to, and it is in connection with the mention in the latter that a suit against the insurance commissioner to test the "controversy" is provided for, although such a suit is also mentioned in section 631. No such suit is suggested in section 1056 of the Code of Civil Procedure. It will be observed, also, that section 625a of the Political Code, the material portion of which is quoted above, draws a distinction between procedure under section 1056 of the Code of Civil Procedure and other procedure authorized by law, this by means of the few lines of the section beginning with the words "or whenever" and ending with the mention of that Code. It will be seen that section 1056 provides for the very course indicated by the report made to the insurance commissioner by his examiners in the present instance. Section 1056 reads in part "that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks, in a daily San Francisco paper."

These proceedings are apparently made complex because of the fact that the Legislature has tied together section 1056 of the Code of Civil Procedure, providing for a publication, after the lapsation of sixty days, in a San Francisco newspaper, and section 625a of the Political Code, providing for letters to the county clerks of the state, but this apparent complexity is far from real. The material situation is that the action taken by the insurance commissioner was pursuant to section 1056 of the Code of Civil Procedure, and because of a deficiency in the assets of the bond company, and not under the terms of section 633d of the Political Code, as will hereafter more fully be shown.

Section 633d of the Political Code, a lengthy and complex enactment, prescribes various rules for the guidance of those organizations, among them such as the bond com-

pany, which are subject under the law to the jurisdiction of the insurance commissioner. After laying down these rules, and after making provision for investigations by the commissioner for the purpose of ascertaining whether they have been infringed, the section contains this language: "Any insurance company or other insurer wilfully violating or failing to observe and comply with any of the provisions of this section, applicable thereto, shall be guilty of a misdemeanor and punishable by a fine of not exceeding five hundred dollars for each violation thereof, or the insurance commissioner may revoke the license of such company or other insurer for the remainder of the term covered by such license." Following this excerpt comes the provision, already mentioned, for the institution of suits by aggrieved insurance companies for the purpose of procuring a judicial determination as to the correctness of revocations or suspensions of license imposed by the commissioner—as the section puts it, "for the purpose of obtaining relief or canceling the act of the insurance commissioner." It is during the pendency of a suit thus, and by this authority, commenced, that the right of a company to do business "shall remain unimpaired," to state with brevity a portion of the section which has been set forth more specifically in an earlier portion of this opinion.

We think the bond company leans upon a broken reed in ascribing the force it does to the language of section 633d of the Political Code to the effect that, pending a determination of a certain suit, the right of such a company to do business in the state "shall remain unimpaired." We think such a suit is authorized by the section merely to test the rightness of action of the insurance commissioner based upon the matters proscribed by section 633d itself. These are matters of infraction of specific inhibitions of the section—specific "don'ts," if it pleases—which companies may not infringe continuously and with impunity. When it comes to the inhibitions of section 1056 of the Code of Civil Procedure the situation is totally different. The settlement of the matters there touched upon cannot, and the Legislature intended they should not, await the comparatively tardy determination of a court of justice. When a company suffers its liabilities to exceed its assets, summary action must be somewhere possible in order to halt the immense damage likely to result from its continuance in the business of giving surety bonds. It would be most unwise to allow this danger to be revived by the mere bringing of an action at law. The necessity for the giving and maintenance of binding and enforceable—of realizable—surety bonds goes hand in hand with the due administration of justice itself. No one can say that the pow-

er to take summary steps in such matters, reposed in the insurance commissioner by section 1056, is ill-placed or that the Legislature in so placing it acted inadvisedly or unconstitutionally. We should here assert, for we have omitted the remark thus far, that section 1056, provides, in terms, that until an ascertained deficiency in assets is paid up, "such company shall not do business in this state." This one provision stands effectually in opposition to the argument of petitioners. Certainly, to our minds, the bond company, under the facts here, is not protected by the clause in section 633d of the Political Code upon which it so confidently relies.

In each Civil No. 8805 and Civil No. 8821 the alternative writ of mandate is vacated and a peremptory writ is denied.

I concur: STEPHENS, J.

CITY OF LOS ANGELES et al. v. SUPERIOR
COURT IN AND FOR INYO COUNTY
et al.

Civ. 1020.

District Court of Appeal, Fourth District,
California.

Jan. 14, 1933.

As Modified on Denial of Rehearing Feb. 8,
1933.

Hearing Granted by Supreme Court March 13,
1933.

1. Prohibition ☞25.

Petition for prohibition must be taken as true on demurrer.

2. Judges ☞49(1).

In action to enjoin city from draining underground waters, judge from county in which part of water basin lay and in which plaintiff owned land, *held* not qualified as "disinterested judge from neutral county" (Code Civ. Proc. § 394, as amended by St. 1931, p. 1948).

The action was brought by a corporation residing in Inyo county and owning and farming extensive area of land there. It appeared, however, that the corporation was also doing business in Mono county, the county of the judge's residence, in view of its large holdings of land in latter county, which, though not farmed, lay in the water basin in question. Extensive taking of water from the basin would necessarily lower water levels in Mono county, and thus the facts in controversy actually extended into that county and had an important bearing on the affairs of its people.

[Ed. Note.—For other definitions of "Disinterested," see Words and Phrases.]

3. Judges ⇨49(1).

Statute providing for appointment of disinterested judge from neutral county in suit against city by local resident, should be liberally construed (Code Civ. Proc. § 394, as amended by St. 1931, p. 1948).

4. Evidence ⇨5(2).

Court may take judicial notice that public opinion in some counties has been aroused over city's tapping underground water.

5. Prohibition ⇨5(2).

Judge's qualification as "disinterested judge from neutral county" within statute held question of law, justifying prohibition to control determination thereof, where facts were undisputed (Code Civ. Proc. § 394, as amended by St. 1931, p. 1948).

6. Judges ⇨49(1).

Proof of probability of judge's "prejudice or bias" preventing fair and impartial trial, is sufficient to disqualify (Code Civ. Proc. § 170).

7. Judges ⇨49(1).

Judge residing in county containing part of water basin from which city was withdrawing underground waters held as matter of law disqualified on ground of prejudice and bias preventing fair and impartial trial, in injunction suit against city (Code Civ. Proc. § 170).

City was charged with depleting to large extent large natural underground water basin extending into county in which judge resided, and many suits and a large number of negotiations were pending in county in question and another county involving the same general situation and plan of water development, and judge had referred to affidavit of prejudice as setting forth facts from which prejudice could be presumed.

Original application by the City of Los Angeles and others for writ of prohibition to be directed to the Superior Court of Inyo County, the Honorable Pat R. Parker, Judge.

Peremptory writ granted.

Erwin P. Werner, City Atty., Mark L. Heron, Asst. City Atty., F. M. Bottorff and Carl A. Davis, Deputy City Attys., and T. B. Cosgrove, Special Counsel, all of Los Angeles, for petitioners.

Henry W. Coll, of Riverside, Call & Murphy, Randall & Bartlett, and Walter J. Little, all of Los Angeles, Preston & Braucht, of Bishop, and Thomas C. Boone, of Modesto, for respondents.

BARNARD, P. J.

This is an application for a writ of prohibition, the petitioners seeking to restrain the respondent judge from trying certain cases now pending and ready for trial in the county of Inyo. The petition, with its exhibits, contains 274 typewritten and printed pages, and, of necessity, only the more essential facts can be here summarized and that briefly.

It appears that on May 10, 1931, an action was filed in the county of Inyo by Hillside Water Company, a corporation, against these petitioners as defendants. Since that action was filed, twenty-nine interveners have appeared therein, and, in addition, fifteen other actions against the same defendants have been filed in that county. The complaints in all of these actions and interventions seek the same relief, which is to perpetually enjoin the petitioners from operating certain pumps and wells in the Owens river valley and transporting the water therefrom to the city of Los Angeles for municipal uses, the theory in each instance being that the water thus removed by the petitioners is taken from a natural basin of underground waters, with consequent injury to the necessary irrigation of lands owned by the plaintiffs and interveners. In each of these actions the defendants filed motions requesting a transfer for trial to some other county, or that the chairman of the judicial council be requested to assign a disinterested judge from a neutral county to hear the same. On August 31, 1931, Judge Dehy of that county granted this motion and ordered that the chairman of the judicial council "be and he is hereby requested to designate and assign a disinterested judge from a neutral county to hear" the said matters.

After certain correspondence with the secretary of the judicial council the respondent judge undertook the handling of the cases, it appearing that no assignment was made in accordance with section 394 of the Code of Civil Procedure, but that a general yearly assignment of Judge Parker to Inyo county was relied upon. The respondent judge made an order consolidating these actions for trial, setting the same for May 9, 1932. On that date these petitioners filed and presented a motion to disqualify Judge Parker from continuing in said cases, upon the ground that he was not a disinterested judge, that he was not from a neutral county, and that he was not a disinterested judge from a neutral county. This motion to disqualify was, by stipulation of counsel, heard before Judge Murray of Madera county, who denied the motion on June 3, 1932. On June 10, 1932, the respondent judge ordered the actions set for trial on June 20, 1932. This application for prohibition followed, an alternative writ being issued on June 18, 1932. On July 12, 1932, the chairman of the judicial council as-

signed Judge Parker, in accordance with the provisions of section 394 of the Code of Civil Procedure, to hear these cases, it appearing that at the time of making this assignment the fact of the issuance of the writ herein had not been brought to the attention of the chairman. At the hearing of this application for a writ, the parties stipulated that the petitioners might file a supplemental petition setting forth additional facts in connection with bias and prejudice on the part of Judge Parker, and that the entire matter should then be submitted to this court. A supplemental petition was subsequently filed and the matter is submitted upon a demurrer.

Among other things, the petition sets forth that it appears from the complaint of Hillside Water Company that the plaintiff is the owner of 6,600 acres of land in Inyo county overlying a natural basin of underground waters commonly known as the Bishop-Big Pine basin, the waters of which are necessary for the irrigation of said land; that the defendants are the owners of many thousands of acres overlying the same water basin, and are operating a system of water works and supply known as the Los Angeles aqueduct; and that the defendants have drilled about sixty-five wells by means of which they are withdrawing large quantities of water from said water basin and transporting the same to the city of Los Angeles, to the detriment of plaintiffs' lands. The petition summarizes the answer of the defendants, denying the allegations of the complaint and setting forth facts relied upon as justifying the right of the defendants to take the water in question. The prior proceedings are briefly reviewed with a summary of the other actions pending, and certain proceedings in the superior court of Inyo county on May 9, 1932, and on May 10, 1932, are set forth, together with various affidavits upon the question of disqualification of the trial judge. It is then alleged that the Hillside Water Company is also the owner of 1,120 acres situated in the county of Mono and near the Inyo county line; that all of the stock of this company is owned by Nevada-California Electric Corporation; that this latter company owns lands, water rights, hydro plants, transmission lines, and other properties in said Mono county of a value estimated at from \$10,000,000 to \$20,000,000; that negotiations have been pending for more than two years for the purchase by these petitioners of certain of the properties owned by the Nevada-California Power Corporation, including all of the lands and water rights of the Hillside Water Company located in the counties of Inyo and Mono; that during the year 1931 more than 50 per cent. of the water consumed in the city of Los Angeles was obtained by means of the operation of the wells and pumps described in the complaints in the suits herein referred to; that there is now pending in the county of Mono a con-

demnation action filed by these petitioners against the Nevada-California Power Corporation and its subsidiary corporations, and against one hundred and twenty-nine residents of Mono county; that through this action these petitioners are seeking to acquire certain lands and water rights situated in Mono county for the purpose of supplying water to the city of Los Angeles for municipal purposes, which, if acquired, will constitute a part of the same municipal water supply system referred to and described in the complaints in the various actions now pending in Inyo county; that by reason of the facts set forth the respondent judge is not a disinterested judge, is not from a neutral county, is not a disinterested judge from a neutral county; and that by reason of the facts shown and the affidavits filed, it appears that a fair and impartial trial cannot be had before the respondent judge by reason of his bias and prejudice.

From the affidavits in support of the contentions of petitioners, it appears that, while the various complaints all allege the existence of a natural water basin of underground water, generally known as the Bishop-Big Pine basin, which is supplied and fed by natural inflow and seepage from the surrounding mountains and from numerous natural streams, no description of the boundaries of said natural body of underground water is contained in any of the complaints; that the complaints in the various actions allege that the defendants are the owners of more than 90,000 acres of land in the Owens river valley; that they are taking an increasing amount of water from this water basin; that they are decreasing the amount of water therein to the detriment of the plaintiffs in the use of their lands; that the water in this underground basin flows and percolates in a general southerly direction; and that "all of said subterranean water is and at all times herein mentioned has been in a state of continuity from its source." It is then stated that the Owens river valley lies partly in Mono county and partly in Inyo county; that the natural water basin referred to in the various complaints lies partly in Mono county and partly in Inyo county; that the lands owned by petitioners constitute a continuous body of land extending on both sides of the boundary line between the counties of Inyo and Mono; that the Owens river has its origin and source in the county of Mono; that a large area of this watershed lies within that county; and that the surface run-off from the lands owned by the petitioners in Mono county drains into the area referred to in the various complaints as the Bishop-Big Pine basin. It also appears by affidavit that the wells operated by these petitioners are situated at varying distances of from one-half mile to twenty-six miles from the boundary line be-

tween Mono county and Inyo county, and that an intensified study has disclosed that there is no difference in the effect of operation of the pumps referred to upon the area on different sides of said boundary line.

Certain statements made by the respondent judge are set forth in the affidavits, only a portion of which will be here given. On April 18, 1932, in connection with a motion for a continuance, in discussing certain negotiations for settlement that had been referred to, the respondent judge said: "—of course, I know something about the history of this particular case inasmuch as part of this involves my own country, and these matters have been going on for the last six or seven years, and we don't seem to be getting any further along. * * *" And again on the same date he stated: "Of course, I am naturally a part of the environment, and for the town of Bishop, the mere matter of purchase possibly is not really in dispute." Certain proceedings in the respondent court on May 9, 1932, in connection with the motion to disqualify are set forth, with the following statements then made by the respondent judge:

"For instance, it could do no one any good to present some questionable rule of law which might permit the court to proceed if underlying it all there is a question as to the validity of anything that we do. I think that we ought to try to work this thing out in the utmost good faith, * * * so that we will all try and find out the law, and for instance, let the attitude of the plaintiffs and the interveners not be to show some technical reason why this should not be granted, but meet the question fairly, and you may have until two o'clock.

"In other words, I think I understand the affidavit pretty well. Counsel refrains particularly from alleging bias or prejudice on the part of the judge, but alleges a set or state of facts or conditions from which prejudice would naturally be presumed; that is about the situation. * * * And while there would not be what you might say personal malice or ill will, that this affidavit sets forth facts and conditions from which a legal sort of an implied malice, possibly a little stronger, but an implied prejudice or bias would follow from the expression of those facts.

"There is no need of denying the allegations of the affidavit. They are all true, that is, as far as the facts are concerned. I suppose there can be no question but what this basin does arise in Mono county and that some portion of it extends into Mono county, and it is quite true as stated, this stenographic report of our last proceeding is very true, although subject to some construction or misconstruction as the case may be. Now, my own remarks: 'If there is something pend-

ing, using your own terms, an honest and sincere effort to make a settlement, why, of course, that should be encouraged, but if it is merely negotiating over the same ground—of course, I know something about the history of this particular case inasmuch as part of this involves my own country.' That has nothing to do with this litigation other than it is a matter of common knowledge that in so far as the use of the water is concerned, that it does embrace both Inyo and Mono counties, and with reference to this particular case I think it was stated in court or at least it has been stated time and time again and by counsel that the efforts to settle embraced certain suits that were pending in Mono county. I think everybody knows that fact to be true, and each time when we met here—perhaps it was not stated in open court, but all counsel seemed to agree that the negotiations pending did include some sort of a settlement of all of the litigation that the City of Los Angeles might be interested in. Now, here is the situation I am in. There is nothing that would give me greater pleasure than to get through with this case once and for all, and call in some other judge. I have no particular desire to hear it, and that desire, of course, if it was ever present is lessened, if not destroyed, by the fact that there will be something hanging over the case. Now, I feel this way about it: I know this, if I were practicing law, I would not like to start a long case, if I had the idea that I was beat before I started. It might keep me still a little or else it might make me a little more reckless, but that, however, does not seem to appear so openly in the affidavit, but notwithstanding my own personal feelings I don't care to yield or to concede a disqualification unless there is one created by statute. I don't think any judge has the right to say 'Well, I am disqualified' just for the sake of getting out of it.

"Now, it is true, and I don't hesitate in saying that, that there may be some interest in many of the citizens of Mono county; now, just how far that would go to cause Mono county to become other than a neutral county, that may be a county to become other than a neutral county, that may be a matter of construction, too, but my personal impulse at the present time would be to ask the judicial council to send another judge here. There are hundreds of them, and it is not at all unlikely that there might be one out of them who could be found from some neutral county, a county that is entirely neutral.

"Now, this question, of course, to me seems a rather serious one even under the statute, that if this watershed does embrace a portion of Mono county, which possibly the taking of the waters from that shed may give rise to a cause of action on behalf of some resident of Mono county who claims to have been injured or who perhaps may assert

some damage, but just how far it would make the county, other than a neutral county—of course that term is subject, perhaps, to construction, but I was just thinking, some man said during the war, perhaps facetiously that 'He was entirely neutral, that he didn't care who licked Germany,' and that is the apparent idea that they have of Mono county's neutrality, but I will under the section, if section 170 controls, refer the matter to some judge to be designated by the judicial council.

"I would rather file this affidavit which is provided by the section, and file it today and go back and let it be submitted to the judicial council, and they can pick out some good judge. * * * However, I am still loyal to Mono county.

"I am going to make an affidavit this afternoon, and then it will be simply along the lines of this affidavit here. The facts may be submitted as to the physical facts, and so forth, just very brief, just simply denying disqualification personally, and leaving open the matter of statutory disqualification. I certainly can't swear that I am not disqualified under the statute, because it is a question of law, and I am not willing to swear what the law is, and I don't think any one else is.

"Of course, I realize this, that it may be true that there are a number of people in Mono county who are more or less interested in this. Let us assume, and it is a fact, I know it, and as the affidavit here sets forth, that a number of suits have been instituted on behalf of the City of Los Angeles to condemn lands in Mono county.

"Now, to repeat, this shadow of disqualification may hang over the entire proceedings, and I should be very anxious for thousands of reasons, and any of them which is satisfactory to me, to certify the disqualification forthwith to the judicial council and have them send another judge here, but I hesitate to do that, because I don't think it is within the power of the court, to state what case he is going to try or what he is not. I think the court should at least, if they are not disqualified, to not retire for purely personal reasons.

"I would not, notwithstanding my own views, consent to a disqualification unless it was one that the law itself absolutely fixed; that, of course, is in the absence of any showing of personal prejudice or bias under 170, and I think somewhat as you do, that the matter has been determined by the judicial council, although they make mistakes too, many mistakes have been made, and I think in one of our cases coming from this county—of course I did at one time—we can always admit our errors, I did hold that this section 394 was unconstitutional once, but I didn't get very far with that. However, they did hold in that particular case—I think it was

the Mono Power Company against the city—that was a motion to transfer on account of the—well, pursuant to that statute, might be made at any time right up to trial, and so no doubt there can be some analogy between that holding and the present situation, and it might be better to make an affidavit and refer it to the judicial council, and if they find that a statutory disqualification exists, why, they can call in some other judge here, and I will make the affidavit this afternoon, and we will have to wait until he gets down. I think that is the safest thing to do, because I still feel, I repeat, that the term 'interest' or lack of interest ties into 170. I think that is a fair construction to place upon both statutes.

"Well, if you want to stipulate on a judge, call Judge Collier. He is not very keen on disqualifying judges.

"I am going to make an affidavit this afternoon, and then it will be simply along the lines of this affidavit here. The facts may be admitted as to the physical facts, and so forth, just very brief, just simply denying disqualification personally, and leaving open the matter of statutory disqualification.

"You will have plenty of chances to construe this statute. It does not say anything about any neutral county. When the judicial council designates a judge, suppose they designate Judge Dehy, and he passes on my qualifications. He is not interested in the question of my disqualification. That is the only question before him. He would certainly be disinterested in that, because there is no chance of my becoming a candidate to succeed him down here, and so he would be disinterested, and he would likewise be from a neutral county.

"* * * The affidavit that will be filed in my own behalf will follow more or less this, and will disregard it, except there may be some little explanation possible. If there is a case which arises detachedly in this colloquy that might show a personal interest, there will be some explanation made of it, but otherwise it will be simply along the lines here as set forth, following the affidavit that was filed.

"* * * No matter what you file, the facts as set forth as to the geography and so forth will remain the same. * * *

"The question there raised was on a question of taxation, as to where a riparian right was taxed, or where the property was, whether it was at the head of the stream or down the stream, and there was an interest running from that stream in every county through which it passed, and it was more or less remotely discussed, and that would be true, I take it, of an underground body of water, so let's let the judicial council pass on it."

On September 10, 1931, the secretary of the judicial council wrote to the respondent judge

referring to the motion filed, asking that this case be assigned to a disinterested judge from a neutral county and asking the respondent if he could hear a demurrer and motion pending therein. On September 14, 1931, the respondent judge wrote to the secretary of the judicial council in part, as follows:

"Regarding the suit in Inyo county, where-in Judge Dehy has, pursuant to the statute, certified to the council his disqualification, I have no particular objection to taking this assignment but I fear I would not be entirely satisfactory to all sides for the reason that the Hillside Ditch Company is a subsidiary of the California Nevada Power Co. which is a corporation operating quite extensively in Mono county. Some seventeen years ago when this corporation first commenced its operations in Mono county and up to the time I retired from practice I was counsel for this corporation and was intimately acquainted with the details of its operations and rights in this section. We were at one time in litigation with the City of Los Angeles over water and water rights and I think I am safe in saying that much of the legislation regarding places of trial in cases where cities were parties was inspired from the fact that this particular city was not too enthusiastic about my trying any of the litigation that might arise in this section.

"As the years have gone on I have had much friendly contact with the city attorneys and officials and I do not know whether the same feeling exists.

"I thought it better that the exact situation should be brought to the notice of the Chief Justice before he makes definite assignment. I deem it needless to add that I admit no personal disqualification of any sort, though I would not like to approach any litigation wherein either side honestly felt that the matters to be submitted had been prejudged."

On September 16, 1931, the secretary of the judicial council replied that the matter had been submitted to the Chief Justice and that "he feels that if counsel in the case raise any objection, we should endeavor to find some one else for the trial of the merits, but that in the absence of absolute disqualification, the preliminary matters, such as demurrers and motions to strike, may properly be handled by you." On May 10, 1932, the respondent judge filed an affidavit denying disqualification, in which he denies that he has any financial interest in any lands within the watershed of the Owens river or any of its tributaries, or any interest that could be affected by anything occurring in connection with the Bishop-Big Pine basin; denies any personal interest, bias, or prejudice; explains certain statements theretofore made by him in open court; sets forth that the "present litigation in nowise affects the county of Mono as a body politic"; that "it is a fact that certain individuals in the county of Mono have been

made defendants in condemnation proceedings instituted by the City of Los Angeles, and that whatever interest there may be or whatever rights may be affected by said condemnation proceedings relate only to the particular individuals involved"; alleges "that there is no general feeling amongst the citizens of Mono county concerning this litigation, nor is there any general feeling of interest concerning this action or the result thereof, and if the matter were brought to trial in the county of Mono, no difficulty would be met in securing a fair, unbiased, impartial, and disinterested jury"; and then alleges "that while it may appear from the pleadings in this action that the alleged subterranean channel or the natural basin of underground water generally known as the Bishop and Big Pine basin, may extend in area into Mono county, yet that portion of Mono county into which such extension may be found is a section of Mono county uninhabited, uncultivated, and generally classed as unproductive, either of crops or revenue of any sort." Other affidavits were filed in behalf of respondents which do not deny any fact set up by petitioners, except that it is denied that the respondent judge "is not a disinterested judge from a neutral county within the meaning of that term as used in section 394 of the Code of Civil Procedure," and which allege that Mono county is a neutral county, and that the respondent judge is a disinterested judge. It is alleged in the petition that on June 29, 1932, the respondent judge made the statement that if it were not for the counties of Mono and Inyo there would not be any census taken in the city of Los Angeles.

[1, 2] The first question presented is whether, under the facts shown by the petition, which must be taken as true for the purpose of this proceeding, the respondent judge is a disinterested judge from a neutral county within the meaning of section 394 of the Code of Civil Procedure. Prior to 1931, this section provided that, when an action was brought in another county against a city, the action or proceeding must be, on motion of the defendant, transferred for trial to a county other than that in which the plaintiff or any of the plaintiffs resides or is doing business. This statute, as it then stood, has been passed upon in a number of cases. *City of Stockton v. Wilson*, 79 Cal. App. 422, 249 P. 835; *City of Stockton v. Ellingwood*, 78 Cal. App. 117, 248 P. 272, 273; *Fitzpatrick v. Sonoma County*, 97 Cal. App. 588, 276 P. 113; *Mono Power Company v. City of Los Angeles*, 33 Cal. App. 675, 166 P. 387; *Finance & Construction Company v. Sacramento*, 204 Cal. 491, 269 P. 167, 168. In *City of Stockton v. Ellingwood*, the court said:

"It must be presumed in favor of the constitutionality of the section that the Legislature determined, upon sufficient investiga-

tion, that in a case such as this, in order to avoid any local bias which would probably affect the verdict of a jury, justice requires that the place of trial be changed to a neutral county. * * * The disqualification of a county under the provisions of section 394, like the implied bias of a juror as defined by section 602, or the disqualification of a judge under the provisions of section 170, cannot be removed or overcome by proof of impartiality or convenience. Section 394 is based upon the legislative determination that there is reason to believe that the plaintiff in an action such as this cannot have an impartial trial in the county in which the action is commenced."

In *Finance & Construction Company v. Sacramento*, it was said: "The evident purpose of this section of the Code, as was held in *City of Stockton v. Wilson*, 79 Cal. App. 422, 424, 249 P. 835, 836, 'is to guard against local prejudices which sometimes exist in favor of litigants within a county as against those from without and to secure to both parties to a suit a trial upon neutral ground.' It is apparent from the terms of this section of the Code that the Legislature was of the opinion that a person doing business in a county would have an unfair advantage over a city situated without said county, in the trial of an action in which such person and such city were arrayed against each other. It accordingly provided that in an action in which the parties were so situated, the city might have the place of trial of said action changed to some other county, where such condition did not prevail."

In that case the court held that a person owning and farming a tract of land in a certain county was doing business there within the meaning of this section of the Code, the court saying: "A person may become as intimately identified with the affairs of a community, and as closely associated with the people of such community in the ownership of a farm and the growing thereon of products of the soil as those who are engaged in carrying on a store or conducting a mill or foundry in the same community. In the event of a suit instituted by him against a city situated as the defendant city in this action finds itself, the same local prejudices could well exist in his favor and against said city as if the plaintiff in said action were the grocer or the hardware merchant in said community."

Since those cases were decided, in 1931 (St. 1931, p. 1948), the following provision was added to section 394: "When the action or proceeding is one in which a jury is not of right, or in case a jury be waived, then in lieu of transferring the cause the court in the original county may request the chairman of the judicial council to assign a disinterested judge from a neutral county to hear said cause and all proceedings in connection

therewith." Respondents construe this alternative provision for the assignment of a disinterested judge from a neutral county as referring to and limited by the prior provisions, to the effect that such an action should be moved to a county in which none of the plaintiffs either resides or is doing business. Relying upon this strict interpretation, they argue that since it does not appear from the petition that the Hillside Water Company is farming the lands it owns in Mono county, the respondent is a disinterested judge from a neutral county within the meaning of the section. Were this interpretation of the amendment accepted the conclusion reached by respondents would not necessarily follow. Even if the fact is to be overlooked that the Nevada-California Power Company, owning all of the stock in the Hillside Water Company and a real party in interest, is alleged to be doing business on a very large scale in Mono county, under such a strict and technical interpretation of the statute as contended for by respondents, if logically followed out, it would sufficiently appear from the petition that the Hillside Water Company is itself doing business in Mono county within the meaning of the section. It appears that the value of this company's large holding of land, both in Inyo and Mono counties, is largely dependent upon the existence of the water supply in this underground water basin. It is a reasonable inference from the name of this company that at least one of its objects is obtaining and distributing water. The very object of the many suits which it is sought to have tried by the respondent judge is to prevent these respondents from taking water from this particular water basin, it being claimed that a continuance of this practice will seriously interfere with the business conducted by the plaintiffs in those actions, even to the extent of destroying the beneficial use of their lands and rendering the same valueless. They themselves allege that the water in this water basin is in a state of continuity from the place where it enters the basin to a point below where it is taken out by the petitioners, and that the flow of water is in a southerly direction. It is alleged by the petitioners and conceded to be true by the respondent judge that this water basin lies partly in Mono county and partly in Inyo county. It would be impossible to take water from this basin to the extent alleged in the suits referred to without taking it from and lowering the water level in that part of the water basin lying in Mono county, as well as that part lying in Inyo county. Water seeks its level, and strictly speaking, the plaintiffs in the actions to be tried, although living in Inyo county, seek to prevent these petitioners from interfering with their business of taking water from that part of this water basin which lies in Mono county. Water-bearing lands are just as important in their way as lands producing crops

of grain or from which minerals are being extracted. If minerals were extracted from land in Mono county by means of a shaft, the entrance to which was situated in Inyo county, it could hardly be contended that the mining business was not being done in part in Mono county. To paraphrase the language used in *Finance & Construction Company v. Sacramento*, we think a person or corporation may become much more intimately identified with the affairs of a community and much more closely associated with the people therein, through engaging in the business of taking underground waters therefrom, than through merely owning and farming land therein and raising crops thereon. And in its effect upon the neutrality of a county the former situation might well be much more serious than the latter.

[3] However, we feel that the amendment to section 394, now under consideration, should not be strictly construed. It has been frequently pointed out that such statutes are remedial in their nature and that they should be liberally construed with a view of carrying out their purpose. In *Finance & Construction Company v. Sacramento*, supra, the court further said: "We think it is more in keeping with the remedial purpose of section 394 to give the words this broader and more liberal meaning than to restrict them, as contended for by the appellant, to the narrow meaning signifying those only who are engaged in trade or commerce."

That the purpose of this statute and this amendment was to secure for the parties concerned a fair trial goes without saying. In the early case of *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315, in discussing a somewhat similar statute, the court said: "This provision should not receive a technical or strict construction, but rather one that is broad and liberal. 'The Court ought not to be astute to discover,' said the Supreme Court of Michigan, in *Stockwell v. Township Board of White Lake*, 22 Mich. 341, 350, 'refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.'"

[4] In amending section 394 in order to permit the trial of a case of this character to remain in an otherwise improper county under certain conditions, the Legislature did not confine itself to the limited language of the earlier part of the section providing for the removal of such a case to another county, but used language capable of and strongly suggesting a much broader interpretation than the words used in the earlier provision, using language which, in both letter and spir-

it, seems to accord with the purpose of the act and to imply that the amendment means exactly what it says in providing that in case the alternative procedure is used in lieu of transferring the case to another county, the judge called in shall be both disinterested and from a neutral county. The provision is not to be given application unless the local situation be conceded to be at least impliedly unfair to one of the parties, and when an outside judge is to come in and try a case in such surroundings and under such conditions, it is reasonable to provide for even greater care in his selection than would be used in the selection of another county to which to remove the case. This refers to something different than prejudice and bias on the part of the judge and something other than financial disinterestedness on his part, and extends to such other general influences as might exist and might impliedly affect the matter of his interest or his neutrality. We may take judicial notice of the fact that public opinion in some counties has at times been much aroused over undertakings similar to those here involved. *City of Stockton v. Ellingwood*, supra. Not only does the general situation existing in Inyo county in this regard have some relation and bearing on the situation existing in Mono county, but unless we are to shut our eyes to the facts and blindly and strictly follow technicalities, it is obvious that the facts here in controversy actually extend into Mono county and have such an important bearing on the affairs of the people of that county that its neutrality is much more than questionable. Under such circumstances, especially in the light of the statements made by him, the respondent judge can hardly qualify as such a disinterested judge from a neutral county as is contemplated by the real meaning and intent of the statute. While the respondent judge felt constrained to take the strict literal view of this amendment, on several occasions he expressed a desire to be relieved from the assignment and we feel that to compel him to proceed in these matters is neither fair to him or the petitioners, nor required by the statute.

[5] In connection with the matters just discussed, the respondents contend that the question of whether the respondent judge is a disinterested judge from a neutral county within the meaning of section 394 was submitted to Judge Murray, who was appointed by the chairman of the judicial council to pass thereon, and that his decision on this question was made upon conflicting evidence and is therefore conclusive here. It appears, however, that Judge Murray's decision was not based upon conflicting evidence. The essential facts have been conceded throughout these proceedings, in many hearings, and especially by the respondent judge. While the respondents make some effort to contend that

the admissions made in Judge Parker's affidavit were only to the effect that the facts stated were alleged in the original pleadings, it fully appears from the context and from statements the judge twice made in open court, that the actual facts were conceded and that the underground water basin in question does extend into Mono county. No effort has been made at any time to combat the actual facts which are material upon the question of the neutrality of Mono county. The only facts alleged in opposition to the motion related to bias and prejudice on the part of Judge Parker, which matter was not before Judge Murray for decision. No substantial conflict appearing, the question of disqualification raised is one of law, and prohibition will lie. *Briggs v. Superior Court* (Cal. Sup.) 10 P.(2d) 53, 57.

[6, 7] The next matter presented is that of bias and prejudice on the part of the respondent judge. In *Briggs v. Superior Court* (Cal. Sup.) 10 P.(2d) 1003, 1006, the court said: "Under the section prior to said amendment it was necessary not only to show bias and prejudice, but also that a fair trial could not be had by reason thereof. In 1927 the wording of the section was changed to read that a judge is disqualified 'when it is made to appear probable that by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial cannot be had before him.' As amended, the section does not dispense with, but still requires a showing of bias or prejudice. It then remains to determine whether, as matter of law, it is probable by reason thereof a fair and impartial trial cannot be had."

We think that, within the meaning of this section, a sufficient showing of bias and prejudice on the part of the respondent judge has been here made, to necessitate the conclusion, as a matter of law, that a fair and impartial trial cannot be had. It must be borne in mind that the essential facts here are not disputed. The petitioners herein are charged in the original proceedings with depleting to a very large extent a large natural underground water basin. It is conceded that this basin extends into Mono county and it appears from the petition that a very large portion thereof is situated in that county. Not only is the long prior history in connection with the controversy over essentially the same water situation admitted and frequently referred to throughout these proceedings, but it appears

that many suits and a large number of negotiations are now pending in Inyo county and at least one suit and a large number of negotiations are now pending in Mono county, referring to, involving, and vitally affecting the same general situation and plan of water development. These facts were fully recognized by the respondent judge, who more than once made statements, of which the following are samples: "This affidavit sets forth facts and conditions from which a legal sort of an implied malice, possibly a little stronger, but an implied prejudice or bias would follow from the expression of those facts." And again: "* * * But alleges a set or state of facts or conditions from which prejudice would naturally be presumed." Not only is this a correct statement of the effect of the facts shown, but in the other statements made by the respondent judge, above quoted, there is disclosed a state of mind which, while perfectly natural and entirely understandable, might well cause the petitioners to feel that they could not have a fair trial before him in view of the nature of the cases to be tried, and makes it probable that such a bias or prejudice exists as should, under section 170 of the Code of Civil Procedure, disqualify the respondent judge from proceeding with the trials in question.

In view of the liberal construction that should be given these statutes, the purposes for which they were adopted, and the uncontradicted facts here, we feel that the respondent judge is disqualified for the trial of these cases within the meaning of the statutes referred to. In our opinion, no impartial person could read the petition and exhibits now before us without coming to the conclusion that these cases should not, as a matter of right and justice, be tried by the respondent judge. A contrary conclusion could only be arrived at under the most strict and technical interpretation of the statutes, and then must inevitably be reached with regret that the law is unfortunately impotent to do justice in this particular case. We think that no such conclusion is necessary and that our existing laws sufficiently provide that a judge assigned under such circumstances as appear here shall be in fact, and not in name only, a disinterested judge from a neutral county.

Let a peremptory writ issue as prayed for.

We concur: MARKS, J.; JENNINGS, J.

HOBART ESTATE CO. et al. v. WATERS,
County Tax Collector.*

Civ. 4840.

District Court of Appeal, Third District,
California.

Feb. 3, 1933.

As Modified March 1, 1933.

Hearing Granted by Supreme Court April 3,
1933.

1. Taxation ⇨367.

Property scheduled as operative property in public utility's report to board of equalization must be regarded as operative property for particular year involved, where no protest is made within time provided by law (Pol. Code, § 3667c).

2. Taxation ⇨446.

Decision of board of equalization as to what is operative and nonoperative property and respective proportions thereof is binding upon all parties concerned, until set aside by court of competent jurisdiction (Pol. Code, § 3667c).

3. Taxation ⇨367.

Board of equalization has power to extend time for filing of report by public utility as to operative and nonoperative property situated in county (Pol. Code § 3667c).

4. Taxation ⇨196.

Constitutional provision that property or severable portion thereof must be exclusively used by public utility to exempt it from local taxation *held* to require no construction (Const. art. 13, § 14).

5. Constitutional law ⇨283.

Holding that public utility's property having dual use is subject to local taxation presents no question of violation of Fourteenth Amendment (Const. U. S. Amend. 14; Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

6. Constitutional law ⇨283.

Taxation ⇨200.

That board of equalization, upon public utility's report including proceeds derived from "dual use" property, erroneously levied tax thereon, and that taxpayer voluntarily paid it, presents no question of due process, and does not bar local tax upon same property (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

7. Constitutional law ⇨35.

In case of conflict between taxation provisions of Political Code and those of Constitution, latter controls (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

8. Taxation ⇨200.

Where public utility's report shows that property was not used exclusively for opera-

tive purposes and that no tender of taxes thereon had been made, property was subject to local taxation, and assessor's failure to file protest was immaterial (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

9. Taxation ⇨374.

Only where property of public utility is claimed to be operative, and assessor asserts that it is nonoperative, is filing of protest by assessor necessary (Pol. Code, §§ 3666, 3667c, and §§ 3665b, subd. 1 (a), and 3665c, subd. 2; Const. art. 13, § 14).

Application by the Hobart Estate Company and Emma Rose, doing business under the names and styles of Utica Mining Company and Angels Electric Light & Power Company, for a writ of mandate to be directed to Julia Waters, as tax collector of the county of Calaveras.

Writ denied.

Warren Olney, Jr., Allan P. Matthew, J. Richard Townsend and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioners.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this proceeding the petitioners seek a writ of mandate from this court directing the respondent to accept the sum of \$229.83 in full payment of taxes levied and assessed against property belonging to said petitioners situate in the county of Calaveras, and upon the assessment rolls of said county indorse the word "Paid," indicating a full discharge and release of all taxes assessed against said petitioners.

Omitting a number of the preliminary allegations of the petition not necessary to be considered herein, the petition states that on the 1st day of April, 1932, the petitioners filed with the state board of equalization of the state of California a report, as required by law, of its operative and nonoperative property situate in the county of Calaveras; that the time for filing said petition was extended from the 15th day of March, 1932, to and including the 1st day of April, 1932, by the state board of equalization pursuant to section 3667c of the Political Code; that at the time of filing the operative report by the petitioners herein, petitioners furnished a duplicate report to the assessor of Calaveras county, that no protest was filed against said operative report by the assessor of Calaveras county, within the time allowed by law; that after the time allowed by law for the filing of a protest by the assessor of any county where such operative property is situate, the assessor of Calaveras county did file a pro-

*For subsequent opinion see 32 P.2d 613.

test; that upon motion of the petitioners, the protest of the assessor of Calaveras county, so filed after the time allowed by law, was dismissed. The report further sets forth that during the year 1932 the assessor of Calaveras county assessed property shown in said report as operative property, property shown as used in a "dual" capacity both in the carrying on of an operative and nonoperative business by the petitioners herein, and also upon property listed in said report as nonoperative.

Alleging that the assessment placed upon the petitioners' property in Calaveras county is illegal, save and except as it was levied upon property listed as nonoperative property in said report, petitioners estimated the amount of taxes claimed to be legally chargeable against said property, and tendered the same to the tax collector of said county in the sum hereinbefore named. This amount was refused by the respondent as tax collector, who claimed that the total sum of \$2,618.59 was the legal amount of taxes chargeable against the property of the petitioners herein.

Upon this hearing it is contended by the petitioners that the failure of the assessor of Calaveras county to protest within the time allowed by law against the listing of property as set forth in the operative report made by the petitioners herein to the state board of equalization, precludes the assessing and levying of any tax upon property belonging to the petitioners, save and except that listed as nonoperative.

On the part of the respondent it is contended that the operative report filed by the petitioners is invalid, in that it was filed after the time allowed by law, and also that the property used by the petitioners both in their operative and nonoperative enterprises (called by the parties to this action "dual use property") is subject only to taxes payable to Calaveras county. The petitioners maintain that "dual use property" is taxable according to the percentage of uses made thereof; that is, if the properties used to the extent of 50 per cent. in its operative enterprises and 50 per cent. in nonoperative activities, then and in that case the percentage of taxes payable to the state and payable to the county would be 50 per cent. each.

In making its tender of payment to the respondent there appears to be no segregation between the amount of taxes admitted to be due upon the nonoperative property and the estimated percentage of taxes due upon the property listed as "dual use property."

[1] With this summary before us, and without setting forth a description of the property, and without attempting any definition of operative and nonoperative property or "dual use property," only one vital question is presented for our consideration. Be-

fore attempting to review the authorities upon what we consider the vital issue herein, it may be stated that the cases called to our attention we think definitely settle the law that property scheduled as operative property in a report to the state board of equalization, where no protest is made within the time allowed by law, must be held for the particular year involved as operative property. To this effect are the following cases: *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 P. 553, and *Great Western Power Co. v. City of Oakland*, 196 Cal. 131, 236 P. 307.

[2] We may also add that even where a protest is filed, by the last paragraph of section 3666 of the Political Code, the decision of the state board of equalization as to what is operative and nonoperative property, and in what proportion operative and in what proportion nonoperative, is binding upon all parties, the state, the county, city and county, municipality or district, unless set aside by a court of competent jurisdiction.

[3] Without entering into a discussion of the power of the board of equalization to extend the time to file an operative report, we are of the opinion that section 3667c of the Political Code authorized the board of equalization to grant the extension allowed in this case. While the language of the section is somewhat ambiguous, a reading of the sections preceding leads to the conclusion that all reports required by the board upon which it must base its actions and conclusions are included within the meaning of section 3667c of the Political Code.

Other technical objections are made by the respondent; but as other issues involved in this case are determinative, we do not deem it necessary to enter into any discussion of technical objections.

As we have stated, the report filed by the petitioners with the state board of equalization lists operative property, nonoperative property, and what is called "dual use property," and it only remains for the court to determine whether, under the Constitution and the various sections of the Political Code, the assessor of Calaveras county could legally levy an assessment upon the property coming within the last classification. No tender of payment of taxes covering such property is alleged to have been made.

Section 14 of article 13 of the Constitution, after setting forth the various kinds of property subject to taxation, including the properties operated in the sale of gas and electricity, uses the following language: "And other property, or any part thereof used exclusively in the operation of their business in this State."

Subdivision 1 (a) of section 3665b of the Political Code, after specifying what shall be taxed by the state, contains the following lan-

guage: "Used exclusively in the operation of the railroad business," etc. Following this, subdivision 2 of section 3665c of the Political Code, defining under the head of "operative property," uses the following words: "Each of the companies mentioned in said section shall report in such detail as the state board of equalization shall prescribe, all of its property in this state which comes under the definition of operative property in section three thousand six hundred sixty-five b of the code." It may be here stated that the report does not set forth any severable portion of the property belonging to the petitioners as used in an operative capacity, as distinct from the extent to which such property is used in a nonoperative capacity. In other words, the "dual use property" appears to be a unit so far as the report is concerned. There is no severable portion which can be said to be used exclusively for operative purposes, and no severable portion thereof which can be said to be used for nonoperative purposes. The property which we have herein designated for convenience as a "unit" is simply used in a double capacity.

While the petitioners rely upon the cases of *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 P. 553, and a case bearing the same title reported in 196 Cal. 131, 236 P. 307, and the case of *San Francisco-Oakland Terminal Rys. v. Johnson*, 210 Cal. 138, 291 P. 197, a careful reading of the two cases wherein the *Great Western Power Company* was the plaintiff, shows that they deal only with the conclusive effect of the decision of the state board of equalization as to what constitutes operative property, when set forth as such in the operative report, where no protest is made by the county assessor.

In the case of *San Francisco-Oakland Terminal Rys. v. Johnson*, supra, an action was brought to recover taxes paid under protest based on the theory that the property was subject only to local taxation; the facts set forth in the opinion show that the uses made of the property, other than as operative, were so negligible as not to be legally considered in the classification of the property, and that the uses made of the property were really in furtherance of the business carried on by the plaintiff in its operative capacity. In the instant case the circumstances are readily distinguishable from the *Oakland Cases*. Here a separate and distinct business is conducted in which the property belonging to the plaintiffs and assessed by the assessor of *Calaveras county* is used, and that the portion of property not used in its local capacity for distribution purposes is used in the generation of electricity in a public utility capacity.

The cases are numerous to the effect that, to remove the property from local taxation and place it under the jurisdiction of the board of equalization for taxation purposes,

the property must be used exclusively in the operation of a public utility, or of such a business as comes under the classification found in section 14 of article 13 of the Constitution.

In *San Diego & Arizona Ry. Co. v. State Board of Equalization*, 165 Cal. 560, 132 P. 1044, 1047, the language of the court, after stating the facts involved therein, and referring to the act of the Legislature as it then read, is as follows: "By that subdivision it is provided that the part of the new road which is in actual use by any company is 'deemed to be in operation,' so as to justify its classification as operative property, 'as soon as it offers and renders service to the public for compensation.' * * * The property also comes within the description of railroad property taxable only for state purposes, as given in the Constitution. The provision is that all the specified companies shall annually pay a tax upon the property enumerated or any part thereof, 'used exclusively in the operation of their business in this state.'"

In *Lake Tahoe Ry. etc., Co. v. Roberts*, 168 Cal. 551, 143 P. 786, 787, Ann. Cas. 1916E, 1196, the question involved was whether a steamer plying upon Lake Tahoe was subject to state or local taxation. It was there held that while the steamer, in connection with its agreement with the *Southern Pacific Company*, transported passengers, yet it was not engaged exclusively in such business. The court held that the property was subject only to local taxation. The language in the opinion is applicable here. We quote therefrom: "The question thus presented is an extremely simple one, resting as it does solely upon the meaning of the language of section 14, art. 13, of the Constitution, which declares that, based upon gross revenue, railroad companies shall pay a tax to the state upon certain enumerated properties 'and other property, or any part thereof used exclusively in the operation of their business in this state.' The brief statement of facts above set forth shows conclusively that the steamboats of the plaintiff were not used exclusively in their railroad business, and with equal conclusiveness it shows that no severable part of the steamers is used exclusively in the operation of the business, for manifestly a steamer in operation being a single, indivisible fabric, while it may be said that it is partly used for a given purpose, it cannot be said, as the Constitution declares, that 'any part thereof' is so used."

As we have stated, no severable part of the unit fabric which is being used in this case in a "dual" capacity is used exclusively in the generation of electricity, or in contributing in any way to the uses and purposes of a public utility. And, as further said in the opinion, as if in answer to the petitioners' contention herein as to a percentage assessment: "To illustrate, if this substituted

percentage tax based on revenue is to apply to a single piece of property partly used for railroad purposes, that indivisible portion of it not so partly used must be subject to local taxation by local assessors under the strict ad valorem tax, or it escapes taxation altogether. How shall a local assessor assess a portion of a steamboat? What portion shall he assess and what shall be the ad valorem value placed upon the portion which he does assess? All these would be practical questions under appellant's contention and would require answer at the hands of the law. The fact that these manifest contingencies have not been provided for by law is additional evidence that the framers of the Constitution meant what they said, namely, that only property used exclusively, or only a severable part of property used exclusively in the operation of the business of the company, should be included in the list of property whose sole and only tax is covered by the gross revenue percentage, and that the earnings of other properties not so exclusively used in whole or in part are not an element in the admeasurement of this tax."

In *San Bernardino County v. State Board of Equalization*, 172 Cal. 76, 155 P. 458, the opinion in the *Lake Tahoe Case* is reviewed and the view expressed that the words of the Constitution and the Political Code relieving public service corporations from local taxation must be given a fair and reasonable interpretation, yet there is nothing in the opinion in the *San Bernardino Case* limiting, qualifying, or in anywise restricting the scope of the opinion in the *Lake Tahoe Case*. In the *San Bernardino Case* it appears that the property in question (an icing plant) was used exclusively in icing cars used in the transportation of perishable products, which brings it within the definition of "other property exclusively used" in connection with the public service business carried on by the corporation. Thus it is not the kind of property, but the use of the property, which determines its classification.

In *Southern Pacific Co. v. Richardson*, 181 Cal. 280, 184 P. 3, the right of the state or the local authorities to levy a tax on ferryboats operated between San Francisco and Oakland on what is known as the "Creek Route" was involved. The contention of the state was that, as the boats were operated by a railroad company, the taxes should be levied by the state board of equalization. The court, however, held to the contrary, and points out distinctly that the other property used in the business of a public utility must be exclusively used for that purpose. It is further pointed out in the opinion that to hold such property exempt from local taxation would be to read into section 14 of article 13 of the Constitution words which are not there. It is also held that such a construction would limit the scope of section 1 of said

article, wherein it is provided that all property shall be subject to local taxation according to its value.

The opinion in the *Richardson Case*, *supra*, is well summarized in the syllabus, from which we quote the following: "The fact that subdivision (a) of section 14 of article XIII of the Constitution, which declares the duty to pay the taxes provided for in the opening paragraph, begins with the phrase 'all railroad companies,' and, in describing the kinds of property to be so taxed, closes with the phrase, 'and other property, or any part thereof, used exclusively in the operation of their business in this state,' is not to be taken as meaning that persons or corporations carrying on any business of a kind mentioned in the opening paragraph must be taxed in the same manner and for state purposes exclusively, upon property which they may have and use exclusively in the operation of a separate public utility business in this state which otherwise would not be so taxable, but the only reasonable interpretation is, that the phrase refers only to the kinds of business which are declared to be so taxable in the opening paragraph, and includes only the property which is used exclusively in the operation of such business."

In *Pullman Co. v. Richardson*, 185 Cal. 484, 197 P. 346, 348, the case of *Lake Tahoe Ry. etc., Co. v. Roberts* is approved, and in deciding the *Pullman Case* the court quotes from the *Tahoe Case* as follows: "The fact that these manifest contingencies have not been provided for by law is additional evidence that the framers of the Constitution meant what they said, namely: That *only property* used *exclusively*, or only a *severable* part of property *used exclusively* in the operation of the business of the company, should be included in the list of property whose sole and only tax is covered by the gross revenue percentage, and that the earnings of other properties not so exclusively used in whole or in part are not an element in the admeasurement of this tax." The court in the *Pullman Case* takes occasion to italicize the salient portions found in this quotation.

In the case of *San Francisco-Oakland Terminal Rys. v. Johnson*, *supra*, the Supreme Court reviews the cases which we have cited, but we find nothing therein which limits the language of the *Tahoe Case* where a substantial use is made of the property for purposes which give it a distinctly local character. It is pointed out in the *Johnson Case* that the steamers on *Lake Tahoe* derived at least 45 per cent. of their revenue from purely local business. In the *Johnson Case* it appears that the local business transacted by the property involved was less than one-half of one per cent. In other words, the local business was purely negligible, and did not justify the classification of the property as not being used exclusively in connection with the busi-

ness of the public utility operating the same. The restaurants and news stands referred to in the Johnson Case were used for the convenience of passengers who theretofore had been carried upon the railroads, and were necessarily connected with, and a part of the business of, transporting the passengers carried by the railroad company. The facts in the Johnson Case are readily distinguishable from the case at bar. Here the report, as we understand it, shows that a substantial use of the "dual use property" is in the conduct of a purely local enterprise.

In the case of *People v. Southern Pacific Co.*, 209 Cal. 578, 290 P. 25, it was the use of the property, and not the ownership thereof, that determined its classification. The property involved in that case was railroad property, and property used exclusively in the conduct of such business. We find nothing in this case which limits the holding in any of the cases heretofore cited relative to the classification of property.

In the recent case of *Southern California Telephone Co. v. County of Los Angeles*, 212 Cal. 121, 298 P. 9, 11, the question of whether the property involved was or was not operative property or property used exclusively in the operation of a public utility was again before the court. The opinion in this case reviews all the cases which we have heretofore cited, and approves the following language found in the Tahoe Case, to wit: "In *Lake Tahoe Ry. etc., Co. v. Roberts*, supra, the court discusses the method of interpreting these provisions, and points out that the words 'used exclusively in the operation of their business' have a plain and obvious meaning. It was therefore held that property used only partially in the business was subject to local taxation." The right of the county to tax property not used exclusively in the conduct of a public utility was upheld, as likewise, where the property has a "dual use," in order for it to be subject to state taxation, the public utility use must relate to a severable portion of the property having such "dual use."

[4-7] The holding of all of the cases which we have cited is to the effect that the language of the Constitution, specifying that the property or a severable portion thereof must be exclusively used by the public utility in order to exempt it from local taxation, is plain, definite, and certain, and requires no construction as contended for by the petitioners, but only on application to the circumstances presented for consideration and determination of whether the property is so exclusively used. To hold that the property having such "dual use" is subject to local taxation

presents no question of violation of the Fourteenth Amendment of the United States Constitution, as contended for by the petitioners. The fact that the state board of equalization, upon a report including proceeds derived from "dual use property," levies a tax accordingly, and the petitioners voluntarily pay such tax, in nowise presents the question of taking property without due process of law, nor does it bar the constitutional right of local authorities to levy and collect a tax upon such "dual use property." The petitioners making such a report were under no legal obligations to pay any tax illegally levied. Some of the cases which we have cited and relied upon by the petitioners show that the remedies were afforded by paying the tax under protest and suing for the recovery thereafter. The failure of the petitioners to pay the state tax under protest does not relieve them from the obligation to pay any county tax warranted by the Constitution. If there is a difference between the wording of the Constitution and some of the sections of the Political Code to which our attention has been called, the language of the Constitution must prevail.

[8, 9] As we read the operative report, it shows upon its face property not used exclusively for operative purposes, upon which no tender of taxes was made, which renders it subject under the Constitution to local taxation, and it is therefore immaterial whether the assessor did or did not file a protest as to such property. It is only where property claimed to be operative which the assessor asserts to be nonoperative, that circumstances are presented which render it necessary for the assessor to file a protest. If any of the property, or any severable portion thereof, exclusively used in an operative capacity by the petitioners as specified in the Constitution, or held as such under the sections of the Political Code referred to for the fiscal year of 1932-33, by reason of the failure of the assessor to file a protest against the petitioners' operative report, is included in the assessment, petitioners have their remedy by paying the tax under protest, and then bringing an action to recover the excess over and above the amount which they are legally obligated to pay. No protest being needed as to that part of the property listed by the petitioners in their report to the state board of equalization showing, as we have said, the legal right of the county to levy and collect a tax, it follows that the demurrer of the respondent should be sustained, and it is so ordered.

The writ is denied.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

In re VIZELICH'S ESTATE.

ALLEN et al. v. MORRILL et al.

Civ. 4631.

District Court of Appeal, Third District,
California.

Jan. 30, 1933.

Hearing Denied by Supreme Court March 30,
1933.

1. Wills ⇨470.

In determining meaning of words used in will, words are not to be construed by any one section or paragraph, but instrument must be read as whole.

2. Wills ⇨545(1).

Words "death without issue," used in will directing distribution upon death of named children, *held* to relate to date of final distribution, at which time estate should vest absolutely.

Will directed that testator's real property should be retained by executor or executrix until named children should agree to sale; that, from proceeds of property when sold, the executor should pay all debts, charges, and expenses of administration remaining unpaid, and certain special legacies; that remainder of proceeds, together with all other property, should be divided equally, share and share alike, among named sons and daughters; that before sale of property income should be regularly collected and distributed equally between named sons and daughters; and that, in case of the death without issue of any of my sons and daughters and grandchildren mentioned, "their share and shares herein devised and bequeathed shall go to my surviving children, that is to say, my sons and daughters, share and share alike."

[Ed. Note.—For other definitions of "Limitation Contingent on Death without Issue," see Words and Phrases.]

3. Wills ⇨497(2).

Term "children," used in will, primarily means descendants in first degree, and does not include grandchildren, in absence of satisfactory evidence that testator had such intention.

[Ed. Note.—For other definitions of "Child; Children (In Wills)," see Words and Phrases.]

4. Wills ⇨497(2).

Where son of testatrix died without issue before final decree of distribution, share of such son in testatrix' estate to which he would have been entitled had he survived *held* to go to surviving "children" of testatrix, to exclusion of grandchildren, the children of daughter who died before son.

Will directed that, in case of "death without issue of any of my sons and

daughters and grandchildren herein mentioned, their share and shares herein devised and bequeathed go to my surviving children, that is to say, my sons and daughters herein named, share and share alike."

5. Wills ⇨595.

Estate by implication is not favored, and devise will not be implied unless necessary to carry out testator's intention and prevent failure of will.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Proceedings in the matter of the estate of Nellie Harding Vizelich, deceased. From a portion of the decree of distribution in favor of Mrs. Kate Morrill and others, Penelope J. Bruce Allen and another appeal.

Decree modified, and, as modified, affirmed.

Prior opinion 12 P.(2d) 993.

See, also, 11 P.(2d) 870.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellants.

Clark, Nichols & Eltse, of Berkeley, R. C. Minor, of Stockton, C. Victor Smith and Harvey S. Craig, both of Oakland, and McNoble, Parkinson & Coblentz, of Stockton, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a decree of distribution by Penelope J. Bruce Allen and Annie Elizabeth Bruce, the only children of Amelia Bruce, a deceased daughter of Nellie Harding Vizelich, deceased, and involves the construction of the will of Nellie Harding Vizelich, who died February 1, 1918, leaving surviving her six sons and daughters, to wit: Mrs. Amelia Bruce, Mrs. Kate Morrill, Nellie Vizelich, Nicholas James Vizelich, Stanley Vizelich and Henry Vizelich and five grandchildren.

Nicholas Vizelich died on March 18, 1920, leaving his wife surviving, who has since remarried and is now known as Jennie Vizelich Marr.

Mrs. Amelia Bruce died October 30, 1926, leaving her daughters, Penelope J. Bruce Allen and Annie Elizabeth Bruce, who are the appellants herein.

Stanley Vizelich died March 8, 1927, leaving a wife, Anita Vizelich, surviving.

Nellie Harding Vizelich at the time of her death also left surviving Fred Vizelich Bartlett, being a son of a deceased daughter, Mrs. Bessie Bartlett, and also two granddaughters, the children of a deceased son, Stephen Vizelich, to wit, Bernice I. Vizelich and Lloyd

Carlton Vizelich, as well as the appellants herein, daughters of Amelia Bruce.

Those portions of the will material to a consideration of the questions here presented are:

"Secondly: I direct that all the real property of which I may die seized or possessed be retained in the hands of my executor or executrix hereinafter named until such time as my children who are hereinafter named as my legatees and devisees shall agree that it will be to the best interest of all of them that said real property be sold. When such sale is agreed upon by my said sons and daughters, I direct that said property be sold, and that from the proceeds thereof, after the payment of all debts, charges and expenses of administration, remaining unpaid, my said executor and executrix shall pay the following special legacies: * * * After the payment of said special legacies, I direct that the remainder of the proceeds, together with all other property, whether real, personal or mixed, of which I may die seized or possessed, be divided equally, share and share alike, among my sons and daughters, to-wit: Mrs. Amelia Bruce of Oakland, California; Mrs. Kate Morrill, of Berkeley, California; Nellie Vizelich, Nicholas James Vizelich, Stanley Vizelich, and Henry Vizelich, of Stockton, California.

"Thirdly: In the event of the sale by me in my lifetime of my real property, then the proceeds thereof remaining at the time of my death, or any other property of which I may die seized or possessed, shall be applied to the payment of the legacies herein directed to be paid, and the residue of my estate, of every kind and nature, divided equally, share and share alike, among my sons and daughters hereinabove named.

"Fourthly: After my death and before the sale of the real property of my estate as aforesaid, I direct that the income of said property shall be regularly collected by my said executor and executrix, and that every six months the net profits thereof be equally divided between my said sons and daughters.

"Fifthly: I further direct that in the case of the death without issue of any of my said sons and daughters and grandchildren herein mentioned, their share and shares herein devised and bequeathed shall go to my surviving children, that is to say, my sons and daughters herein named, share and share alike."

This will was admitted to probate on February 25, 1918, and letters testamentary issued to Nellie Vizelich and Nicholas Vizelich. On July 8, 1929, pursuant to the provisions of the second paragraph of the will, the executrix sold the real property and reported the sale for confirmation, which was in due time confirmed, and on June 2, 1930,

the final decree of distribution from which this appeal was taken was signed and filed.

The decree of distribution set over to the three then surviving children, namely, Mrs. Kate Morrill, Nellie Vizelich, and Henry Vizelich, all of the household furniture and twelve-fifteenths of the cash and other residue of the estate, and unto these appellants jointly three-fifteenths of the cash and no portion of the furniture.

The effect of this decree was to distribute to the two appellants the share of the proceeds from the sale of the real property which was left to Amelia Bruce, their mother, and also one-fifth of the share of Nicholas Vizelich, who had predeceased Amelia Bruce, but it did not distribute to appellants any part of the share left to Stanley Vizelich, who died without issue some six months after Amelia Bruce. It is claimed that this latter omission was error, and upon the determination of that question the principal issue here depends.

Appellants also contend that all bequests by testatrix were made subject to defeasance upon death, at any time, without issue, and that the decree of distribution should have so provided.

Our decision must depend largely upon the construction to be placed upon the words in the fifth paragraph of the will "in case of death without issue."

"The question to what period survivorship is to relate must depend rather upon the apparent intention of the testator in each case, than upon any rigid rule, or any technical words. And this intention is to be collected either from the particular disposition, or the general context of the will." In re Winter, 114 Cal. 186, 45 P. 1063, 1064.

[1, 2] First, as to the time to which "death without issue" relates, does it refer to a time prior to the death of the testatrix, or did she have in mind a period subsequent to her death? And, if subsequent, was it to extend to a period beyond the date of possession? Such words in a will as we have before us are not to be construed by any one section or paragraph, but the instrument must be read as a whole. First, then, we observe it was not the giving of such property as passed into immediate use or possession. The will does not contain any express devise of real property, nor does it provide for an unconditional sale of real property or the immediate disposition of the proceeds. It plainly appears that the decedent had in contemplation various steps to take place after her death before there would be any vesting or possession, either conditional or absolute. The will devised not the real property, but provided in paragraph 2 that the real property should be sold *when* the six children named in the will should agree; it then provided "*after* the

payment of said special legacies," etc. The will also provided the income from the real property should be regularly collected and every six months the net proceeds should be divided, all implying an interval of time from which it can be inferred that the words "death without issue" related to a period subsequent to the death of the testatrix. That being true, at what point subsequent to her death did she intend that title would vest?

Appellants claim that "death without issue" meant death at any time, or, in other words, failure of issue at the time of death of the children referred to in the will, and urge that such provision should have been carried into the decree of distribution. Respondents, on the other hand, argue that the contingency "death without issue" applies only until the date of final decree and thereupon the estate should vest absolutely. This appears to us a more reasonable construction.

If the position of appellants be sound, all the cash finally distributed to the children and grandchildren of decedent would be virtually tied up in trust for a period which might not terminate for many years. As said in *Re Estate of Newman*, 68 Cal. App. 420, 229 P. 898, 900: "The law favors the vesting of interests and every interest will be presumed to be vested, unless a contrary intention clearly is manifest."

We do not believe that the testatrix ever intended that the cash which her children and grandchildren would receive on final distribution should be tied up indefinitely by being made subject to a defeasance clause. It is more reasonable to suppose that she was providing for contingencies which might arise prior to the final distribution of her estate.

[3, 4] Let us now consider the defeated interest of Stanley, who died without issue after Amelia but prior to the decree. If we are correct in holding that "death without issue" referred to a period subsequent to the death of the testator, that is, upon the entry of the final decree, then nothing had vested in him and he had no vested interest in the estate. Where did it go?

The fifth paragraph provides that "in case of the death without issue of any of my said sons and daughters and grandchildren herein mentioned their share or shares herein devised and bequeathed shall go to my surviving children, that is to say, my sons and daughters herein named, share and share alike."

"The word 'children' in its primary significance means descendants in the first degree, and can receive no other construction, in the absence of satisfactory evidence that the testator intended it to include grandchildren. *Palmer v. Horn*, 84 N. Y. 516; *Mullarky v. Sullivan*, 136 N. Y. 227, 32 N. E. 762. No such

intention is apparent in the testator's will. The testator plainly and unequivocally declares that 'in the event of one of my children dying without issue the share of the child so dying shall go to "my children" then surviving, share and share alike.' More precise language could not be employed to effectuate the apparent intention. There is no doubt or ambiguity present, and all rules of testamentary construction must yield to the fundamental principle that the intention, when clearly expressed, shall prevail. I entertain no doubt that the testator, in the use of the expression 'in case either of my said children should die,' had no intention to embrace grandchildren, or to give to the words 'my children' any other than their primary and ordinary meaning or significance." *Davies v. Davies*, 59 Misc. 104, 112 N. Y. S. 157, 158.

Counsel for respondents call our attention to the case of *Swole v. Burnham*, 111 Conn. 120, 149 A. 229, which construes a will similar to the instrument before us. It reads in part as follows: "3rd. If either of my said nieces shall, before such division, have died leaving lawful issue, such issue to receive the parents share; but if there is no issue then such share to be divided among the surviving nieces." * * * The 'share' of each of the three nieces was intended * * * to be one-third. If any one of the three were to die before the division and without issue, the will provides specifically that that 'share' shall go to the survivors of the nieces, 'if there is no issue then such share to be divided among the surviving nieces.' It does not provide that it go to the issue of any of them, and, therefore, to give any portion of the share of Eliza to this son of Ida—a nephew of the deceased niece—would be to do what the will does not authorize. Moreover, the share fixed by the will being one-third, we think that is the 'parent's share' to which her issue is entitled, and that, to make the intent of the testatrix effectual, Grace L. Kelsey Swole must receive two-thirds and Merill K. Platt one-third of the residuum."

It is evident that Mrs. Vizelich, the testatrix herein, desired the share of any of her children or grandchildren who might die without issue, to go to her surviving children, and, as a precaution against uncertainty in that classification, she added, "that is to say, to my sons and daughters herein named."

[5] An estate by implication is not favored in law, and, unless it is necessary to carry out the intention of the testator and prevent the will from failure, courts will not imply a devise.

In *Re Estate of Franck*, 190 Cal. 28, at page 32, 210 P. 417, 418, our Supreme Court said that no gift by implication shall be read into a will unless the contrary is unavoidable. It states: "It is equally well settled that a de-

wise or bequest may arise by implication. To warrant the court in so declaring there must be something more than conjecture. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind. *Bishop v. McClelland*, 44 N. J. Eq. 450, 452, 1 L. R. A. 551, 16 A. 1; *Estate of Blake*, 157 Cal. 448, 468, 108 P. 287."

"In order to carry out the intention of a testator and prevent the will from failing of effect, a devise or bequest may be implied, although it has not been formally expressed in the will, unless the implication violates public policy or some settled rule of positive law. The presumption, however, is very strong against the testator having intended any devise or bequest not set forth in his will; and in order that the devise or bequest may be effectual the implication must be a necessary one, that is, the probability of an intention to make the devise or bequest implied must appear from the will to be so strong that a contrary intention cannot reasonably be supposed to have existed in the testator's mind. Such an implication cannot rest on mere conjecture, although it is not required that the implication be absolutely irresistible." 40 Cyc. 1390.

"To create a bequest in that way, the implication on which it is founded must be a necessary one; not natural necessity, but so strong a probability of an intention to give must appear, that an intention contrary to that which is imputed to the testator, cannot be supposed to have existed in his mind. A construction in favor of a bequest by implication, should never be adopted except in cases where, after a careful and full consideration of the whole will, the mind of the judge is convinced that the testator intended to make the bequest. *McCoury's Executors v. Leek*, 1 McCart. [14 N. J. Eq.] 70; *Holton ads. White*, 3 Zab. [23 N. J. Law] 330." *Denise's Executors v. Denise*, 37 N. J. Eq. 163, at page 170.

The will of Nellie Harding Vizelich evidences a purpose to retain the fruits of her labor and thrift within her immediate family and she clearly and explicitly restricted the benefits therein to her surviving children, viz. her sons and daughter named.

We are therefore of the opinion that upon the death of Stanley, the share to which he, if living, would have been entitled at the entry of the decree was defeated and vested absolutely in his then surviving sisters, Mrs. Kate Morrill and Nellie Vizelich, and his brother, Henry Vizelich.

Respondents Jennie Elizabeth Marr, as executrix of the will of Nicholas Vizelich, deceased, and Anita Vizelich, as administratrix of the estate of Stanley Vizelich, have filed separate briefs herein. Under the de-

cree no part of the estate went to either of them. This contest is between other parties to succeed to the estate, and the appeal is taken from that portion of the decree of final distribution which affects only such parties and does not affect these respondents. They therefore have no interest in this appeal.

The decree of distribution appealed from is affirmed, except as to that portion relating to certain furniture, and as to that portion of the decree appellants are entitled to a one-fourth of the appraised value thereof, and, as so modified, the decree is affirmed.

We concur: **R. L. THOMPSON, J.;**
PLUMMER, J.

129 Cal.App. 330

McSHERRY v. MARKET CORPORATION.
Civ. 8632.

District Court of Appeal, First District,
Division 1, California.

Jan. 30, 1933.

1. Brokers $\S$ 82(1).

No action for compensation for any acts mentioned in statute regulating realty brokers can be maintained without alleging broker was duly licensed (*Gen. Laws Supp. 1925-27, Act 112, § 2*).

2. Brokers $\S$ 42.

Evidence showing that transaction wherein plaintiff's assignor, pursuant to contract with another to organize corporation, performed services as realty broker, to be paid for by corporation, was "joint adventure" or "partnership"; plaintiff, although not licensed broker, could recover against subsequently organized corporation for such services (*Gen. Laws Supp. 1925-27, Act 112, § 2*).

Evidence showing that plaintiff's assignor, pursuant to contract with another to organize a corporation to lease and operate a public market, solicited tenants for the market, made survey to determine feasibility of project, designed floor plan, and lighting arrangements, and generally utilized his knowledge in these respects, showed that transaction was "joint adventure" or "partnership," "joint adventure" being used to characterize a single joint adventure, while "partnership" is more generally used to characterize a general and continuing joint adventure; hence plaintiff, though not licensed realty broker, could recover for such services

from subsequently organized corporation, in view of portion of Gen. Laws Supp. 1925-27, Act 112, § 2, providing that portion thereof defining realty brokers, who, before maintaining action for services, must be licensed, shall not apply to co-partnership performing acts of realty broker with reference to property owned by partnership.

[Ed. Note.—For other definitions of "Joint Adventure" and "Partnership," see Words and Phrases.]

3. Joint adventures ⇨7.

That joint adventurer was to be paid for services in helping organize corporation only if project succeeded and then by corporation, *held* not to prevent recovery therefor against corporation receiving benefit thereof.

4. Joint adventures ⇨7.

Where joint adventurer was to be reimbursed by corporation for expenses incurred in organizing it, directors' refusal to approve itemized statement thereof *held* not to prevent recovery.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Action by F. T. McSherry against the Market Corporation. From the judgment for plaintiff, defendant appeals.

Affirmed.

Maurice E. Gibson, of San Francisco, for appellant.

Louis Oneal, of San Jose, and H. D. Durst, of Redwood City, for respondent.

PER CURIAM.

An action to recover for services rendered and for money loaned and expended by Joseph McSherry, who thereafter assigned his claims to plaintiff.

The court entered judgment for plaintiff, which included an award of \$2,000 agreed to be paid the assignor under a written contract, and \$550 expended by him. Defendant corporation has appealed from these portions of the judgment. Plaintiff was also awarded judgment for other sums claimed by the assignor, but of those the defendant does not complain.

The complaint alleged and the court found that on November 10, 1928, defendant, a corporation which had then been organized, assumed the contract mentioned and agreed to pay said sum of \$2,000; further, that the sum of \$550 was expended by the assignor pursuant to the contract, and an itemized statement thereof presented to the directors of the corporation, who refused to act thereon.

The corporation does not deny that the services were rendered under the contract,

but claims that no recovery can be had for the reason there was no allegation or proof that the assignor was a duly licensed real estate broker. It also claims that in the absence of proof that the defendant's directors approved the expenditures these cannot be recovered.

The \$2,000 claim arose out of a written agreement between the assignor and one Weeks. This agreement recited that the two were engaged in organizing a corporation for the purpose of leasing and operating a public market, and that they desired to define their respective interests in the stock of the company; that other than stock which might be sold for the purpose of assisting in financing the corporation and one qualifying share to each director, all stock issued should be divided between the two parties to the contract as follows: To Weeks or his nominees 60 per cent., and to the assignor 40 per cent. thereof; further, that conditioned upon the opening of the market the assignor, in addition, should receive for his services to be rendered prior to the organization of the company in securing tenants for the market said sum of \$2,000 and his expenses, these sums to be paid by the corporation.

It is admitted that services were rendered by the assignor under the contract and that the corporation assumed them and agreed to pay therefor, its sole defense being as above stated. When the corporation was organized was not shown nor was it expressly alleged or found when the services under the contract were rendered. It is a fair conclusion, however, from the facts appearing that they were rendered before the corporation came into existence. It also does not appear that any persons other than the two parties to the contract became stockholders in the company except that the contract names three other persons who were to be the organizers of the company and who with said parties were to act as directors until the election of their successors; but it does not appear that these persons acquired stock therein except to the extent necessary to qualify them as directors. It may fairly be inferred that the corporation was but an instrumentality to carry out the venture. *Wise Realty Co. v. Stewart*, 169 Cal. 176, 146 P. 534.

[1] Section 2 of the act defining and regulating real estate brokers defines a real estate broker within the act as a person, partnership, or corporation who, among other things, for a compensation "leases, or offers to lease, or negotiates the sale, purchase, or exchange of leases, rents, or places for rent, or collects rent from real estate. * * *" No action for compensation for the performance of any of the acts mentioned could be maintained without alleging that such person was duly licensed. However, the section also

provided that "the provisions of this act shall not apply to any person, copartnership or corporation who shall perform any of the acts aforesaid with reference to property owned by such person, copartnership or corporation" (Deering's Code and General Laws, Consolidated Supplement, 1925-27, p. 832).

[2] In the present case it is clear from the contract taken in connection with what was done thereunder (the evidence in this connection being hereinafter set forth) that the relation of the parties was so closely analogous to that of partners that their rights should be governed by the same rules. The transaction was a joint adventure, this term being used to characterize a single joint adventure, while the term partnership is more generally used to characterize a general and continuing joint adventure. *Keyes v. Nims*, 43 Cal. App. 1, 184 P. 695; *Dempsey-Kearns, etc., Enterprises v. Pantages*, 91 Cal. App. 677, 267 P. 550. However, the resemblance is so close that the rights of the parties are governed by practically the same rules (15 R. C. L., *Joint Adventurers*, 500; *Keyes v. Nims*, *supra*; *Butler v. Union Trust Co.*, 178 Cal. 195, 172 P. 601); and the relation is sometimes designated a limited partnership (*Vail v. Pacific Fish Products Co.*, 76 Cal. App. 58, 243 P. 869). Whether the parties had acquired an interest in the market property at the time the contract was made was not shown; but it does appear from the contract that the question whether they should proceed with the project depended upon their ability to induce others to rent space therein, and the value of their stock would depend upon their success in this respect. If they were partners and owned the property or an interest therein, then it is clear that the statute would not apply; nor do we think it can reasonably be held to have been the intention that it should apply where the acts are to be done with respect to property which partners expect to acquire under circumstances such as appear in the present case.

Defendant introduced evidence that the assignor solicited tenants for the market; but it was also testified that he was experienced in the establishment and conduct of public markets, and that his services under the contract consisted of making a preliminary sur-

vey for the purpose of determining the feasibility of the project, and that he designed the floor plan, lighting arrangements, and counter spaces, and in general utilized his knowledge in these respects; further, that he interviewed numerous business establishments in the community regarding the quantity and character of business which might be expected at the proposed location of the market. These facts standing alone would not prevent the application of the statute, but they indicate the character of the services contemplated by the parties, and, taken with the provisions of the contract, support the conclusion that the relation of the parties was essentially that of partners and that the transaction was one which the statute excepted from its operation.

[3] Nor does the fact that the assignor's compensation was to be payable only in case the project should be successful, and then by the corporation, change the rule. The contract being valid when made and performed, and the corporation having received and accepted the benefit, there is no legal objection to a recovery against it.

[4] With respect to the claim for moneys expended the contract provided that the assignor should be reimbursed for his actual expenses in performing services thereunder; that an itemized list thereof should be presented and approved by the directors of the corporation. The court found that the corporation assumed the payment of the expenses; that the sum of \$550 was incurred as such expense by the assignor in that connection; and that he presented an itemized statement thereof to the directors. It was also found that the latter refused to act thereon; and for that reason the corporation claims that no recovery can be had.

The finding brings the case within the rule that recovery on a contract is not precluded because of the refusal of a referee named therein to act. 13 Cor. Jur., *Contracts*, § 774, p. 681; *Shirk v. Lingeman*, 26 Ind. App. 630, 59 N. E. 941; *Potter v. Holmes*, 72 Minn. 153, 75 N. W. 591; *Coplew v. Durand*, 153 Cal. 278, 95 P. 38, 16 L. R. A. (N. S.) 791.

We are satisfied that the conclusions of the trial court are correct, and the judgment is accordingly affirmed.

129 Cal.App. 255

In re MASSENA'S ESTATE.

SCOTT v. MASSENA.

Civ. 829.

District Court of Appeal, Fourth District,
California.

Jan. 27, 1933.

Rehearing Denied Feb. 25, 1933.

Hearing Denied by Supreme Court March 27,
1933.

1. Executors and administrators $\S$ 510(11).

Appellate court is bound by finding of probate court settling first report and account of administrator, if supported by any substantial evidence (Probate Code, $\S$ 921).

2. Executors and administrators $\S$ 278.

Approval of administrator's first report and account of solvent estate was proper, where net amounts justly due by decedent were paid in good faith without showing that claims therefor were presented and allowed (Probate Code, $\S$ 929).

3. Executors and administrators $\S$ 506(3).

Evidence held to support probate court's finding approving first report and account of administrator who with heirs' consent continued operation and upkeep of hotel for best interests of estate (Probate Code, $\S$ 581).

Appeal from Superior Court, Kern County;
Allen B. Campbell, Judge.

First report and first account of Charley Massena, administrator of the Estate of H. V. Massena, also known as Harry Vivian Massena, also known as Harry V. Massena, deceased. From an order settling and allowing amended first report and first account of the administrator, Robert Bruce Scott appeals.

Affirmed.

Matthew S. Platz, of Bakersfield, for appellant.

Brittan & Mack, M. G. Brittan, and Alfred Siemon, all of Bakersfield, for respondent.

VAN ZANTE, Justice pro tem.

This appeal is from an order made by the probate court settling and allowing the amended first report and first account of the administrator in the above-entitled matter, which amended report and account had been filed on the 21st day of September, 1931.

At the time of the hearing the matter of heirship of appellant had not been determined, although a petition therefor was pending.

The report showed that letters of administration issued on the 16th day of June, 1930, and that the estate was of the value of \$52,481.60. As the amended report of the administrator tends to show the conditions and cir-

cumstances that confronted him, we therefore quote the following therefrom:

"Petitioner alleges that the principal asset of the estate consisted of the Massena Hotel, in Bakersfield, California, which included the furniture, fixtures, and appliances therein and the good will thereof; that the hotel building was and is such that it could not readily be used, sold or rented for any other purpose than hotel purposes; that the good will of the hotel business was a very substantial part of the assets in connection with the hotel; that deceased had built up the business and good will by many years of careful attention to the same; that within the last two or three years the hotel business in the city of Bakersfield underwent a severe change resulting from the erection of two fine hotels, and by consequent reduction of rates and a wider distribution of the hotel business relating to hotels such as the Massena Hotel; that there is not now and never has been a possibility of disposing of the Massena Hotel for any other than hotel purposes, and any impairment of the good will or business of said hotel would very materially detract from the value of the property employed in such business; that in the judgment of your administrator it was for the best interest and the highest advantage of the estate that the hotel be kept open and conducted as such during the administration so that the good will of said business would not be impaired and the business might be exhibited to the prospective buyers in a going condition; and that it was necessary to keep said hotel open for the purpose of properly conserving and preserving the assets of the estate. Petitioner alleges that during said time said administrator has been endeavoring to lease, rent or sell said premises in order to pay the existing mortgage thereon. He has been compelled to rent said property and the rooms therein in order to keep intact the value of said hotel as a going hotel. Petitioner alleges that during said time he has advertised in the papers, personally sought agents for the purpose of selling said hotel, but that due to the present existing depression in financial circles, he has been unable to secure a purchaser or secure a tenant or person who is willing to lease said premises, in an amount which would properly provide the proper return on the present investment, and in connection with this, this petitioner has advertised in the papers in Los Angeles, in San Francisco, in Bakersfield and other cities. That from the moneys obtained from the operation of said business he has placed the whole thereof in an administrator's account as such in the First National Bank in Bakersfield, and all the moneys received from the operation of renting said properties, said moneys have been deposited to the account for the benefit of said estate, and said properties have always been conducted for the direct benefit and profit to the estate."

[1] The amended account filed by the administrator is detailed and long. The appellant filed written exceptions and objections to the account indicating wherein the account as filed did not comply with section 921 of the Probate Code, and alleging mismanagement on the part of the administrator, and further alleging that the administrator continued the business of deceased at a loss without procuring an order of court. After an extended hearing, the trial court in its order settling the amended report and the first amended account of the administrator finds and decides, with certain exceptions which we deem relatively unimportant, that the allegations of the report and account are true. The account shows an income from conducting the business amounting to \$9,667 and expenses incurred in conducting the business, including the extra compensation allowed the administrator, amounting to \$8,807.09. This shows a net profit of \$859.91. The evidence adduced at the hearing was ample to sustain the findings made by the probate court. The sufficiency of the evidence to sustain the order is not questioned by appellant. "This court is bound by the finding of the trial court on a question of fact, if the finding is supported by any substantial evidence. Appellant has not pointed out wherein the above finding is not sufficiently supported, but we have, nevertheless, examined the record, and find there is sufficient evidence to support it." *Estate of Burke*, 198 Cal. 163, at page 166, 244 P. 340, 341, 44 A. L. R. 1341.

[2] Appellant complains that the account shows that numerous specified items were paid as debts of the deceased, without any showing that claims therefor were presented and allowed. However, he admits that sufficient proof was produced to justify the payment of the items under section 929 of the Probate Code, if that section applies. No authority is cited, and we know of none, holding that this section does not cover this particular situation.

The appellant contends that the administrator, in continuing the business of the deceased, incurred losses which are not chargeable against the estate because he had no valid order for the purpose of continuing the business. Respondent contends that there were no losses, and the expenses incurred, of which appellant complains, were incurred for necessary repairs, betterment, and preservation of the property entrusted to his care. In this they refer to items not included within the \$8,807.09 which we have formerly referred to as operating expense of the hotel.

[3] The evidence adduced at the hearing strongly indicates to us that all these items allowed by the probate court were intended and were necessary for the preservation of the property belonging to the estate, including the good will of the hotel. It was shown

at the hearing that the administrator was an experienced hotel man and had the consent of all the known heirs at the time these expenses were incurred. We think that under the circumstances the probate court was justified in approving the account. Here was a going business of which the good will was a substantial part, intrusted to the care of the administrator, who by reason of his experience presumably knew best how to preserve the property for whom it was intended, as contemplated by the provisions of section 581 of the Probate Code, one provision of which reads as follows: "He [executor or administrator] must keep in good tenantable repair all houses, buildings and fixtures thereon which are under his control." In referring to the same authorities cited by appellant, including *In re Rose's Estate*, 80 Cal. 166, 22 P. 86, on which he particularly relies, our Supreme Court said in *Estate of Burke*, supra: "It is a fact that the administrator herein acted without having first submitted the question of the completion of the contracts to the judgment of the probate court. In some jurisdictions such a failure on his part would be regarded as a sufficient reason for the disallowance of an expenditure of the estate's funds. But this court has not gone to the extent that some jurisdictions have gone and made the procurement of the permission of the court absolutely essential to the allowance of an expenditure made by the administrator. In *Re Clos's Estate*, 110 Cal. 494, 42 P. 971, it was said: 'It would have been better, perhaps, as it would in any case, had the executrix first procured the permission of the probate court to make the contemplated improvement before proceeding thereto; but this is not an indispensable condition to the allowance of the demand in her account, where it appears that the expenditures were just and reasonable, and have been made in the interests of the estate. *Estate of Moore*, 88 Cal. 1, 25 P. 915.' The probate court, having examined into the matter before us concluded that the administrator had acted reasonably in the premises and approved his action. We emphasize the recommendation made by the court, and add that, in all cases where there is room for doubt as to the duty of the administrator or as to the policy that should be pursued, the judgment of the probate court should be consulted before any steps are taken that might seriously affect the funds of the estate."

This case was cited by appellant, but we think it unmistakably sustains the position taken by the probate court. *Riedy v. Bidwell*, 70 Cal. App. 552, 233 P. 995, 998, is a case not unlike the case at bar. The trial court rendered judgment adverse to the executor. The District Court of Appeal, after reviewing, we believe, all California cases bearing on the questions involved here, said: "By virtue of the carrying out of the terms of the

contract in the instant case the estate stood to receive a very considerable benefit: First, in the fact that the business would be more presentable to any intending or prospective purchaser as a 'going concern,' and hence more salable and at a higher price than though it were 'closed down'; secondly, as a 'going concern,' and by reason of its reasonable use the various machinery, equipment, and property generally would not deteriorate and therefore depreciate in value to the same extent as though standing idle; and, thirdly, there was a possibility not only of having the taxes and general upkeep bills paid by reason of the operation of the business, but as well a net profit to the estate of 6 per cent. on the investment. The contract was not illegal in itself. Having been made by the executor presumably for the purpose of preserving the property of the estate, as well as with the expectation of earning a profit therefrom, it would have been within the power of the court to make allowance to the executor in his account for his proper and necessary expenses in connection therewith. In *re Rose's Estate*, 80 Cal. 166, 22 P. 86. Had there been no net profit over and above the stipulated fixed salaries of the respective employees, or had the net profit, as estimated solely by dollars and cents, been nominal in amount, no good reason would appear why in effect the contract should not have been recognized and ratified. That under the apparently skillful guidance and management of the plaintiffs the result of business operations was changed from a loss to a considerable gain should in no way militate against the legitimacy of the contract. The plaintiffs in all good faith performed their part of the agreement. It is but right and just that the defendant should be compelled to compensate the plaintiffs in accordance with the terms of the agreement. The judgment is reversed."

We think the order made by the probate court should be affirmed, and it is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

129 Cal.App. 325

KELLY v. KELLY.
Civ. 8752.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1933.

1. Husband and wife ⇨278(1).

Property settlement agreement between husband and wife *held* not invalid because not providing for support of children, especially where, under agreement, large share of

trust estate which would eventually descend to husband was assigned to children.

2. Husband and wife ⇨278(1).

Property settlement between husband and wife *held* not invalid on ground of uncertainty and indefiniteness as to time of performance and subject-matter.

Agreement provided that whatever property then stood in name of either party was separate property of such party unless otherwise stated, and that husband thereby assigned to wife one-half interest in all property to which he might then be entitled or which he might thereafter acquire by gift, inheritance, or bequest, or as beneficiary of any trust, from which one-half, one-third of such half should belong to wife in fee, but other two-thirds of such one-half interest the wife took in trust holding for her own use the rents, issues, and profits for her life only, the remainder to be held in trust for children, share and share alike, and to their heirs and assigns forever, and the other one-half of all such gifts, bequests, and notices husband should hold as his own, and out of the same pay all debts and incumbrances.

3. Appeal and error ⇨588.

Where appeal is taken pursuant to alternative method, reviewing court need not look to typewritten transcript to determine whether ground exists for reversal, where appellant fails to furnish brief of evidence relating to issue (Code Civ. Proc. § 953a).

4. Husband and wife ⇨278(1).

Evidence showing that agreement between husband and wife was drawn by competent lawyer who explained nature and legal effect to husband supported finding that husband did not enter into agreement under mistaken knowledge of his rights and legal effect of agreement.

5. Husband and wife ⇨278(1).

That there was no assurance that provision of property settlement agreement between husband and wife for maintenance of children would be carried out *held* not ground for nullifying agreement.

6. Husband and wife ⇨278(1).

In action to annul property settlement agreement between spouses, whether agreement would be recognized and given effect by courts administering trusts *held* immaterial.

7. Husband and wife ⇨278(1).

Property settlement agreement may be entered into between husband and wife.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Action by Edward Rudolph Kelly against Mary Bowen Kelly. From a judgment for defendant, plaintiff appeals.

Affirmed.

George H. Shreve and Edward F. Boyle, both of San Diego, for appellant.

John H. McCorkle and Joe L. Shell, both of San Diego, for respondent.

KNIGHT, J.

Plaintiff and defendant are husband and wife, and the parents of two minor children. Differences had arisen between them, and although they continued to reside in the same home they had severed the marital relationship. On March 30, 1928, they entered into a written property settlement agreement, and about two years later, to wit, on December 28, 1929, plaintiff brought this action to have the agreement annulled. The judgment was that he take nothing by his action, and he has appealed.

It appears that subsequent to their marriage the parties acquired several pieces of real estate, which, shortly prior to and as part of the property settlement, they divided and exchanged deeds therefor. It also appears that plaintiff's mother, who at the time of the making of said agreement, was well advanced in years and ill, was beneficiary of one or more trust estates then being administered in and pursuant to the laws of the state of Pennsylvania, and that in the event of her death the interests she possessed in said trust estates would descend to plaintiff. It was in the light of these present and future conditions that said agreement was drawn and executed. It declared first that its purpose was to settle forever the property rights of the parties; also that whatever property then stood in the name of either party was the separate property of such party, unless otherwise stated. The agreement then proceeded as follows: "Second, the party of the first part (plaintiff) hereby grants and assigns to the party of the second part a one-half interest in any and all property of any and every kind to which first party may now be entitled, or of which he may hereafter receive or become entitled to, by gift, inheritance, or bequest, or as beneficiary of any trust, of which one-half, one-third of such half shall belong to the party of the second part, in fee and in perpetuity, and to her heirs and assigns, forever, but the other two-thirds of such one-half interest, the party of the second part takes and shall take in trust, holding for her own use only for herself the rents, issues and profits for her life only, the remainder to be held by her in trust for Robert Bowen Kelly and Charles Edward Kelly, children of the parties hereto, share and share alike, and to their heirs and assigns forever. Third, the other one-half of any and all

such gifts, bequests and notices now held or hereafter received by the first party, he shall hold and take as his own, but out of the same shall pay all debts and encumbrances against the same, so that the interests herein above given to the party of the second part shall be free from such debts and encumbrances. Fourth, in case there should hereafter ever be a decree of divorce granted to either party hereto from the other, then the provisions with respect to the division of property herein above specified shall be deemed a property settlement and shall be incorporated in such decree of divorce in lieu of any and all other provisions for either division of property or alimony."

In October, 1928, some seven months after the agreement was executed, Mrs. Kelly, the defendant, instituted divorce proceedings in which she pleaded the making of said property settlement, and asked, among the other relief prayed, that said agreement, a copy of which was attached to the complaint, be made part of the decree of divorce. Answering the complaint, Kelly denied certain allegations thereof, and asked that said agreement be declared void upon the ground that it was "unconscionable" and obtained by his wife by means of threats to inform his mother of the matrimonial differences existing between himself and wife, and of certain alleged misconduct on his part. Subsequently, and before trial, Mrs. Kelly dismissed the suit for divorce, and approximately fourteen months later Kelly filed the present action to have the agreement annulled, which, as indicated, resulted in a judgment upholding the validity of the instrument.

[1, 2] The first point made on appeal is that the agreement is void for uncertainty, unintelligibility, and indefiniteness "as to the time of performance and subject matter contained therein." The specific objections made in this regard are that the agreement contains no provision for the support of the children, that it cannot "be ascertained what appellant and respondent intended to convey and receive respectively, nor can it be determined when said agreement should become effective * * * or terminate or be performed, and further that said agreement shows on its face that there was no definite meeting of the minds of the parties thereto as to the subject matter. * * *" We find no merit in any of said objections. Plaintiff cites no authority to sustain his view that the absence of a provision for the support of the children destroys the validity of a property settlement agreement between husband and wife; and even if such were the law the agreement in question conforms to that requirement because, as will be noted, under its provisions, a large share of said trust estate which will eventually descend to plaintiff was assigned to the children. Furthermore it is held gen-

erally, in divorce cases, that such agreements are not binding upon the trial court either as to the matter of the support of the children (*Lewis v. Lewis*, 174 Cal. 336, 163 P. 42) or with respect to the parties themselves (*Chadwick v. Chadwick*, 95 Cal. App. 690, 273 P. 86); and that if in the rendition of its decree the court believes the agreement to be unjust or inequitable it may reject it in whole or in part. *Moog v. Moog*, 203 Cal. 406, 264 P. 490. The remaining objections to the agreement based on the charges of uncertainty and indefiniteness are answered by the terms of the agreement. As stated, the evidence shows that the subject-matter of the settlement was plaintiff's expectancy in trust estates then being administered, and necessarily it was impossible at the time the agreement was drawn and executed to state with any degree of certainty when plaintiff would succeed to his mother's interests in said estates, or what amount or character of property he would receive therefrom. The agreement definitely fixed the proportions assigned to the respective parties, which was legally sufficient under the existing circumstances. Plaintiff has cited numerous authorities dealing generally with the element of uncertainty in contracts and agreements, but none involves a property settlement agreement such as we have here; nor do they even remotely touch the point at issue here. It is unnecessary therefore, to devote any discussion to them.

[3,4] Plaintiff's second point is that the agreement was void because, as he asserts, he "entered into same under a mistaken knowledge of law, of his rights and the legal effect of the document." In substance it was so alleged in his complaint and denied in the answer; and after taking evidence upon the issue the trial court found adversely to plaintiff's claim. As will be observed, the point now urged is in effect an attack upon the sufficiency of the evidence to support such finding. However, the appeal was taken pursuant to the alternative method provided by section 953a of the Code of Civil Procedure, and plaintiff has utterly failed to print in his brief as required by section 953c of said Code any evidence whatever relating to said issue, nor has he called attention to any part of it by transcript reference. And it has been repeatedly held that under such circumstances the reviewing courts are not called upon to look to the typewritten transcript to determine whether ground exists for reversal. *Barker Bros. v. Joos*, 36 Cal. App. 311, 171 P. 1085; *Dahlberg v. Dahlberg*, 202 Cal. 295, 260 P. 290; 2 Cal. Jur. 650, 651. Notwithstanding plaintiff's failure to comply with the law and rules of court in this respect, we have examined the record and find ample evidence to support the trial court's finding; it being shown by the evidence that the agreement was drawn by a competent lawyer, who, before

plaintiff signed the same, fully explained to him the nature and legal effect thereof.

[5-7] Lastly, plaintiff contends that "there is no guarantee or assurance that the supposed object of the parties in executing this agreement, to-wit, the provision for the care and maintenance of the minor children would be carried out or accomplished"; the argument made in this behalf being that he has no assurance that defendant will devote any of the income or principal received by her under the agreement to the support of the children, thus leaving him "wholly responsible for their support and maintenance," or leaving the children to "the mercy of any eventualities which might arise." Obviously there is no legal point involved in the above contention. Suffice it to say plaintiff had full opportunity at the time the agreement was drawn and before it was executed to safeguard any possible fears he may have entertained in this behalf, and the belief now that he may not have done so does not constitute legal ground for nullifying the agreement. Nor are we here concerned with the question of whether the agreement will be recognized and given effect by the courts of the state administering said trusts. It has been repeatedly held by the courts of this state that an agreement of the kind here presented may be entered into between husband and wife (*Chadwick v. Chadwick*, *supra*, and cases cited therein), and since there is no merit in any of the technical objections made by plaintiff against its validity the judgment of the trial court sustaining the agreement is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

129 Cal.App. 279
ATWOOD v. SHEA et al.
Civ. 8594.

District Court of Appeal, First District,
Division 1, California.
Jan. 28, 1933.

Rehearing Denied Feb. 27, 1933.

Hearing Denied by Supreme Court March 27,
1933.

1. Exchange of property ⇨8(4).

Evidence, in action to rescind agreement to exchange lot for automobile, sustained finding of no fraud by defendant in representing automobile, and procuring lot owner's signature to exchange agreement and deed.

2. Exchange of property ⇨8(4).

Difference between value of lot and automobile in exchange agreement, though circumstance in determining fraud, was insufficient in itself to establish fraud in view of general finding to contrary.

Appeal from Superior Court, San Mateo County; C. P. Vicini, Judge.

Action by Zenas Thomas Atwood against T. J. Shea and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

A. M. More and E. B. Mering, both of San Francisco, for appellant.

Vincent Hallinan and C. K. Bonestell, both of San Francisco, for respondents.

KNIGHT, J.

Appellant agreed to exchange a lot belonging to him for an automobile belonging to respondent, and after the deed to the lot had been executed and delivered to respondent, sought by this action to rescind the transaction upon the ground of fraud; it being claimed that respondent represented the automobile (a Buick) to be a 1926 model with standard gear shift, whereas it was a 1924 model and without a standard shift; also that he was inveigled into signing the exchange agreement and the deed upon the representation that the purpose of the documents was merely to allow respondent to search the title to the lot, and that he signed the documents without reading them. The trial court found against appellant on all of the foregoing issues and entered judgment accordingly in favor of respondent, from which this appeal is taken, it being contended that the evidence is insufficient to sustain the findings and that the findings do not support the judgment.

[1] We find no merit in any of the foregoing points. The findings are based on conflicting evidence and there is ample testimony to sustain them. It appears therefrom that appellant, accompanied by one Skellenger, called at respondent's office and stated that he wanted to trade a lot for an automobile; that he needed a car but was unable to buy one because he could not sell his lot. Respondent showed them a 1925 Buick sedan, which they examined, and Skellenger told appellant it was a good car. About a week later appellant again called to examine the car. At that time he was accompanied by two friends. They examined the car and told ap-

pellant it was in good shape. Respondent then informed appellant that he would not make any deal until he had seen the lot, and on the following day the parties drove out to the lot in the car, which was driven by a friend of appellant's named Rovelli, who also told appellant that the car was in good shape. According to respondent's testimony appellant wanted to close the trade at that time. However, the parties met again a day or two afterwards at the office of a Mr. Azarello, who drew the exchange agreement and the deed, which appellant signed. A few days later, after Azarello had received a report on the title to the lot, he delivered the deed to respondent; whereupon respondent forwarded to appellant the ownership slip for the automobile and requested him to take the automobile away. Instead of doing so appellant served notice of rescission. Furthermore respondent expressly denied having told appellant that the car was a 1926 model. In this regard he stated that while driving to the lot Rovelli asked him whether the car was a 1925 or 1926 model, and he replied it was a 1925. Azarello denied also having misrepresented anything concerning the nature of documents signed by appellant, stating in substance that appellant knew what he was signing. As indicated, the foregoing evidence is legally sufficient to sustain the trial court's finding on the issues of fraud.

[2] We have also carefully analyzed the findings and they show no material conflict or inconsistency, the court having found generally "that there was no fraud or misrepresentation on the part of the defendants," etc. The objections appellant makes in this regard are, in our opinion, purely technical. Appellant calls attention to certain evidence tending to show that there was much difference in value between the lot and the automobile. While this fact, if it be such, may be considered as a circumstance in determining the question of fraud, it is in itself legally insufficient to establish fraud, particularly in view of the general finding to the contrary.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

129 Cal.App. 144

CITY OF LOS ANGELES v. ABBOTT et al.
Civ. 7354.District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

I. Eminent domain ⇨265(5).

Discontinuance of condemnation proceedings compelled by injunction *held* not "abandonment" within statute, so as to entitle defendant to attorneys' fees from condemnor (Code Civ. Proc. §§ 1255, 1255a).

"Abandonment" includes the intention to abandon, and the external act by which such intention is carried into effect, neither of which was shown by discontinuance of suit compelled by issuance of injunction, since the characteristic element of "abandonment" is voluntary relinquishment; "abandonment" being the intentional relinquishment of a known right, and being synonymous with "repudiation."

[Ed. Note.—For other definitions of "Abandon; Abandonment" and "Repudiation," see Words and Phrases.]

2. Eminent domain ⇨265(5).

Under statute authorizing attorney's fees for defendant where condemnation proceeding is abandoned, and specifying manner in which implied abandonment arises, neither delay incidental to new action nor involuntary vacating of property constitutes "abandonment" (Code Civ. Proc. § 1255a).

3. Statutes ⇨212.

Court must assume that Legislature used terms "costs," "expenses," and "attorney's fees" in statute with full knowledge of existing statutes and their judicial interpretations (Code Civ. Proc. §§ 1021, 1022, 1255a).

4. Eminent domain ⇨265(3).

Defendant *held* entitled to "costs," but not attorneys' fee as part of "costs," where injunction compelled discontinuance of condemnation proceedings (Code Civ. Proc. § 1255a).

"Costs," when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee bill.

[Ed. Note.—For other definitions of "Costs," see Words and Phrases.]

5. Eminent domain ⇨265(1).

Where injunction compelled city to discontinue condemnation proceedings, motion to tax costs and strike out attorneys' fees *held* to lie (Code Civ. Proc. § 1255a).

6. Costs ⇨219.

Where improper charges in verified memorandum of costs are put in issue by affidavit,

party claiming costs has burden of proof; memorandum not being conclusive (Code Civ. Proc. § 1255a).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Condemnation proceedings by the City of Los Angeles against Sadie D. Griffith Abbott and others, including Robert L. Halperin. Last-named defendant's motion to dismiss the action was granted, plaintiff's motion to tax costs was denied, and plaintiff appeals.

Reversed, with directions.

See, also, 114 Cal. App. 180, 299 P. 807; (Cal. App.) 300 P. 854; (Cal. App.) 1 P. (2d) 538; (Cal. Sup.) 12 P. (2d) 19; (Cal. Sup.) 17 P. (2d) 993.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom and C. N. Perkins, Deputies City Atty., all of Los Angeles, for appellant.

Aubrey Devine and Hyams & Himrod, all of Los Angeles, for respondent.

CRAIG, J.

In an action in eminent domain instituted by the city of Los Angeles, a municipal corporation, wherein the respondent was, among others, named as a defendant, all proceedings and expenditures of moneys were subsequently enjoined by the decree of a coordinate court in another suit. Respondent thereafter moved to dismiss this action as though the same had been abandoned, within the purview of sections 1255 and 1255a of the Code of Civil Procedure. Said motion was granted, and he thereupon filed a "memorandum of costs and disbursements," which included an item entitled "attorneys' fees \$1,650.00." There was then filed on behalf of appellant a notice of motion to tax costs, particularly excepting to said item, together with an affidavit setting forth the facts above recited, and that all proceedings in the condemnation matter had been held null and void and that appellant, its officers, agents, and employees were restrained from approving any demand for costs or expenses incurred, or paying out any moneys in connection with said contemplated improvement. The motion to tax costs was denied, and the plaintiff appealed from the order made and entered accordingly.

It is conceded that the judgment of dismissal was in the usual form in such cases when signed by the trial court, adjudging "that the above entitled action be and the same is hereby dismissed, and it is ordered that said defendant Robert L. Halperin have judgment against the plaintiff for costs in the sum of \$——." The memorandum of costs

and disbursements consisted of the following items only:

Appearance fee		\$2.00
Verify answer	fees claimed	\$.50
" mem. of costs,	fees claimed	\$.50
Affidavit in support of		\$
Motion to dismiss	fees claimed	\$.50
Jury fees and mileage		\$
Serving process		\$
Miscellaneous items of costs, Attorneys' fees		\$1650.00
	Total	\$1653.50
Costs taxed by order of court,		\$— .00

The motion to tax costs was based upon the following four grounds: "(1) That the City of Los Angeles, plaintiff herein, is permanently restrained from spending any money in this action. (2) That the final determination of said action was had herein by the rendition of a judgment of this court restraining plaintiff from proceeding with said action. (3) That there has been no abandonment of said action on the part of said plaintiff and therefore, under section 1255a Code of Civil Procedure said defendants are not entitled to costs. (4) That the attorney fees claimed are excessive." And the notice of motion expressly based the same upon the papers and files in said action and in the injunction suit, heretofore mentioned.

While it is strenuously contended by appellant that since the trial court was not empowered to allow costs, and neither the judgment nor the memorandum of costs and disbursements discloses any allowance of costs, none should be approved upon appeal—it is insisted that the court indicated, and is supported by statutory and judicial precedent in determining by its judgment, that in any event no amount other than the items of actual expenditure should be allowed. It is argued by the respondent that the proceedings were abandoned, within the contemplation of section 1255a of the Code of Civil Procedure, and that attorneys' fees constitute "costs" as therein expressly provided to be allowed in such cases.

In this connection it is appropriate to observe that in the notice of motion to dismiss, it was stated upon such assumption that the action "has been abandoned by the plaintiff," and that the defendant would "move the court for a judgment of dismissal and for costs and attorneys' fees herein." With this memorandum of "costs and disbursements" thereafter filed, respondent's counsel averred by accompanying affidavit that to the best of his knowledge and belief "the within memorandum of costs and disbursements are true and correct and have been necessarily incurred in this cause," but from its recitals it quite apparently was but a mere formality. Other averments, to the effect that the cause was called for trial, that the witnesses were in attendance, that their mileages and fees set forth were just, and that process servers actually traveled the number of miles claimed, since the date of trial was never set, substantiate such conclusion. By its judgment

the court recited that the defendant "moved the court for a judgment of dismissal and for costs and attorneys' fees herein," but only adjudged, as previously observed, "that the said defendant Robert L. Halperin have judgment against the plaintiff for costs." The section mentioned provides as follows: "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment. * * * Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action."

That under this statute a defendant may in a proper case be awarded costs and disbursements including a reasonable attorney's fee, need not be, and is not, questioned. That he may legally claim the right to collect an arbitrary amount of compensation other than legal costs and disbursements, not allowed by the court, in a proceeding dismissed at his own instance before it has been set for trial upon any date, and which the plaintiff did not abandon by notice as required or otherwise, but was enjoined from prosecuting or financing would require an interpretation not warranted by the language of said section. By the provision quoted from its judgment of dismissal, the trial court gave judgment dismissing the action and in favor of the defendant for his costs. It appears therefrom that the defendant moved the court for an additional amount of attorneys' fees; but with apparent judicial discretion following the due consideration which must be presumed, it refrained from decreeing that the defendant "have judgment against the plaintiff for costs and disbursements including expenses and attorney fees." There is nothing before us which tends to indicate that the trial court might have been justified in concluding, nor that it did consider, any item other than actual costs as legally defined, as being warranted in law or in fact. That it did not embrace more than costs in its judgment is obvious; that it did not approve the cost bill in the form presented is likewise patent. The respondent cites no authority, nor are we aware of any, which requires or permits the interpretation contended for in his behalf, either as to abandonment of the action or costs of the action.

[1] Abandonment includes the intention to abandon, and the external act by which such intention is carried into effect. *Hough v. Brown*, 104 Mich. 109, 62 N. W. 143; *Barnett v. Dickinson*, 93 Md. 258, 48 A. 833; *Cassell v. Crothers*, 193 Pa. 359, 44 A. 446. Intention is the essence of abandonment. *Tennessee & C. R. Co. v. Taylor*, 102 Ala. 224, 14 So. 379; *Bartley v. Phillips*, 165 Pa. 325, 30 A. 842. The characteristic element of abandonment is the voluntary relinquishment, and it is in that respect distinguished from other modes by which ownership may be divested. *Commonwealth v. Koontz*, 258 Pa. 64, 101 A. 863; *Dikes v. Miller*, 24 Tex. 417; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 P. 1054. "Abandonment" is the intentional relinquishment of a known right. *Sharkey v. Candiani*, 48 Or. 112, 85 P. 219, 7 L. R. A. (N. S.) 791; *Moore v. United Elkhorn Mines*, 64 Or. 342, 127 P. 964, 130 P. 640. Abandonment has been held not shown by evidence of forfeiture, upon the ground that the latter is an enforced relinquishment, and involuntary. *Shank v. Holmes*, 15 Ariz. 229, 137 P. 871; *Blackwell, Oil & G. Co. v. Whited*, 81 Okl. 45, 196 P. 688. It has been distinguished from "loss" by the fact that a loss is involuntary, while abandonment is by intent or design. *Ferguson v. Ray*, 44 Or. 557, 77 P. 600, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1. It is synonymous with "repudiation." *Parker Land & Imp. Co. v. Ayres*, 43 Ind. App. 513, 87 N. E. 1062. Neither the intention, nor the statutory external act evidencing an intention, to voluntarily relinquish the appellant's known right to take the property of respondent for a public use, is shown in this case. Hence we must hold that the compulsory discontinuance of the proceedings by injunction did not constitute an abandonment thereof within the meaning of section 1255a of the Code of Civil Procedure.

Again, under a statute conferring the right in condemnation proceedings to enter upon and appropriate land only upon payment of compensation and damages awarded, the Supreme Court of Illinois held that a failure to pay pending an appeal by the defendants did not constitute an abandonment, although payment within a time specified by the Legislature was mandatory and otherwise would be fatal. As there said: "The effect of the appeal was to stay all proceedings in execution of the judgment and the running of the time within which payment of the compensation was to be made. *Village of Prairie du Rocher v. Milling Co.*, 251 Ill. 341, 96 N. E. 249." *City of Winchester v. Ring*, 315 Ill. 358, 146 N. E. 541; *Forest Preserve Dist. v. Kean*, 303 Ill. 293, 135 N. E. 415. And under a Kansas statute requiring a condemnor to evidence its intention to abandon proceedings by a resolution, it was decided that even a notice of dismissal of the suit did not in the absence of such resolution amount to legal abandonment of the project. "Appellants ar-

gue that the notice previously mentioned, filed by the attorney for the commission, was an abandonment of the condemnation proceedings within the meaning of this statute, and that all steps taken by any of the parties in the proceedings subsequent thereto are void and of no effect, for the reason that by the filing of such notice the condemnation proceedings terminated, and that the court thereafter had no jurisdiction of the subject-matter. * * * It is sufficient to point out that our statute, here in question, provides that the abandonment of the condemnation be by resolution adopted by the commission. No such resolution was adopted. The trial court correctly held that there had been no abandonment of condemnation proceedings by the commission." *State v. Nelson*, 126 Kan. 1, 266 P. 107, 109.

[2] Especially has it been long recognized and established that "where one is ousted from the possession of property, he can not be charged with abandonment, nor can he be where he is prevented from using or occupying by injunction or other judicial order, as the relinquishment is not voluntary in either case." 1 Ency. of Ev. p. 3. In the instant case the plaintiff proceeded by its condemnation proceedings and resistance of the injunction to evidence a strong intention to retain, occupy, and use the property, as distinguished from conduct authorizing an implication to the contrary. Had the plaintiff made its written request to the clerk, and caused the entry, and subsequently notified the defendants, of its dismissal of the action, they might have been legally justified in proceeding as provided in section 1255a of the Code of Civil Procedure; since the effect of its action would be to apprise the defendants of its determination to abandon the action. *Silver Lake Power & Irr. Co. v. City of Los Angeles*, 32 Cal. App. 123, 162 P. 432. Since the converse was strenuously manifested against the injunction suit, restraining condemnation, against the defendants' motion to dismiss the action, and by the plaintiff's appeals, it seems clear that we have before us anything but an abandonment in the light of any authority which we have been able to find. In the one instance there was an express withdrawal. In the other a most energetic resistance to enforce relinquishment. On the point in question, to wit, whether or not there may be an abandonment by the condemnor for the purposes of this particular section, it may be said that two of the decisions of our own courts bear upon the subject. *Silver Lake Power & Irr. Co. v. City of Los Angeles*, supra; *City of Los Angeles v. Hannon*, 79 Cal. App. 669, 251 P. 247, 249. It may be well to observe that if it be conceded that these authorities are not in harmony, we must accept the latter as of superior weight since a hearing was denied by the Supreme Court. Both cases construe section 1255a of the Code of Civil Procedure. The *Silver Lake Case* had to do with the mat-

ter of abandonment through express notice, and appears to hold that where express notice was used by the condemnor to dismiss the action, it would be regarded as coming under that section even though the procedure therein required was not strictly followed. The Hannon Case had to do with the matter of abandonment by implication, and determined that no acts or facts other than those included within the provision "failure to comply with section 1251 of this Code" can amount to an implied abandonment authorizing defendants to invoke the provisions of section 1255a. It is not contended that the appellant herein was chargeable with such failure. Since the Legislature saw fit to make express provision for the manner in which an implied abandonment might arise, under the maxim *expressio unius est exclusio alterius*, neither the delay incidental to a new action, nor an involuntary vacating of the property, can be said to have constituted an abandonment. *City of Los Angeles v. Hannon*, supra.

[3] We must assume that the terms "costs," "expenses," and "attorney fees," were embraced within the section in controversy with full knowledge by the Legislature of existing statutes and their judicial interpretations. They are distinguished by sections 1021 and 1022 of the Code of Civil Procedure, by the following unmistakable declarations: "Sec. 1021. The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided." Sec. 1022. "Except as otherwise expressly provided in this code, costs are allowed of course to the plaintiff, upon a judgment in his favor," in the cases enumerated. In construing section 1195 of the Code of Civil Procedure with relation to mechanics' liens the Supreme Court has said: "It needs but a cursory examination of the foregoing provision of the statute to determine that the attorney's fee referred to is not considered a part of the costs, but as a matter separate and distinct therefrom." *Schallert-Ganahl Lumber Co. v. Neal*, 94 Cal. 192, 29 P. 622, 623. To the same effect are *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 P. 325, and *McIntyre v. Trautner*, 78 Cal. 449, 21 P. 15. More specifically, in *City of Los Angeles v. Vickers*, 81 Cal. App. 737, 254 P. 687, upon a precise question it was held upon a review of numerous authorities:

"And it has been said in a condemnation case: 'The word "costs," when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee-bill.' *City of St. Louis v. Meintz*, 107 Mo. 611, 18 S. W. 30. * * *

"In a condemnation case which came before our own courts a defendant included in

his cost bill items of the counsel fees paid by him in conducting his defense. On a motion to tax the trial court struck out the items in question, and on appeal the very ground was taken which is urged by respondent here. The court, according to the syllabus in the report, which is a fair statement of the effect of a portion of the opinion, decided:

"The 'just compensation' to which the owner of property is entitled under section 14 of article 1 of the Constitution, in proceedings in eminent domain, does not include reasonable disbursements made by him for attorneys at the trial; it has reference to the value of the property taken and the damage to property not taken, and nothing more."

"The court said in the opinion, also:

"It has frequently been held that costs are recoverable only by virtue of some statute.' *Pacific Gas & E. Co. v. Chubb*, 24 Cal. App. 265, 141 P. 36.

"This case appears to be exactly in point upon the question which respondent makes as to his rights under the Constitution. It is true that the decision relates to attorney's fees as costs, but expenditures made to lawyers for the defense of a condemnation suit and fees paid to experts for their testimony stand in the same category in so far as it may be contended that payment of the latter reduces, in effect, the amount to be paid to a defendant under decree of condemnation."

[4-6] So, in the instant case, while the costs, as repeatedly defined, were proper charges, the motion to tax them and to strike out illegal items should have been entertained. Their insertion by the clerk otherwise than in compliance with the statute and a valid judgment was ineffectual. *Kaiser v. Barron*, 153 Cal. 474, 95 P. 879; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 47 P. 42, 56 Am. St. Rep. 87. Objection by respondent that the verified memorandum is not subject to question is in this case untenable. Where improper charges are put in issue by affidavit, the burden of proof is upon the party claiming them. *Whitaker v. Moran*, 23 Cal. App. 758, 139 P. 901; *Faulkner v. Hendy*, 79 Cal. 265, 21 P. 754; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 P. 536; *Senior v. Anderson*, 130 Cal. 290, 62 P. 563.

In a recent decision of our Supreme Court, in *City of Los Angeles v. Abbott et al.*, 17 P.(2d) 993, and since the preparation of the foregoing portions of this opinion, it has been held that under sections 1251, 1255, and 1255a of the Code of Civil Procedure, providing for the allowance of costs and attorneys' fees in eminent domain proceedings, a defendant is not entitled to recover such fees where the condemnor is prohibited from prosecuting the action by an injunction and it appears that the condemnor has conclusively shown that

it was prosecuting the action in good faith and only desisted because of the injunction.

The order is reversed, and the court below is directed to strike from the cost bill improper charges in accordance with the foregoing decision; neither party to recover costs of this appeal. Lloyd v. Brewster, 5 Paige (N. Y.) 87; Chism v. Smith (Sup.) 130 N. Y. S. 881.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 759

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants and Respondents.

Civ. 7337.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appeals.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott, 18 P.(2d) 785, decided by this court, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 760

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Westlake Park Investment Company (a Corporation), Defendant and Respondent.

Civ. 7338.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged by the plaintiff in City of Los Angeles v. Abbott, 18 P.(2d) 785, decided by this court, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 761

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; George McAdams, Defendant and Respondent.

Civ. 7339.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 762

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Fred Murch et al., Defendants and Respondents.

Civ. 7340.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged by the plaintiff in City of Los Angeles v. Abbott et al. (Cal. App.) 18 P.(2d) 785, decided heretofore, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 763

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; W. D. Morgan et al., Defendants and Respondents.

Civ. 7341.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott,

(Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 764

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Robert C. Solomon et al., Defendants and Respondents.

Civ. 7342.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott, (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 765

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; R. C. Solomon & Co. (a Corporation), Defendant and Respondent.

Civ. 7343.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 767

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; A. R. Thompson et al., Defendants and Respondents.

Civ. 7345.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod and William L. Kuehn, all of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott et al. (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 766

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Prudential Life Insurance Company of America (a Corporation) et al., Defendants and Respondents.

Civ. 7344.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod and William L. Kuehn, all of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

129 Cal.App. 768

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Louise C. French, Defendant and Respondent.

Civ. 7346.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod and William L. Kuehn, all of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in *City of Los Angeles v. Abbott* (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 769

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; W. E. Lewis et al., Defendants and Respondents.

Civ. 7347.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in *City of Los Angeles v. Abbott* (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 770

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; W. E. Lewis, Defendant and Respondent.

Civ. 7348.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in *City of Los Angeles v. Abbott* (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 771

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; George W. Prior et al., Defendants and Respondents.

Civ. 7349.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: **WORKS, P. J.; STEPHENS, J.**

129 Cal.App. 772

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. **Sadie D. Griffith ABBOTT et al.**, Defendants; **Willis O. Lewis et al.**, Defendants and Respondents.
Civ. 7350.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: **WORKS, P. J.; STEPHENS, J.**

129 Cal.App. 773

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. **Sadie D. Griffith ABBOTT et al.**, Defendants; **Olivia Duer**, Defendant and Respondent.

Civ. 7351.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

18 P.(2d)—50½

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod and William L. Kuehn, all of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: **WORKS, P. J.; STEPHENS, J.**

129 Cal.App. 774

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. **Sadie D. Griffith ABBOTT et al.**, Defendants; **Phillip A. Seewagen and Earl N. Wilson**, Defendants and Respondents.

Civ. 7352.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: **WORKS, P. J.; STEPHENS, J.**

129 Cal.App. 775

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Herbert D. Updike et al., Defendants and Respondents.

Civ. 7353.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in *City of Los Angeles v. Abbott* (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 776

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; L. Escallier, Defendant and Respondent.

Civ. 7363.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Andreani, Haines, Bisher & Carrey, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in *City of Los Angeles v. Abbott* (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 777

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Gussie Levy, Defendant and Respondent.

Civ. 7364.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Andreani, Haines, Bisher & Carrey, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in *City of Los Angeles v. Abbott* (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 778

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Louise B. Prudhon, Defendant and Respondent.

Civ. 7365.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Harold E. Prudhon, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 779

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Lena Granas, Defendant and Respondent.

Civ. 7366.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Harold E. Prudhon, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 780

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Louis Klener et al., Defendants and Respondents.

Civ. 7367.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

CAL.REP.17-18 P.2d-39

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Charles Schusterman, of Los Angeles, for respondents.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 781

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Minnie Cohen, Defendant and Respondent.

Civ. 7368.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Charles Schusterman, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 782

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Delbert C. Kemp, Defendant and Respondent.

Civ. 7372.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

Thomas T. Robinson, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 783

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Benevolent Realty Holding Company, Defendant and Respondent.

Civ. 7539.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Prior opinion 1 P.(2d) 541.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur

Nordstrom and C. N. Perkins, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 758

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Lankershim Estate (a Corporation), Defendant and Respondent.

Civ. 7541.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Prior opinion 1 P.(2d) 541.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 784

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Richard R. Freeman, Defendant and Respondent.
Civ. 7543.

District Court of Appeal, Second District,
Division 2, California.
Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Prior opinion 1 P.(2d) 542.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 785

CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Dora Haynes, Defendant and Respondent.
Civ. 7545.

District Court of Appeal, Second District,
Division 2, California.
Jan. 24, 1933.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Prior opinion 1 P.(2d) 542.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, J.

A motion to tax costs after dismissal of condemnation proceedings having been denied, the plaintiff appealed.

The issues here presented are identical with those urged in City of Los Angeles v. Abbott et al. (Cal. App.) 18 P.(2d) 785, heretofore decided, and are governed thereby.

The order is reversed, with directions in accordance with the foregoing decision.

We concur: WORKS, P. J.; STEPHENS, J.

217 Cal. 377

BELKNAP v. MITCHELL et al.

Sac. 4634.

Supreme Court of California.

Feb. 6, 1933.

1. Animals ⇐26(2).

Landlord *held* not to have agister's lien on tenant's sheep for rental, where lease did not reserve right of pasturage (Civ. Code, § 819).

2. Animals ⇐26(4).

Landlord, intervening in action to foreclose mortgage on tenant's sheep, *held* not entitled to agister's lien on sheep, where landlord was not in possession of sheep when action was commenced.

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by J. E. Belknap against William M. Mitchell, in which W. P. Mitchell and others interposed a cross-complaint. From the judgment for plaintiff, defendant and cross-complainants appeal.

Affirmed.

J. T. Sharp and A. K. Wylie, both of Alturas, for appellants.

Oscar Gibbons, of Alturas, for respondent.

IRA F. THOMPSON, J.

This is an appeal from a judgment in favor of plaintiff establishing his right to the possession of approximately 700 sheep and denying the same to the defendants, and determining that no one of the defendants, W. P. Mitchell, E. C. Robinson, and Jerve Kresge, had a lien thereon.

The facts necessary to understand the claims advanced by appellants for a reversal of the judgment may be briefly stated as follows: On November 13, 1928, the appellant W. M. Mitchell executed a chattel mortgage upon 1,552 head of ewes and 15 rams, together with their increase and wool, to secure his promissory note of \$10,900 due May 13, 1929, with interest at 8 per cent. per annum. At maturity there remained unpaid on the note \$7,134.14 principal. On December 12, 1929, respondent commenced this action to obtain possession for the purpose of realizing on the security to satisfy the last-named amount, together with interest from March 13, 1929. The appellant W. P. Mitchell, the father of W. M. Mitchell, interposed a cross-complaint in which he asserted a claim of lien for herding the mortgaged sheep in the sum of \$4,160, and claimed to be in possession thereof along with appellant Kresge. Kresge also filed a cross-complaint in which he alleged a lien for

pasturage and feed of the sheep in the sum of \$750 and joint possession with appellant W. P. Mitchell. The appellant E. C. Robinson also filed a cross-complaint in which he alleged he had sold hay to W. M. Mitchell for feeding the sheep of the value of \$343 and pasturage worth \$33.73, making a total of \$376.73, supplied by him to preserve and keep the sheep. He did not, however, allege possession, but set out that one T. A. Walls, as the agent and representative of respondent, promised him that he would pay him the amount of \$376.73 out of money to be realized from the sale of lambs.

Less difficulty will be had in understanding the claim of each of the appellants if we deal with them separately from this point. We will, therefore, turn first to the contention of the appellant W. P. Mitchell. In the brief it is assumed the court found that W. P. Mitchell was a partner of W. M. Mitchell, and considerable space is devoted therein to an argument that the evidence is insufficient to prove such a partnership. The finding is as follows: "That it is not true that the said W. P. Mitchell properly cared for said sheep, or any of said sheep, after the 13th day of November, 1928, and it is not true that his wages as herder thereof was worth the sum of \$100 per month, or any other amount; and in this connection, the court finds that it is true that immediately prior to the 13th day of November, 1928, and for the purpose of securing said loan to said W. M. Mitchell herein, that the said W. P. Mitchell told plaintiff that there was no charge against any of said sheep on account of his herding thereof, and that there would be no charge for herding in the future." In addition, it was found that between the time of the execution of the mortgage and the trial there were only about 700 head of sheep remaining; the others having been lost or disposed of. The court made no finding with respect to the possession of the appellant W. P. Mitchell, although there is one to the effect that Kresge was not in possession. We have examined the transcript and find sufficient in the record to justify the quoted finding, in addition to which it may be noted that appellant W. P. Mitchell does not contend it is unsupported. From which it follows that, in so far as the claim of W. P. Mitchell is concerned, the appeal is without merit.

[1, 2] To state the basis for the claim of lien of the appellant Jerve Kresge is to demonstrate that it is groundless. He had leased to W. M. Mitchell about 1,700 acres of land at an annual rental of \$750. He seeks to establish an agistor's lien to cover the unpaid rental for the year 1929. When Kresge leased the land to Mitchell without reservation, the right of pasturage passed to the lessee. Section 819, Civ. Code; Harrelson v. Miller & Lux, Inc., 182 Cal. 408, 188 P. 800. It needs no argu-

ment to demonstrate that a lessor is not an agistor. It is equally clear that the court's finding that Kresge was not in possession of the sheep when the action was commenced by respondent, which finding is not attacked, is fatal to appellant's contention.

Finally, with respect to the claim of appellant E. C. Robinson, it is sufficient to say that the court found that T. A. Walls did not promise Robinson to pay the sum claimed, and, further, that Walls had no authority, express or implied, to make such a promise.

Judgment affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

217 Cal. 394

**FIRST NAT. BANK OF PASADENA v.
SMITH et al.
L. A. 13333.**

Supreme Court of California.
Feb. 9, 1933.

1. Fraudulent conveyances *§*298(1).

Evidence, in action to charge realty with judgment lien, sustained finding judgment debtor's conveyance of property for his support when his liability as guarantor had become fixed was fraudulent as to judgment creditors.

2. Fraudulent conveyances *§*80.

Executory agreement for future support is not sufficient consideration as against existing creditor thereafter reducing claim to judgment.

3. Fraudulent conveyances *§*301(1).

Agreement for judgment debtor's support covering property presently owned and what debtor might thereafter acquire *held* sufficient notice to justify finding of grantees' knowledge of debtor's fraudulent intent.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the First National Bank of Pasadena against Thomas M. Smith and others and Donald C. Barbee and Ella Croft Barbee. From a judgment for plaintiff, defendants Donald C. Barbee and Ella Croft Barbee appeal.

Affirmed.

Fred W. Morrison, of Los Angeles, for appellants.

Addison B. Ritchey, of Pasadena, for respondent.

PRESTON, J.

Plaintiff, a judgment creditor of Thomas M. Smith, after return of execution nulla bona on its judgment, brought this action to impeach certain transfers of real property in Los Angeles county, made by the judgment debtor to defendant Ella Croft Barbee, who took title for the benefit of the community existing between herself and her husband, defendant Donald C. Barbee, and to charge said property and the proceeds thereof with payment of its claim, which amounted in the aggregate to \$8,662.65. Said Thomas M. Smith, though named, was not served as a party defendant in the action. Issue was joined and a trial had which resulted in findings and judgment for plaintiff, declaring that the conveyances referred to were made with intent to hinder, delay, and defraud plaintiff and in contemplation of insolvency and that they were not only made without consideration, but defendants, and each of them, participated in the transaction knowingly and for the purpose of aiding said Smith in the carrying out of his unlawful intent.

[1, 2] The evidence furnishes ample support for the findings and judgment. About 1926, upon a financial statement to plaintiff showing some ninety odd thousand dollars in assets, Smith was accepted by it as a guarantor of an obligation to it of about \$7,000. In December, 1928, after the liability on said obligation as against Smith had become a fixed one, he conveyed everything he had in the way of real and personal property to the defendant Ella Croft Barbee, reserving only certain corporate stocks, which at that time had little, if any, value. Defendants based their sole defense to this action upon the claim that these conveyances were made in consideration of their promise and pledge to provide for the support and maintenance of Smith during the remainder of his natural life, he being at that time about seventy-eight years of age. But there is also evidence that even this promise was not the consideration for the transfer for at least one witness testified that the defendant Ella Croft Barbee had stated to him that the property of Smith had been deeded to her for its better management by her for the benefit of Smith. Even if this were not the case, an executory agreement for future support is not a sufficient consideration as against an existing creditor who thereafter reduces his claim to judgment. *Baxter v. Baxter*, 19 Cal. App. 238, 125 P. 359; *Potts v. Mehrmann*, 50 Cal. App. 622, 195 P. 941.

[3] Defendants made no claim at the trial for the offset of the value of the support that had actually been furnished to Smith subsequent to the making of the agreement and prior to trial of this action. Moreover, there

will be property left belonging to Smith in their hands after satisfying the demands of plaintiff. The further fact is that the written agreement for the support of Smith by defendants declares on its face that he is about to divest himself not only of all property then owned by him, but that it is to cover as well all property he might thereafter acquire. This statement of itself would be sufficient notice to justify a finding of knowledge on the part of defendants of Smith's fraudulent intent in the matter. It has been wisely said that under our system of jurisprudence the debtor must be just before he can be generous.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

plaintiffs. *Liebelt v. Carney*, 213 Cal. 250, 2 P.(2d) 144, 78 A. L. R. 405. Moreover as to the larger of the two notes defendants expressly certified in writing to plaintiffs that no usury was exacted. Still persisting, appellants urge that the smaller note was dated in 1922, at which time under the law the presence of a mortgage rendered the note it secured nonnegotiable. If this were true, it avails appellants nothing as the note was extended and republished after the law was amended and prior to the purchase by respondents.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

217 Cal. 399

CONNON et ux. v. GOEBEL et al.
L. A. 13184.

Supreme Court of California.
Feb. 10, 1933.

Bills and notes ⇨376.

Usury not appearing on face of negotiable notes held no defense against innocent purchaser for value before maturity.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by John M. Connon and wife against Henry Oscar Goebel and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

W. L. Mason, of San Pedro, and Fogel & Beman and Shallenberger & Twombly, all of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondents.

PRESTON, J.

Action by innocent purchaser for value before maturity of two negotiable promissory notes each secured by a separate mortgage upon a single tract of land in Los Angeles county. The usual decree of foreclosure and sale was entered. Defendants have appealed. The defense is usury at the inception of both transactions. The court found as a fact that usury was present. But this fact is not disclosed upon the face of the notes. The purchase for value before maturity without notice renders the plea of no avail as against

217 Cal. 380

ECKSTRAND v. WILSHUSEN.
Sac. 4604.

Supreme Court of California.
Feb. 6, 1933.

1. Venue ⇨4.

Whether action is local or transitory depends on character thereof as disclosed by complaint and character of judgment permissible on default (Const. art. 6, § 5; Code Civ. Proc. § 392, subd. 1).

2. Venue ⇨16½.

When local and transitory actions are joined in same complaint, action is regarded as transitory as respects defendant's right to trial in county of her residence (Const. art. 6, § 5; Code Civ. Proc. § 392, subd. 1).

3. Venue ⇨4.

Ambiguities in complaint must be resolved against pleader and in favor of defendant's right to trial in county of his residence in determining whether action is local or transitory (Const. art. 6, § 5; Code Civ. Proc. § 392, subd. 1).

4. Appeal and error ⇨863.
Venue ⇨72.

Questions as to legal sufficiency of complaint to accomplish purpose do not properly arise on motion to change place of trial or appeal from order denying it.

5. Venue ⇨5(4).

Action to cancel deed and compel reconveyance or reversion of title to plaintiff held local, so as to preclude change of place of trial from county in which realty was situated to that of defendant's residence (Const. art. 6, § 5; Code Civ. Proc. § 392, subd. 1).

6. Venue $\Rightarrow$ 16½.

Matters forming subject of personal action cannot be joined in complaint with matters forming subject of local action so as to deprive defendant of right to trial in county of her residence (Const. art. 6, § 5; Code Civ. Proc. § 392, subd. 1).

7. Venue $\Rightarrow$ 16½.

Prayer for general relief in complaint seeking cancellation of deed and reconveyance or reversion of title to plaintiff did not deprive defendant of right to trial in county of her residence as joining matters forming subject of personal action (Const. art. 6, § 5; Code Civ. Proc. § 392, subd. 1).

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Mary E. Eckstrand against Mollie Wilschusen. From an order denying defendant's motion to change the place of trial, she appeals.

Affirmed.

Cushing & Cushing, of San Francisco, Mahan & Mahan, of Eureka, and Everett S. Layman, of San Francisco, for appellant.

J. Logan Beamer, of Eureka, for respondent.

SHENK, J.

This is an appeal by the defendant from an order denying her motion for a change of place of trial.

The action was commenced in the county of Humboldt. In due time the defendant appeared, filed a demurrer, and moved to transfer the cause to the city and county of San Francisco on the ground that she was a resident of said city and county. The motion was denied. The question is whether the action on the record presented is local or transitory.

[1-3] It is conceded that the real property, described in the complaint herein, is situated in Humboldt county, and that the residence of the defendant is in the city and county of San Francisco. In order to determine whether the action is local or transitory, it is necessary to ascertain the true character of the action as disclosed by the complaint, and the character of the judgment which might be rendered upon a default thereto. Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 P. 120; McFarland v. Martin, 144 Cal. 771, 78 P. 239; 25 Cal. Jur. p. 855. When local and transitory actions are joined in the same complaint, the action is regarded as transitory so far as the right of the defendant to the place of trial is concerned, and any ambiguities must be resolved

against the pleader and in favor of the defendant's right. *Sheeley v. Jones*, 192 Cal. 256, 219 P. 744; 25 Cal. Jur. p. 858.

[4, 5] In substance the complaint alleges: That in 1920 the plaintiff executed a deed purporting to convey to the defendant certain lands in Humboldt county; that at the time of its execution it was agreed in writing between the plaintiff and the defendant that in consideration of the execution of the deed the defendant would support the plaintiff during the remainder of her natural life; and that upon the plaintiff's death the defendant would make certain disposition of the property; that, when the deed was executed and delivered, it was agreed that the defendant would not record the deed prior to the death of the plaintiff; that, since the execution and delivery of said deed, the defendant has wholly failed to support the plaintiff, and that the defendant, contrary to her agreement, recorded the deed; that prior to and at the time of the execution of said deed the defendant falsely and fraudulently represented to the plaintiff that, if the plaintiff would execute and deliver said deed to the defendant, the latter would support and maintain the plaintiff during the remainder of her natural life, and would not record said deed until after the plaintiff's death; that the plaintiff believed and relied upon said false and fraudulent representations and promises, and but for the same would not have executed and delivered the deed. The plaintiff prayed that said deed be "declared null and void and of no effect, and that the title to the lands and premises therein mentioned revert to the plaintiff as her estate in fee simple"; and for costs and general relief.

From an examination of the complaint we are satisfied that the substantial nature of the action (see *State v. Royal Consolidated Min. Co.*, 187 Cal. 343, 351, 202 P. 133) is to cancel a deed on the ground of fraud and to compel a reconveyance to or a reverting of the title in the plaintiff, and that such would be the only relief which could have been granted if the defendant had defaulted. Questions as to the legal sufficiency of the complaint to accomplish the purpose intended do not properly arise on the motion (*Lefurgey v. Prentice*, 36 Cal. App. 338, 171 P. 1080), or on this appeal. Those questions are for the trial court to determine. It is enough here to say that the action is local as contemplated by section 5 of article 6 of the Constitution and subdivision 1 of section 392 of the Code of Civil Procedure.

[6-7] It is insisted by the defendant that there are joined in the complaint matters which form the subject of a personal action; that it is the rule that such matters may not be included with matters which form the

subject of a local action and deprive the defendant of the right to have the case tried in the county in which she resides, relying on *Booker v. Aitken*, 140 Cal. 471, 74 P. 11, and other cases to like effect. The rule is as stated, but we cannot agree that it is applicable to this case. The principal basis for making the point is the prayer for general relief. But under the allegations of the complaint, and in view of the particular relief sought, we cannot give the prayer for general relief the significance sought to be accorded to it by the defendant. *McFarland v. Martin*, 144 Cal. 771, 78 P. 239.

The order is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

217 Cal. 338

**MARSH et al. v. INDUSTRIAL ACCIDENT
COMMISSION OF CALIFORNIA**
et al.

S. F. 14755.

Supreme Court of California.

Jan. 31, 1933.

1. Master and servant ☞385(1).

In awarding compensation, test is whether employment has produced incapacity causing loss of earning power and to be compensable disability need not be limited to claimant's incapacity to pursue ordinary occupation (St. 1917, p. 831, as amended).

Workmen's Compensation Act (St. 1917, p. 831, as amended) does not award compensation for mere pain or physical impairment unless it is of such character as to raise presumption of incapacity to earn.

2. Master and servant ☞385(1).

"Injury," within Compensation Act, connotes compensable injury and is correlated to incapacity or disability justifying compensatory award (St. 1917, p. 831, as amended).

"Injury" and "compensable disability" are thus more nearly synonymous expressions than are "date of injury" and "date of accident."

[Ed. Note.—For other definitions of "Injury," see Words and Phrases.]

3. Master and servant ☞385(1).

In case of latent disease such as pneumoconiosis, "injury" for compensation purposes dates from time when diseased condition culminates in incapacity for work (St. 1917, p. 841, § 11; p. 877, § 69).

Date of injury is time when accumulated effects culminate in disability traceable to latent disease as primary cause, and by exercise of reasonable care and diligence it is discoverable and apparent that compensable injury was sustained in performance of duties of employment.

4. Master and servant ☞373.

To justify compensation based on occupational disease, unbroken causal connection must exist between injury and employment, and if such connection exists, all physical consequences flowing from disease may be considered in determining merits of claim (St. 1917, p. 831, as amended).

The connection must be such as to show that the disease or injury was proximately caused by the employment or the conditions of work; and when such unbroken chain of causation is found to exist, then all physical consequences flowing from the disease or injury are proper elements for consideration in determining the merits of a claim for compensation or death benefits.

5. Master and servant ☞398.

Claim for death benefits filed over one year after employee's death held too late under mandatory statute (St. 1917, p. 841, § 11 (b) (2)).

In Bank.

Certiorari to Industrial Accident Commission.

Three separate proceedings under the Workmen's Compensation Act, one by Irene Marsh for the death of Daniel Birch Marsh, her husband, claimant, another by Harry Lange, claimant, and the third by Myrtle Woods for the death of Jack C. Woods, her husband, claimant, all opposed by the Spicky Polish Corporation, employer, whose insurance carrier was the State Compensation Insurance Fund. The Industrial Accident Commission having refused an award in each case, the claimants joined in applying to the Court of Appeal for a single writ of review, and at the request of the justices of the Court of Appeal the causes were transferred to the Supreme Court for determination.

Award in the first two cases annulled, and in the last case order denying relief affirmed.

Winston C. Black, of San Francisco, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

PRESTON, J.

In these causes a single writ of review was issued by the District Court of Appeal, First District, Division 1. The regular justices of this division, Mr. Justice Knight and Mr. Jus-

tice Cashin, sitting with Mr. Justice pro tem. Johnson, gave the causes most careful consideration which included extended original research. The justices reached a tentative conclusion as to the proper rule of law to be declared in such cases and to that end Mr. Justice pro tem. Johnson prepared an exhaustive opinion wherein he promulgated this rule. The justices then found that their conclusions were at variance with other opinions of the District Court of Appeal in similar cases, to wit: *Kauffman v. I. A. C.*, 37 Cal. App. 500, 174 P. 690; *Blanchard v. I. A. C.*, 68 Cal. App. 65, 228 P. 359; and *Associated Indemnity Cor. v. I. A. C.* (Cal. App.) 12 P. (2d) 1075. It is also to be noted that the cited cases are not altogether in harmony with each other. Therefore, for reasons of public policy and at the request of said justices, the above causes were transferred to this court for determination. After due consideration thereof, we have adopted the rule of law declared in the above-mentioned tentative opinion and by so doing we have modified the doctrine of the cited cases so far as it is out of harmony with this pronouncement. We are pleased to adopt practically the entire opinion prepared by Mr. Justice pro tem. Johnson as the foundation for our conclusion herein. It is as follows:

"The petitioners in this proceeding presented to the Industrial Accident Commission their several applications for compensation benefits under the Workmen's Compensation Act (St. 1917, p. 831, as amended); and the applications having all been denied after due hearings, wherein there arose questions of law and of fact common to all parties, the petitioners joined in applying to this court for a review of the orders by which they deem themselves aggrieved. The petitioners Irene Marsh and Myrtle Woods are applicants for death benefits by reason of the deaths of their respective husbands, Daniel Birch Marsh and Jack C. Woods, while the petitioner Harry Lange applied for disability compensation in his own behalf.

"Marsh, Lange and Woods had all been employed by the Spicky Polish Corporation, whose insurance carrier was the State Compensation Insurance Fund. The Spicky Polish Corporation is engaged in business in San Francisco in the manufacture of a silica powder used for cleaning and polishing purposes. From the evidence it appears that, by reason of conditions incident to their employment, the three men named became affected with an occupational disease, such as is frequently contracted by miners working in tunnels, and which is medically known as pneumoconiosis silicosis, or more simply as pneumoconiosis silicosis, a term denoting a disease of the lungs due to silica dust, and sometimes called merely silicosis. Marsh worked in the plant from December 13, 1926, to February 13,

1928, and died on February 14, 1930. In the case of Lange there was an interruption in his employment, his service which began on February 11, 1927, having continued to November 15, 1927, and then after an interval having been resumed from April 1, 1928, to June 8, 1928. Woods was employed from June, 1928, to August 3, 1929, and died on August 10, 1929. The applications of all three applicants were filed on October 20, 1930.

"The orders denying compensation and death benefits were based upon the ground that each of the applications was barred by lapse of time under the provisions of the Workmen's Compensation Act; and it is for the determination of this question that the writ of review was issued in this proceeding.

"An occupational disease is classed not as an accident, but as an injury; and under section 11 of the act (St. 1917, p. 841) proceedings in such cases for collection of disability payments must be begun within six months from the date of the injury; and for collection of death benefits within one year from the date of death, subject to the exception, among others, that the right to such benefits is barred unless death ensued within one year from the date of the injury. As will be seen later, this exception becomes pertinent in the Marsh case, Marsh having died on February 14, 1930, and the proceeding by the widow having been instituted on October 20, 1930, and hence earlier than one year after the death. As is said in *Textile Leather Corp. v. Great American Ind. Co.*, 108 N. J. Law, 121, 156 A. 840: 'It is a well-known fact that industrial diseases are gradual in development—the first and early steps are not always perceptible. The rate of progress may vary. Sometimes a patient makes a complete recovery; sometimes it is only an apparent one. Sometimes the disease is quiescent and latent; sometimes the fatal course is swift. Medical science cannot always detect and describe the progress of the disease. Employees exposed to occupational diseases frequently work for different employers. It is unthinkable that the legislature should have contemplated that in such instances the recovery of compensation should be defeated. The legislature has properly assumed a benevolent care for workmen. The Compensation Act has proved of inestimable benefit not only to employer and employee, but also to the state generally. The legislature must have intended that compensation should be determined, subject to procedural limitations, when the disability or death occurred, and at no other time. Otherwise, the whole plan would prove ineffective.' Accordingly, when an occupational disease is of a latent and progressive character, and the timeliness of an application for compensation benefits is brought into question, it is essential that the nature of the

employment and the operative conditions should be understood as well as the effects upon the individual exposed.

"In the manufacture of silica powder for commercial purposes by the Spicky Polish Corporation, silica rock brought from the quarry to the company's plant is there ground by mechanical processes into a very fine powder, and then deposited in bins, part being sacked and sold in bulk, and part used on the premises in combination with soap in the preparation of the polish. By reason of these operations, the air is constantly thick with minute particles of silica dust, and during the employment of the men in question the factory was not equipped with devices to carry off the dust. Marsh, Lange, and Woods were all engaged about the grinding machines and took part also in sacking the product. As a result they all contracted a form of disease of the lungs known as pneumoconiosis silicosis, but the real character of the ailment from which they had suffered was not understood until about a month before the applications of these petitioners were filed.

"It is not the mere inhalation of the dust that causes the pneumoconiosis. A brief explanation of the characteristics of pneumoconiosis is contained in Sullivan's Case, 265 Mass. 497, 164 N. E. 457, 62 A. L. R. 1458, and in medical studies made of late years the process of development of the disease is described with particularity. In general terms this process may be stated in an untechnical way as follows: The fine particles of dust, when inhaled, lodge on the moist surface of the interior of the lungs. Some are swept out with the normal movement of mucus to the exterior; but many make their way through the lining membrane of the air spaces into surrounding lymph channels, and thence travel toward centrally located lymph nodes, causing their enlargement. This passage through the lining membrane and into the lymph channels results in tissue damage, probably chemical in its nature, under the influence of alkaline tissue fluids; and the tissue damage in turn causes the congregation of certain cells and the disintegration of others, which, together with the silica particles, tend to choke the lymph channels and hinder or destroy their normal drainage function. The result of this is further tissue damage, with swelling, constriction or obliteration of smaller air spaces, and stagnation of circulation in their walls. Eventually, in progressive cases, many of the original essential structures of the air and circulatory channels, damaged beyond repair, are replaced by scar tissue, medically known as fibrosis; and there is then loss of elasticity, diminution of effective lung surface, and impeded blood circulation through the parts—all combining to produce shortness of breath and labored heart action, which may be sufficient in the end to cause death. Together with

these direct effects of the silica particles, the changes they initiate interfere with protective mechanisms against microorganisms and thus favor the development of infections, especially bronchitis, pneumonia and tuberculosis.

"Many circumstances combine to diversify the symptoms, the physical and X-ray findings, and the course of the disease. Depending upon the duration and intensity of the exposure to the dust, the size of the particles, the intercurrent of infections, and the like, the disease may develop within a comparatively few months or may take many years and may even manifest itself only after the lapse of several years following cessation of exposure. In its manifestations it may simulate heart disease or other varieties of lung disease, and in earlier stages it may present but few and ill-defined signs in the stethoscopic and even the X-ray examination. Under these circumstances, it is natural, therefore, that the disease should be frequently overlooked, not only by the sufferer himself, but also by his physician; and that even fatalities from the disease should be sometimes ascribed to other causes, often to the secondary infection, unless the physician is made aware of the preceding exposure to silica dust and has familiarity with the varied manifestations of pneumoconiosis.

"In such an occupational disease, the specific date of origin is impossible of determination. It is the cumulative effect of exposure day after day that produces the injurious results; and because of the very fact that 'injury,' in the statutory sense, is referable to a period of time rather than a point in time, some rational norm must be adopted for determining the 'date of the injury' in the practical application of the statute of limitations embodied in the act. With this in view, we will consider separately the claims of the petitioners.

"The Marsh Case: The application of Irene Marsh for benefits on account of the death of her husband was denied by the Commission, on the ground that the application was barred because death had ensued more than one year from the date of the injury.

"In all these cases, the Commission takes the position that no occupational injury could have occurred after the last day of employment, and that the date of injury for purposes of the act was the day on which the employee's service terminated. The claimants contend, on the other hand, that the date of injury is the time at which a medical practitioner can determine the nature of the disease.

"When Marsh left the employ of the Polish Corporation on February 13, 1928, it was not because any symptoms of lung trouble were manifest at that time, but because of an injury to his hand, which had no influence on

the subsequent developments. It was not until December, 1928, that he began to complain of his chest and to lose weight and show marked weakness; and from that time his health continued to decline until his death on February 14, 1930. The cause was, however, not known until an X-ray picture was taken about a week before he died, which showed conditions characteristic of pneumoconiosis.

[1, 2] "The law does not award compensation for mere pain or physical impairment, unless it is of such character as to raise a presumption of incapacity to earn. The object is to make amends for a disability attributable to the employment, and the test is whether there is an incapacity causing loss of earning power in whole or in part. *Hustus' Case*, 123 Me. 428, 123 A. 514. In order to be compensable, disability need not be limited to incapacity of a workman to pursue his ordinary occupation, but embraces impairment of earning power generally. *Gordon v. Evans*, 1 Cal. Ind. Acc. Com. (pt. 2) 94; *Savich v. Ind. Com.* (Ariz.) 5 P.(2d) 779. The term 'injury' then is to be understood as connoting a compensable injury, and is correlated to an incapacity or disability justifying a compensatory award. *Dombrowski v. Jennings & Griffen Co.*, 103 Conn. 720, 131 A. 745. Injury and compensable disability are thus more nearly synonymous expressions than are date of injury and date of accident. *Acme Body Works v. Koepsel*, 204 Wis. 493, 234 N. W. 756, 236 N. W. 378.

"In *De la Pena v. Jackson Stone Co.*, 103 Conn. 93, 130 A. 89, the court speaking of an occupational injury (but with a special exception of the law of Connecticut in mind) says: 'A compensable personal injury is an abnormal condition of a living body which arises out of and in the course of the employment and produces an incapacity to work for the requisite statutory period. It need not be traced to a definite happening or event. It may be caused by accident or disease, and includes diseases peculiar to an occupation except those of a "contagious, communicable or mental nature."' The happening or event includes the entire transaction to which the injury is traced, not only the operative causes, but their effect on the body of the injured person.'

[3] "An injury, then, may arise out of, and in the course of, the employment, when there is a causal connection between the employment and the injury; but for purposes of compensation the injury dates from the time when the diseased condition culminates in an incapacity for work. It is at that time that the employer's liability becomes fixed; for until then the workman had received no injury in the legal sense, though the seeds productive of the injury had lodged in his frame long before. *Johnson v. London Guarantee & Acc. Co.*, 217 Mass. 388, 104 N. E. 735; *Textileath-*

er Corp. v. Great American Ind. Co., 108 N. J. Law, 121, 156 A. 840. When a disease is latent and progressive, it may not culminate until a considerable time after the employment has terminated. So, if the disabling result is delayed, then the injury is correspondingly delayed, and the right to compensation does not accrue until the incapacity occurs.

"Our Compensation Act expressly provides (St. 1917, p. 877, § 69) that it shall be liberally construed for the protection of persons injured in the course of their employment, and the purpose of such laws is to protect workmen, in proper cases, from economic insecurity. It is not surprising to find, therefore, that in those jurisdictions where occupational diseases are compensable, it is almost universally the rule that the injury is not deemed to occur until ascertainable disability results. And it may be noted that in our own state it has been held that an employee is not to be deprived of compensation because he fails to make a correct medical diagnosis. *Winthrop v. I. A. C.*, 213 Cal. 351, 2 P.(2d) 142; *Singer v. I. A. C.*, 105 Cal. App. 374, 376, 287 P. 567. The dependency of compensation on ascertainable disability is illustrated in a variety of cases, some being cited in the briefs and others gathered in our own research. In *Nebraska* the law allows for presentation of a claim a period of six months from the occurrence of the injury. In *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N. W. 316, the applicant, while at work in a cellar, was injured in the back by débris violently thrown against him by a flood of water. The injury was believed to be trivial at the time, and the claimant continued to perform his duties for a few weeks. Thereafter his health declined, but it was not until about nine months later that an X-ray picture disclosed the fracture of a lumbar vertebra. Application for compensation was then made and granted, the court holding that the time began to run only from discovery of his latent and previously unknown injury. A similar situation is exhibited in the recent case of *Kostron v. American Packing Co.* (Mo. App.) 45 S.W.(2d) 871. In *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615, there was injury to a workman's head producing results which, though not immediately appreciable, became serious in course of time. In awarding compensation, the court spoke as follows: 'Accidents frequently occur where the true nature of the injury and the resulting disability are not discernible for a considerable time even with the aid of scientific skill. When latent injuries from accidents do not at first indicate disabilities which are compensable, an employee is not necessarily deprived of compensation under the Workmen's Compensation Act, Comp. St. 1922, § 3056, for failure to demand his rights under the act before they can reasonably be ascertained. An accident resulting in an injury which proves to be progressive in its nature belongs to that class.'

Again in *Travelers' Ins. Co. v. Ohler*, 119 Neb. 121, 227 N. W. 449, an employee who received an electric shock, supposedly inconsequential, continued his work for upward of a year before he became incapacitated and had to cease; and in his case also compensation was allowed. Likewise in *City of Hastings v. Saunders*, 114 Neb. 475, 208 N. W. 122, the date of injury was declared to be the time of culmination in a compensatory disability.

"Upon the same principle it is held that when a strain is suffered which does not at once disable, but later gives rise to a hernia, the injury occurs when the rupture manifests itself. *Re Brown*, 228 Mass. 31, 116 N. E. 897; *Hornbrook-Price Co. v. Stewart*, 66 Ind. App. 400, 118 N. E. 315; *Esposito v. Marlin-Rockwell Corp.*, 96 Conn. 414, 114 A. 92.

"There are several instructive cases also in which injury to an eye was sustained without culminating in blindness until after the lapse of a considerable period. In some of these cases the time for instituting proceedings is made to run only from the time when blindness finally resulted, while in others the date of the injury is fixed as of the time when the diseased condition culminated.

"In *Guderian v. Sterling S. & R. Co.*, 151 La. 59, 91 So. 546, an employee was struck over the eye on January 9, 1919. No concern was felt at the time, but after a period of treatment by a physician during which the sight gradually failed, the plaintiff was sent to a specialist on April 23, and notwithstanding the treatment so received, complete blindness resulted in May. Under the law of Louisiana, proceedings to obtain compensation must be instituted within one year from the time of the injury, and it was not until April 22, 1930, that action was begun. It was contended in defense that the claim was barred, but the court held that symptoms of injury were not sufficient to set the time running, and that the cause of action did not arise until the sight failed. Accordingly the plea of prescription was overruled. This case was followed in *Bagg v. Pickering Lumber Co.*, 7 La. App. 63, and *Thompson v. Tarver*, 17 La. App. 230, 135 So. 723.

"In like manner, in *Acme Body Works v. I. A. C. and Koepsel*, 204 Wis. 493, 234 N. W. 756, 236 N. W. 378, the court acted upon the principle that injury did not occur, or a right to compensation for partial total blindness arise, until sight had been lost, even though nearly six years had intervened between the accident and the blindness, and though the claimant's employment had meanwhile changed. The accident had occurred on June 23, 1920, while Koepsel was in the employ of the Acme Body Works, but it was not until July 12, 1926, when Koepsel went to a physician because of a slight accident received that day that it was found that there was a cataract causing industrial blindness. On December 22, 1926, Koepsel filed an ap-

plication upon which a hearing was had, wherein it was determined that though the blindness was caused by the accident which occurred in 1920, the date of the injury was June 12, 1926, and that the right to compensation from the former employer or the insurance carrier was not barred.

"In other jurisdictions, however, the rule adopted is that the injury occurs when the diseased condition culminates. Such was the rule declared in *Johansen v. Union Stock Yards Co.*, 99 Neb. 328, 156 N. W. 511, and in *Stolp v. Dept. of Labor & Ind.*, 138 Wash. 685, 245 P. 20, which are in turn followed in the striking case of *Fee v. Dept. of Labor & Ind.*, 151 Wash. 337, 275 P. 741. In that case the applicant suffered injury to the left eye while at work on February 15, 1926, and though there was more or less pain for several months, no permanent injury was apprehended. As pain continued, however, he consulted several specialists, but without getting relief; and in November and December, 1926, and January, 1927, he intermitted his work in order to have continuous treatment. Until February, 1928, the specialists held out hope of vision being restored, but in that month he was told for the first time that there was no hope of cure, and that in a few months he would probably be totally blind in that eye. He thereupon applied on February 7, 1928, for disability compensation, but his claim was rejected by the board on the ground that it was barred. The order was reversed, however, upon appeal to the Supreme Court, which held that the time did not begin to run until the vision was seriously impaired and it had become manifest that the injury had culminated in a permanent disability.

"A like rule was applied in Missouri, though expressed in different terms, in two recent cases of injury to the eye. It is there declared that in the case of a latent injury the period of limitation begins to run from the time when it becomes 'reasonably discoverable and apparent that a compensable injury has been sustained.' *Wheeler v. Missouri Pac. R. Co.*, 328 Mo. 888, 42 S.W.(2d) 579, 582; *Young v. Management & Eng. Co.* (Mo. App.) 45 S.W.(2d) 927, 929. In the case of *Johnson v. London Guarantee & Accident Co.*, 217 Mass. 388, 104 N. E. 735, and *Bergeon's Case*, 243 Mass. 366, 137 N. E. 739, there was a diseased condition due to lead poisoning, and in *Textileather Corp. v. Great American Ind. Co.*, 108 N. J. Law, 121, 156 A. 840, death was caused by benzol poisoning. In all these cases the date of the injury was declared to be the time when the accumulated effects first incapacitated the employee for work.

"Our research has brought to our notice also a group of cases in Connecticut, in which disability was caused by pneumoconiosis, which developed as the result of inhalation

of silica dust, created by grinding the surface and edges of tools or other articles upon revolving wheels of stone with the use of water, a practice known as 'wet grinding.' In most of these instances tuberculosis, locally called 'grinders consumption,' became superimposed upon the pneumoconiosis. The cases which have engaged our attention in this connection are the following: *Kovaliski v. Collins Co.*, 102 Conn. 6, 128 A. 288; *Dombrowski v. Jennings & Griffen Co.*, 103 Conn. 720, 131 A. 745; *Mesite v. International Silver Co.*, 104 Conn. 724, 134 A. 264; *Cishowski v. Clayton Mfg. Co.*, 105 Conn. 651, 136 A. 472; *Romaniec v. Collins Co.*, 107 Conn. 63, 139 A. 503; *Jadovich v. Collins Co.*, 109 Conn. 62, 145 A. 25; *Rousu v. Collins Co.* (December 8, 1931) 114 Conn. 24, 157 A. 264. In the *Rousu Case* pneumoconiosis is thus described: 'Pneumoconiosis is an occupational disease which may develop into tuberculosis. *Madore v. New Departure Mfg. Co.*, 104 Conn. 709, 718, 134 A. 259. It has been held to be an injury which occurs when the diseased condition arises, and becomes compensable when that condition yields to the infection and unfits the employee for work. * * *. It is a condition which gradually develops and increases, its presence may be unknown and unsuspected during a long period of time, the exact or approximate date of its inception and the rate and degree of its progress from time to time incapable of ascertainment when the condition finally is manifested and incapacity to work results, as through the intervention of infection.'

"In these Connecticut cases there was exposure to the dust-laden atmosphere for various lengthy periods, ranging from 40 months in an intermittent service during a period of 5½ years in the *Rousu Case* to a period of 23 years continuously in the *Kovaliski Case*, at the end of which time the weakened bodily condition yielded to tubercular infection. In all these cases in which either tuberculosis or pleurisy developed, or death occurred, as a direct result of the primary pneumoconiotic injury, the court held, in concurrence with the commissioners, that there was evidence sufficient to show an unbroken causation between the conditions of the employment and the secondary injury producing the incapacity for labor, or the death, and that the workman so incapacitated was entitled to compensation and his dependents to death benefits. *Mesite v. International Silver Co.*, 104 Conn. 724, 134 A. 264; *Cishowski v. Clayton Mfg. Co.*, 105 Conn. 651, 136 A. 472. In other words, when tuberculosis is superinduced by pneumoconiosis and results in disability, the compensable injury occurs coincidentally with the disability.

"In the *Romaniec Case*, pneumoconiosis developed at some time during a service of 11 years as a wet grinder, but not to such extent as to cause disability. At the end of that time *Romaniec*, acting upon the advice of a physi-

cian, returned in 1919 to Poland, where he engaged in farming for 4 years, after which he came again to America, and resumed service with his former employers from February, 1923, to July, 1925, when he became disabled from pleurisy, due to aggravated pneumoconiosis. He worked spasmodically until February, 1926, by which time he became totally disabled. The date when his injury became compensable was found to be July 25, 1925, the time at which the disease culminated.

"In the *Jadovich Case*, the claimant's employment began as a wet grinder in 1907 and continued to October, 1921. Then after an interval he resumed work from November, 1922, to May 5, 1923. In May, 1927, claim for compensation was made upon the ground that in the course of the employment, pneumoconiosis had developed, and that in its progress it caused the claimant to become disabled on April 12, 1927. At a hearing had on May 23, 1927, the commissioner found that by reason of his employment *Jadovich* had a 'first stage pneumoconiosis' but was not then disabled; and the application was dismissed without prejudice to a renewal 'should he be able to prove that he had a real disability because of pneumoconiosis.' The application having been renewed on March 5, 1928, it was then found that the claimant had been totally incapacitated since June 11, 1927, and compensation was accordingly awarded.

"In like manner in *Schaefer & Co. v. Eicher*, 185 Wis. 317, 201 N. W. 396, where a tool-grinder became incapacitated, it was held that the date on which he was rendered unfit for work was the date on which liability became fixed.

[4] "From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease, such as pneumoconiosis, it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment. * * *. In order to justify an award for disability or death due to an occupational disease, there must always be established an unbroken causal connection between the injury and the employment or the condition under which the employee is required to carry on his work. The connection must be such as to show that the disease or injury was proximately caused by the employment or the conditions of work; and when such unbroken chain of causation is found to exist, then all physical consequences flowing from the disease or injury are proper elements for consideration in deter-

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Jan. 31, 1933.

mining the merits of a claim for compensation or death benefits. *Madore v. New Departure Mfg. Co.*, supra, 104 Conn. 709, 134 A. 259; *Cishowski v. Clayton Mfg. Co.*, 105 Conn. 651, 136 A. 472; *Kovaliski v. Collins Co.*, supra, 102 Conn. 6, 128 A. 288; *London G. & A. Co. v. I. A. C.*, 202 Cal. 239, 241, 259 P. 1096, 54 A. L. R. 1392; *Singlaub v. I. A. C.*, 87 Cal. App. 324, 262 P. 411. In the cases under consideration the record sufficiently establishes a chain of causation between the conditions of employment and the physical consequences of the disease contracted."

[5] Respecting the claim for death benefit in the case of Woods, the application was made on October 20, 1930. It was therefore filed more than one year from the date of the death of Woods, August 10, 1929. There is therefore no escape from the mandatory provisions of section 11(b), subd. (2), of said act (St. 1917, p. 841), and the action of the commission in denying relief was clearly correct. The order in this case is affirmed.

In the case of Marsh, who died February 14, 1930, the application was filed on October 20, 1930, which was within one year from the date of death. But the commission found that death did not ensue within one year after the date of injury as provided by section 11(b), subdivision (2), of said act. In reaching this conclusion, however, the commission fixed the beginning of the running of the prescriptive period as of the date the deceased was first disabled from work. This holding is not in consonance with the rule of law laid down above; neither does the evidence disclose when the presence of pneumoconiosis or silicosis was or should have been diagnosed as the primary and efficient cause of the disability and later the death of Marsh. The award in this case is therefore annulled to the end that further proceedings may be had to ascertain when the statute of limitations began to run.

In the Lange case the commission made no finding as to the date when the presence of pneumoconiosis should or could have been discovered as the efficient and primary cause of disability. The conclusion that the claim was barred under section 11(b), subd. (1), of the act was reckoned solely from the date when disability first prevented the applicant from working. Under the rule of law declared by this opinion the evidence fails to disclose sufficient data for a conclusion as to when a causal connection between the occupation and the disability was or should have been discerned. The award in this case is, therefore, annulled to the end that further proceedings may be had not inconsistent with these views.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

1. Courts ⇨92.

Where court decided that action to enforce stockholders' liability must be brought within three years after creation of liability, irrespective of time of discovery of facts, and that such liability was created when bank became insolvent, so that complaint failing to allege ignorance of insolvency stated no cause of action, first holding was not dictum.

2. Courts ⇨92.

Where court bases decision on two distinct grounds, ruling on neither ground can be called a "dictum."

[Ed. Note.—For other definitions of "Dictum," see Words and Phrases.]

3. Statutes ⇨226.

Where construction of statute by court of adoptive state differs from construction given by courts of originating state, presumption is that court of adoptive state considered decisions of originating state before determining true construction.

4. Statutes ⇨226.

Court must follow its own decisions construing adopted statute, notwithstanding they differ from decisions of court of originating state.

5. Limitation of actions ⇨4(2).

Constitutional right of action against corporate directors is subject to reasonable statutory limitations and limitation of three years after creation of liability is reasonable (Const. art. 12, § 3; Code Civ. Proc. § 359).

6. Courts ⇨400.

Holding of Supreme Court of United States on certiorari that action to enforce directors' liability was one to enforce liability created by law is binding on rehearing in state Supreme Court (Const. art. 12, § 3; Code Civ. Proc. § 359).

7. Limitation of actions ⇨5(1).

"Liability created by law," as used in statute of limitations, includes only liabilities created by statute or Constitution, as distinguished from actions arising under the common law (Code Civ. Proc. § 359).

[Ed. Note.—For other definitions of "Liability Created by Law," see Words and Phrases.]

8. Corporations ⇨356.

Liability of corporate director for misappropriations of codirector did not exist at common law, but was created by Constitution, and in computing the time it is subject to the

provision relating to liability created by law instead of that applicable to actions for relief against fraud (Const. art. 12, § 3; Code Civ. Proc. § 359, and § 338, subd. 4).

9. Limitation of actions — 100(1).

Rule that action for relief against fraud accrues on discovery of fraud applies only when fraud is that of defendant, not that of third person (Code Civ. Proc. § 338, subd. 4).

10. Corporations — 356.

Liability of corporate director for misappropriations of codirector, created by Constitution, is direct and primary, not that of surety, so that concealment of misappropriations by guilty director did not extend time for enforcement of liability against innocent director (Const. art. 12, § 3; Code Civ. Proc. § 359).

11. Corporations — 356.

Creditor's action to enforce constitutional liability of corporate director for misappropriations of codirector was barred where not brought within three years after last misappropriation, irrespective of creditor's discovery of facts (Const. art. 12, § 3; Code Civ. Proc. § 359).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Peirce Coombes against Milton E. Getz and others. From judgment for named defendant, on demurrer, plaintiff appeals.

Affirmed.

McKinstry, Haber & Firebaugh, Gavin McNab, Schmulowitz, Wyman, Alkins & Brune, and McKinstry & Haber-Peirce Coombes, all of San Francisco, for appellant.

Treadwell, Van Fleet & Laughlin, of San Francisco, and Joseph L. Lewinson and W. H. Douglass, both of Los Angeles, amici curiæ for appellant.

Pillsbury, Madison & Sutro, Bert Schlesinger, and R. C. Harrison, all of San Francisco, Lawler & Degnan, of Los Angeles (Alfred Sutro and Eugene M. Prince, both of San Francisco, of counsel), for respondent.

Leslie R. Hewitt and Walter L. Maas, both of Los Angeles, amici curiæ for respondent.

CURTIS, J.

This case was before us upon a motion to dismiss the appeal [213 Cal. 164, 1 P.(2d) 992, 4 P.(2d) 157], and also before the Supreme Court of the United States (Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866) on a writ of certiorari taken to said court for the purpose of reviewing the order of this court dismissing said appeal. Said order of dismissal was made by this court on the ground that section 3 of article 12 of the state

Constitution, upon which the plaintiff relies as authority for the maintenance of this action, had since its commencement been repealed by the electors of the state at the general election held in November, 1930. The Supreme Court of the United States reversed this order, and the case is now before us on its merits.

The action was brought by the plaintiff, a creditor of Getz Bros. & Co., a California corporation, to recover from respondent, Milton E. Getz, and others, as directors of said corporation, the amount of an indebtedness upon an open account for goods sold to the corporation by the assignor of plaintiff. The action is predicated upon the following provision of section 3 of article 12 of the state Constitution, prior to its repeal in November, 1930: "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee."

The trial court sustained a demurrer of defendant Milton E. Getz to plaintiff's second amended complaint. Plaintiff refused to amend, and the judgment was accordingly given against him. From this judgment the plaintiff has appealed.

The second amended complaint (which we will hereafter refer to as the complaint) alleges that the plaintiff was, at the commencement of this action, a creditor of said corporation upon a claim assigned to him by the John Demartini Company for goods sold and delivered by said company within two years prior to the commencement of said action to Getz Bros. & Co., at the special instance and request of the last named company, no part of which has been paid. After alleging the incorporation of Getz Bros. & Co., and that defendants were directors thereof, it proceeds to set forth in minute detail that, while said defendants were such directors, M. G. Franklin, one of said directors, who was also treasurer of said corporation, "during the years 1917 to 1920, both inclusive, knowingly, secretly, illegally, wilfully and fraudulently, and with intent to injure and defraud said Getz Bros. & Company misappropriated large sums of money of and from Getz Bros. & Company in excess of Five Hundred and Fifty Thousand Dollars (\$550,000)." It is not necessary to set forth here, as it is alleged in the complaint, the minute details of the various transactions carried on by Franklin, in and by means of which he succeeded in misappropriating and embezzling said sum of \$550,000. We deem it sufficient to state that Franklin had charge of the export business of Getz Bros. & Co. (referred to hereafter as Getz Bros.), and in that capacity made large purchases for his com-

pany from one A. C. Rulofson. By an arrangement and understanding between Franklin, Rulofson, and one Samuels, an attorney at law, and attorney and close friend of Franklin, Rulofson billed the products so sold by him to Getz Bros. at an amount and price greatly in excess of the actual and true amount and price for which said products were agreed to be sold by said Rulofson to Getz Bros. Getz Bros. would then pay to Rulofson the false price at which said products were billed, and thereafter Rulofson, after deducting his commission, would pay the difference between the true price and the false price to Samuels, who in turn paid the greater part thereof to Franklin. These transactions covered the years 1917 to 1920, both inclusive. None of the directors of Getz Bros. other than Franklin had any knowledge of these misappropriations, or of any of them, until on or about June 1, 1922, when through a former employee in the Federal Income Tax Department it was ascertained that Samuels had paid for the year 1917 an income tax of approximately \$60,000 on account of alleged commissions purported to have been paid by Rulofson to Samuels during that year. At this time the board of directors of Getz Bros. consisted of Franklin, Milton E. Getz, M. O. Meyer, and S. O. Meyer and R. A. May. May did not at this time learn of said misappropriation. Getz and the two Meyers, however, were informed thereof, but they assumed from the amount of income tax reported to have been paid by Samuels in 1917 "that the alleged commissions paid to said Leon Samuels by said A. C. Rulofson amounted to approximately one hundred and sixty thousand dollars (\$160,000)," and they therefore made demand on Franklin, Rulofson, and Samuels for payment to Getz Bros. of said amount, less the income tax paid by Samuels. No complete investigation was made at that time of the transactions carried on by Franklin, and it was assumed that the sum of \$160,000 covered his entire misappropriations. None of the directors of said company other than Franklin had any knowledge at that time of any further misappropriations of Franklin. The demand for payment of said misappropriation of \$160,000, less the income tax paid by Samuels of \$60,000, was settled by the payment of \$70,000 to said three directors, Getz and the two Meyers, who, instead of paying the same to the corporation, fraudulently misappropriated the same to their own use. It is further alleged in plaintiff's complaint that neither the plaintiff nor any of the creditors of Getz Bros. had any knowledge of any of the transactions just related until some time in November, 1923, when R. A. May, one of said directors, who in the meantime had learned something of Franklin's misappropriations, informed a representative and employee of one of the creditors, who was making an investigation of the affairs of Getz Bros. of the \$70,000 settle-

ment made by Franklin and associates with the three directors, Getz and the two Meyers. This information led to a complete and extensive examination of the affairs of Getz Bros., which consumed a number of months and cost thousands of dollars, and which resulted in the discovery that Franklin and his associates had misappropriated and embezzled approximately \$550,000 belonging to Getz Bros. It is not alleged when said investigation was concluded, but the pleadings do state that it was subsequent to December, 1923, that said representative and employee of the creditor who made discovery of the facts alleged therein related the same to plaintiff, and for the first time made him acquainted with said facts. The final paragraphs of said complaint state that the creditors of Getz Bros. are numerous, and that the amount of their claims aggregate over \$500,000, and that the action is brought on behalf of plaintiff and all other creditors who chose to join him and contribute to the expense of said action.

It is conceded that the original complaint in this action was filed December 22, 1925. The demurrer of defendant Milton E. Getz was both general and special; it also pleaded the statute of limitations, and expressly alleged that said action was barred as against defendant Milton E. Getz by section 359 of the Code of Civil Procedure. Before considering the merits of the appeal, it may be well to state that the only party defendant interested in this appeal is the defendant Milton E. Getz. Other defendants appeared in the lower court by separate counsel, but none of them is a party to this appeal. We should further state that the present action is not brought to recover said sum of \$70,000, or any part thereof, which it is alleged Milton E. Getz and others misappropriated after collecting it from Franklin and his associates. Plaintiff in his opening brief expressly states that the complaint is not drawn on that theory "since the allegations concerning the seventy thousand dollars are not set forth as a separate cause of action, and, if plaintiff intended to accept the settlement in discharge of the company's claims, he would proceed solely upon the ground that the seventy thousand dollars were misappropriated funds of the corporation." The only reservation which the plaintiff makes to this concession is that a court of equity, having once obtained jurisdiction of a cause, will dispose of the entire controversy, and for that purpose will often extend its jurisdiction to matters which are ordinarily of purely legal cognizance. Admitting the application of this equitable principle to the facts of the present action, it may be further observed that one of the grounds of demurrer is that several causes of action have been improperly united and not separately stated, one against Getz and others for the misappropriation by Franklin, and the other against Getz and others for their own misappropriations of said sum of \$70,000.

Plaintiff admits that the cause of action based upon the \$70,000 transaction was not, nor was it intended to be, separately stated. It must follow, therefore, that, if plaintiff expects to rely upon this cause of action, the demurrer is good and the trial court was correct in sustaining it. However, as we construe the complaint, it purports to state one cause of action only, and plaintiff must confine his right to recover upon the facts which are alleged as constituting that cause of action. This cause of action is based solely upon the liability of the directors of said corporation to its creditors and stockholders for the moneys embezzled or misappropriated by Franklin during the years of 1917 to 1920, inclusive, and while Getz and others were directors of said corporation.

That the liability imposed by section 3 of article 12 of the state Constitution against directors of a corporation may be enforced in a proper action has been definitely established by the decisions of this court. *Winchester v. Howard*, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153; *Dean v. Shingle*, 198 Cal. 652, 246 P. 1049, 46 A. L. R. 1156. Respondent makes no serious contention to the contrary. He does not stress his general demurrer, but relies upon certain grounds set forth in his special demurrer, and upon his demurrer that plaintiff's cause of action is barred by section 359 of the Code of Civil Procedure, for an affirmance of the judgment herein. As the briefs and arguments of counsel have in the main been directed to the question as to whether plaintiff's cause of action was barred by section 359 of the Code of Civil Procedure, we will give first consideration to that question. This section is brief, and reads as follows: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

From the facts alleged in plaintiff's complaint as shown above, the misappropriation and embezzlement of the funds of Getz Bros. by Franklin occurred during the years 1917 to 1920, both inclusive. The complaint in this action was not filed until December 22, 1925. This action was therefore commenced more than three years, and almost five years, after the last act of misappropriation and embezzlement was accomplished. But it is also alleged in said complaint that neither plaintiff nor plaintiff's assignor, nor any other creditor of Getz Bros., had any knowledge of said acts of misappropriation and embezzlement until some time in December, 1923. It will thus be seen that, while the allegations of plaintiff's complaint show that this action was brought more than three years after the com-

mission of the acts of misappropriation and embezzlement which made the directors of said corporation liable to the creditors and stockholders thereof, it also shows that this action was commenced within three years after the discovery by the plaintiff and the creditors of Getz Bros. of said acts of misappropriation. Appellant, therefore, contends that the action was commenced in time, and is not barred by the provisions of said section of the code.

In the case of *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 P. 139, 142, this court held in an action brought to enforce the liability of stockholders for the debts of the corporation that the period of limitation was three years after the liability was created, and not three years after the discovery of the facts upon which the cause of action was based. In that case this court said: "The foregoing discussion takes no account of an allegation (added to the complaint by amendment) to the effect that the amount of the debts and assets of the Ontario Bank, and the sum which would have to be paid by shareholders, were not known to plaintiff until November 1, 1910, a date less than three years before the commencement of the action. The theory upon which plaintiff makes this averment is that the statute does not begin to run until the discovery by the plaintiff of the facts upon which his cause of action depends. Section 359, we think, will not bear the construction thus sought to be put upon it. The actions therein referred to 'must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.' The fair reading of this section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture. In actions to enforce a 'liability created by law,' the period is three years from the creation of the liability. It is true that in *Moore v. Boyd*, 74 Cal. 171, 15 P. 670, the court assumed that the discovery of the facts started the period of limitation in an action on stockholders' liability. The point was not, however, material to the decision. In later cases, the court seems to have taken it for granted that the section requires an action like the one before us to be begun 'within three years after the liability was created.' *Hunt v. Ward* [99 Cal. 612, 37 Am. St. Rep. 87, 34 P. 335], supra; *Wells v. Black* [117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 P. 1090], supra; *Gardiner v. Royer* [167 Cal. 238, 139 P. 75], supra. In none of the later decisions on the subject is there any suggestion that the discovery of the facts by the plaintiff has any bearing on the question of limitation."

[1, 2] Appellant seeks to detract from the weight of this opinion by claiming that the portion thereof dealing with the provisions of

said section 359 of the Code of Civil Procedure was merely dictum, and was not necessary for the decision of any issue in the case. This claim is based upon the further statement in the opinion, following the portion quoted above, that the plaintiff therein had not properly pleaded a belated discovery of the facts upon which the liability was created. This contention cannot be sustained. The court clearly held in the first place that the action must be brought within three years after the liability was created, and not within three years after the discovery of the facts upon which the liability was created. It further held that the liability of the defendant stockholders was created when the bank became insolvent, and that, as the plaintiff had not alleged ignorance of the bank's insolvency, it had not brought itself within the rule of law contended for by it. In other words, the opinion of the court denying relief to plaintiff was based upon two distinct grounds, and there is no more reason for calling the second ground the real basis of the decision than there is for so calling the first ground. "Where the court bases its decision on two or more distinct grounds, each ground so specified is, as much as any of the others, one of the grounds, a ruling upon questions involved in the case, and not 'mere dictum.'" *King v. Pauly*, 159 Cal. 549, 115 P. 210, 212, Ann. Cas. 1912C, 1244.

[3,4] Plaintiff makes the further contention that the case of *Royal Trust Co. v. MacBean*, supra, should be overruled on the grounds: First, that it is out of harmony with prior decisions of this court; and, secondly, that it is opposed to certain decisions of the appellate courts of the state of New York construing a Code section, similar in its terms to section 359 of the Code of Civil Procedure of our own state, and from which our own Code section was patterned. The prior decisions of this court, which the plaintiff contends are opposed to the construction placed on section 359 of the Code of Civil Procedure by this court in *Royal Trust Co. v. MacBean*, supra, are *Moore v. Boyd*, 74 Cal. 167, 171, 15 P. 670, and *Green v. Beckman*, 59 Cal. 545. The first of these two cases was before the court when it rendered its opinion in *Royal Trust Co. v. MacBean*, supra, as will be observed from the reading of the excerpt already quoted from said opinion in which the court said: "The point was not, however, material to the decision." A casual reading of *Green v. Beckman*, supra, will show that the statement contained therein to the effect that under section 359 of the Code of Civil Procedure an action to enforce a liability created by law "against the stockholder may be brought within three years after the discovery of the facts," etc., was not material to the decision. In that action, the plaintiff sought to recover from the stockholders money had and received more than

two, and less than three, years before the commencement of the action. Defendant claimed the action was barred by subdivision 1, section 339, of the Code of Civil Procedure, which prescribed a two-year limitation. The plaintiff claimed that the liability of the stockholder was one created by law, and therefore section 359 of the Code of Civil Procedure was the statute of limitations applicable to such a cause of action. The court held with the plaintiff. The question as to the time of the discovery of the facts upon which the action was based did not, and could not under the facts of the case, arise therein. In the case of *Johnson v. Hinkel*, 29 Cal. App. 78, 82, 154 P. 487, 489, in which we denied a petition for a hearing herein, the District Court of Appeal gave its views regarding the cases of *Moore v. Boyd*, supra, and *Royal Trust Co. v. MacBean*, supra, as follows: "The element of discovery in actions of this character was recognized in *Moore v. Boyd*, 74 Cal. 167, 15 P. 670, but in the later case of *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 P. 139, it would seem that this doctrine has been rejected; for it is there said that a fair reading of the section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture, and that in actions to enforce 'a liability created by law' the period of limitation is three years from the creation of the liability." As to the decisions of the courts of the state of New York construing the Code section of that state, which plaintiff claims furnished the model from which section 359 of the Code of Civil Procedure was patterned, it must be presumed that the court had these cases before it when it decided the case of *Royal Trust Co. v. MacBean*, supra, but refused for reasons then deemed sufficient to follow them. Under such circumstances we consider it our duty to follow the decisions of our own court construing our statute rather than those of the state of New York upon the same subject.

[5] It is next insisted by plaintiff and appellant that, if section 359 of the Code of Civil Procedure is to be interpreted as limiting the right of action of a creditor of a corporation to enforce the liability of the directors for the misappropriation of funds by an officer of the corporation to three years from the date of the creation of said liability under circumstances where the creditor had no knowledge of the facts within the three-year period, then said section of the Code is unconstitutional. It is claimed that this liability against a director of a corporation in favor of the creditor is given to the latter by the state Constitution, and any attempt to infringe upon or impair this right by the Legislature, or any other legislative body, would be beyond their power, and ineffective. This restriction upon legislative

action does not, however, extend to reasonable statutory limitations within which this constitutional right may be enforced. This has been repeatedly held and in cases construing and applying the very Code section with which we are now concerned, that is, section 359 of the Code of Civil Procedure. In the case of *Hunt v. Ward*, 99 Cal. 612, 616, 34 P. 335, 336, 37 Am. St. Rep. 87, which was an action by a creditor to recover from a stockholder upon the latter's liability created by said section 3 of article 12 of the Constitution, this court said: "The invocation by respondent of the clause of the state constitution declaring the liability of stockholders of corporations does not strengthen his position, for the statement of a right in a constitution is always subject to reasonable statutory limitations of the time within which it may be enforced, unless otherwise declared in the constitution itself; and three years is certainly not an unreasonable period of limitation. We see, therefore, no reason for disregarding the plain language of section 359." This case has been followed, and the principles of law therein enunciated approved, in the more recent case of *Gardiner v. Royer*, 167 Cal. 238, 241, 139 P. 75, where many decisions of this court upon the subject are reviewed and analyzed. In that case the court, after "a forcible argument" by learned counsel for the plaintiff in which they asked that *Hunt v. Ward*, supra, and kindred cases be overruled, declined to do so, but on the other hand expressly affirmed and reapproved those cases. The law is succinctly and correctly stated in the opinion of this court rendered in the case of *Santa Rosa National Bank v. Barnett*, 125 Cal. 407, 412, 58 P. 85, 86, as follows: "Section 359 does not attempt to relieve the stockholder from his liability under the constitution. It only limits the time within which the action may be brought, and this is not inconsistent with the constitutional declaration that such liability is imposed upon the stockholder." While these authorities deal with the liability of stockholders of a corporation created by the Constitution, we can see no difference in principle between such liability in so far as the applicability of said section 359 of the Code of Civil Procedure thereto is concerned and that against directors created by the same section of the Constitution. We think these authorities are in principle applicable to cases involving the liability of directors created by said section of the Constitution, and that they correctly determine the effect of section 359 of the Code of Civil Procedure limiting the time within which actions may be brought to enforce such liability. Both section 3 of article 12 of the Constitution creating these two types of liabilities, and section 359 of the Code of Civil Procedure limiting the time for the commencement of actions to enforce liabilities created thereunder, are

construed in these decisions, and it is expressly held therein that the Code section in no way conflicts with the provisions of the Constitution.

Plaintiff makes the point that the objection to the constitutionality of the Code section was denied by the court in these cases solely on the ground that the plaintiffs therein had waived their right to proceed against the stockholders by accepting the note, or other obligation of the corporation, the maturity of which was affirmatively and voluntarily postponed beyond the three-year limitation, and that, as they were presumed to know the law, they could not complain if the result of their action was to permit the stockholders to plead the bar of the statute of limitations. Plaintiff follows up this assertion by the further statement that the creditors of Getz Bros. did not waive any right against the directors of that company because they did not know, and had no means of knowing, of the misappropriations of Franklin. Therefore plaintiff contends that the rule announced in *Hunt v. Ward*, supra, and like cases should not apply to the instant case. We think the plaintiff does not correctly interpret the rulings of the court in these cases. Take, for instance, the case of *Hunt v. Ward*, supra. It was there contended that the three-year period of limitation commenced to run from the maturity of the liability or debt, and not from its creation. In pressing this argument, plaintiff's counsel presented a supposed state of facts where a corporation gave a note payable more than three years after date, in which case, if the liability of the stockholder was barred three years after it was created, and not three years after its maturity, the right of action against the stockholder would be barred before the obligation matured, in which case the creditor would have no right whatever to enforce his cause of action against the stockholder. Hence, so counsel in that case argued, if section 359 of the Code of Civil Procedure were construed to bar a right of action upon a stockholder's liability three years from its creation, and not from its maturity, it would be unconstitutional, as it denied in toto the right of the creditor to enforce the liability against stockholders given by the Constitution. It was in answer to this argument that the court said: "If he [the creditor] chooses to make a contract, with the corporation, by which its payment of the indebtedness is postponed beyond the three-years limitation in favor of the stockholders, he simply does an act which practically waives his right against the latter." After it had settled that question, the court then went on to answer the constitutional objection to section 359 of the Code of Civil Procedure in the language already quoted from in that case, and held that the right given by the Constitution "is always subject to reasonable stat-

utory limitations of the time within which it may be enforced" and that three years is "certainly not an unreasonable period of limitation." The other cases referred to in the respect indicated simply follow *Hunt v. Ward*, *supra*. We are therefore of the opinion that the constitutional objection raised by the plaintiff to section 359 of the Code of Civil Procedure is not well taken.

[6] A considerable portion of plaintiff's brief is devoted to the contention that this action is one to enforce a penalty rather than a liability created by law. This brief was filed before the decision of *Coombes v. Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, referred to above. The decision of the United States Supreme Court in that proceeding conclusively determines that contention adversely to the plaintiff.

[7] It is next contended by the plaintiff that the present action is for relief on the ground of fraud, and therefore section 359 of the Code of Civil Procedure is not applicable, but that the statute of limitations barring such an action is section 338 of the Code of Civil Procedure, subdivision 4 thereof, which provides that a cause of action for relief on the ground of fraud is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud. Preliminary to this argument, and in support of his contention, plaintiff has sought to show that this action is not strictly one to enforce a liability created by law. The term "created by law," as used in section 359 of the Code of Civil Procedure, has a somewhat restricted meaning. In one sense every liability giving rise to a cause of action may be said to be a creature of the law. *Whitten v. Dabney*, 171 Cal. 621, 628, 154 P. 312. But, in the sense in which the term is used in said Code section, it is confined and restricted to a liability which exists by virtue of an express statute, and it does not include nor extend to actions arising under the common law. *Whitten v. Dabney*, *supra*; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663. It does include, however, a liability arising under the Constitution. *Chambers v. Farnham*, 182 Cal. 191, 193, 187 P. 732. In plaintiff's endeavor to show that the liability which he seeks to enforce against Getz as a director of Getz Bros. was not one created by law, he relies upon certain statements made by this court in the two cases already cited herein, the cases of *Winchester v. Howard*, *supra*, and *Dean v. Shingle*, *supra*. In the first of these two cases is to be found the following language on page 443 of 136 Cal., 64 P. 632, 69 P. 77, 80, 89 Am. St. Rep. 153: "Directors and officers of corporations, as well as trustees, have always been held responsible for loss resulting from misappropriations of the trust property made by them or with their consent. The character of the misappropriations for which the officers who

made them can be held responsible to the corporation has been settled in many cases. The liability has existed ever since there have been courts of equity and corporations or trustees. The constitution does not change the nature of the liability, except that for its purpose it is limited to moneys misappropriated. No officer, omitting for the nonce the suretyship, is made liable for any act or to any greater extent than he was liable before the constitutional amendment. The constitution merely makes the directors sureties for their fellow directors and for the officers of the corporation for moneys when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue. What such liabilities are, as I have said, are old and familiar questions; and I repeat it seems obvious to me that such misappropriations are those for which the directors are liable."

[8, 9] *Dean v. Shingle*, *supra*, contains like language, and cites *Winchester v. Howard*, *supra*, in support of its statement. Plaintiff construes this language of the court to mean that directors of a corporation, independent of section 3 of article 12 of the Constitution, were liable for losses resulting from misappropriation of trust property made by a fellow director, and that said section of the Constitution neither creates nor does it substantially affect such liability except that it makes said directors "sureties for their fellow directors." We cannot so construe the language of the court found in those cases. The liability of directors which the court held existed "ever since there have been courts of equity and corporations or trustees" was that "resulting from misappropriations of the trust property made by them or with their consent." The court was not then speaking of the liability which directors incurred by the misappropriations of money of the corporation by a fellow director, or other officer of the company, without the knowledge or consent of the remaining directors. This last-mentioned liability, that is, the liability for misappropriations by a fellow director, was something which did not exist at common law, and was brought into existence by said section of the Constitution. Prior to the enactment of said section of the Constitution, no such liability existed. Plaintiff's cause of action rests entirely for its validity upon the right given creditors of a corporation by this section of the Constitution. It is therefore, as we have already seen, an action to recover on a liability created by law. The sole claim made against Getz by plaintiff is that Getz was a director when Franklin misappropriated the funds of the company. It is not claimed that the action against Getz is based upon any fraud committed by him. Subdivision 4 of section 338 of the Code of Civil Procedure therefore has no application to this action. The rule that an ac-

tion brought for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud applies only when the fraud, which is the basis of the action, is the fraud of the defendant in the case. It has no application when the fraud charged is that of a third party. This distinction is clearly set forth in a decision rendered by the Circuit Court of Appeals in the case of *Hayden v. Thompson*, 71 F. 60, 70, as follows: "The reason of the rule that the time limited by the statute for the commencement of an action for fraud shall not commence to run while the defendant conceals it is that he ought not to be permitted to take advantage of his own wrong. Neither the reason nor the rule has any application to a cause of action which is fraudulently concealed from the parties in interest by third persons. The fraudulent concealment of the defendant alone will delay the running of the statute. *Pratt v. Northam*, 5 Mason, 95, 112, Fed. Cas. No. 11,376; *Simmons v. Baynard* [C. C.] 30 F. 532; *Stevenson v. Robinson*, 39 Mich. 160."

We conclude from this discussion, therefore, that the statute of limitations applicable to the present action is section 359, and not subdivision 4 of section 338 of the Code of Civil Procedure. In fact, any other conclusion would necessitate the overruling of *Royal Trust Co. v. MacBean*, supra, which we have heretofore expressly approved.

[10] The further claim is made by plaintiff that the fraudulent concealment of facts by the various defendants prevented the accrual of plaintiff's cause of action until discovery of the misappropriations, and therefore the cause of action was not barred until three years after the discovery of the true facts. The only fraudulent concealment of facts set forth in plaintiff's pleadings, and on which he relies in this action, was the concealment by Franklin from the other officers of the company of his misappropriations of the company's funds. It is expressly alleged that neither Getz, nor any of the directors except Franklin, knew the true condition of the company's affairs, nor the extent of Franklin's misappropriations, until the investigation was made some time after November, 1923. At this time plaintiff and other creditors of the company learned of Franklin's peculations. In fact, the complaint shows that plaintiff and the creditors learned of these facts at or about the same time. There could not, therefore, be, and the complaint does not allege that there was, any concealment of these facts by Getz from the creditors. The only concealment alleged, as we have already stated, was the concealment by Franklin from the company, his fellow directors, and the creditors, of his wrongful acts. What effect this concealment by Franklin had upon the plaintiff's right of action against Getz is the question presented by the complaint. In this connection plaintiff seeks

to apply the rules applicable to sureties in general to the liability of directors created by the above section of the Constitution. While there is direct language in some of the cases cited above, and in others not cited, to the effect that the Constitution makes the directors "sureties for their fellow directors" for moneys misappropriated or embezzled by the latter, we do not understand that the term is used in these decisions in the strict technical legal sense in which it is generally used in the law of suretyship. The Constitution makes the innocent directors suffer for the unlawful acts of the guilty directors, or other officers. In this sense it may be said that the innocent directors are sureties as they are made to suffer for another's fault. But in so holding it was not, we think, ever intended to make applicable to this liability the general law of suretyship. The section of the Constitution creating this liability says nothing about the directors being made sureties or that their obligation is in any way conditional or secondary. On the other hand, the Constitution does create against them a direct and primary liability for misappropriation of funds by a fellow director, or other officer, during their term of office. This liability, instead of partaking of the characteristics of suretyship, is more like that imposed by the same section of the Constitution upon stockholders for the debts of the corporation. The liability thus created against stockholders has been held in numerous instances to be a direct and primary obligation, and not one of suretyship or guaranty. See *Ellsworth v. Bradford*, 186 Cal. 316, 318, 199 P. 335, where the authorities are collected and cited. The law of suretyship cannot, in our opinion, be invoked in this case. The concealment by Franklin of his defalcations from his fellow directors and the stockholders and the creditors of the corporation did not therefore extend the time in which either the stockholders or creditors might enforce the liability of the innocent directors for such defalcation.

[11] We think we have discussed and answered all the main contentions made by plaintiff in support of his appeal. Our conclusion after such discussion is that plaintiff's cause of action is barred by section 359 of the Code of Civil Procedure, and that the judgment of the trial court, based upon its order sustaining a demurrer to the complaint on that ground, should be affirmed.

The sustaining of the demurrer on the ground that the action is barred by the statute of limitations renders it unnecessary for us to pass upon the merits of the special demurrers.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; TYLER, Justice pro tem.

217 Cal. 383

RIEDMAN v. BRISON, City Clerk, et al.
L. A. 13832.

Supreme Court of California.
Feb. 6, 1933.

1. Waters and water courses ⇨183½.

Municipality's action in seeking to withdraw from metropolitan water district *held* governed by general state law (St. 1927, pp. 711, 712, §§ 9, 10).

2. Waters and water courses ⇨183½.

Legislature may confer power to submit to electors matter of withdrawing from water district on municipality's legislative body only (St. 1927, pp. 711, 712, §§ 9, 10).

3. Waters and water courses ⇨183½.

Statute *held* to have designated city council as state agency which may initiate proceedings for withdrawal of municipality from water district (St. 1927, pp. 711, 712, §§ 9, 10).

4. Waters and water courses ⇨183½.

Provisions of charter of city of Long Beach relating to initiative *held* applicable only to its legislative acts which, unless otherwise authorized, can relate only to municipal affairs, of which withdrawal from water district is not one.

5. Mandamus ⇨74(1).

Matter of withdrawal from water district, to which initiative petition in city clerk's hands related, not being matter of municipal legislation, clerk had no legal duty to perform (St. 1927, pp. 711, 712, §§ 9, 10).

6. Waters and water courses ⇨183½.

Term "governing body" in statute designating body which may submit question of withdrawing from water district, does not include electorate of municipality (St. 1927, p. 712, § 10).

St. 1927, p. 712, § 10, provides that governing body of any municipality whose corporate area has become part of water district may submit to electors thereof at any general or special election proposition of withdrawing from water district incorporated thereunder.

[Ed. Note.—For other definitions of "Governing Body," see Words and Phrases.]

7. Mandamus ⇨16(1).

Mandamus to compel city clerk to certify initiative petition for adoption of ordinance directing council to call election at some indefinite date on question whether city should withdraw from water district *held* properly denied, since requiring performance of useless act (St. 1927, p. 712, § 710).

Facts disclosed that mandamus proceeding was brought to compel city clerk to

examine and certify initiative petition submitting for adoption an ordinance directing council to call an election on some future date not definitely fixed, submitting to voters question whether city should withdraw from water district, but such act would have been useless, since proposed ordinance would not, if adopted, submit to electors proposition of withdrawing from district, as must be done under provisions of St. 1927, p. 712, § 10, but merely purported to provide that election should be called, in future, by legislative body of city, at which subsequent election question of withdrawal should be submitted to electors.

In Bank.

Petition for writ of mandate by Fred C. Riedman against J. Oliver Brison, as City Clerk of the City of Long Beach, and others.

Alternative writ discharged, and application for permanent writ denied.

Eugene C. Campbell, of Long Beach, for petitioner.

Nowland M. Reid, City Atty., and Beach Vasey, Deputy City Atty., both of Long Beach, for respondent.

James H. Howard, Gen. Counsel for Metropolitan Water District of Southern California, of Los Angeles, and Charles C. Cooper, of Los Angeles, amici curiæ for respondents other than Stakemiller & Barton.

WASTE, C. J.

An initiative petition, purporting to be signed by 7,253 duly qualified electors of the city of Long Beach was presented to the city council of that municipality, submitting for adoption an ordinance directing the council to call an election on some future date not definitely fixed, at which there should be submitted to the voters the question whether or not the city of Long Beach should withdraw from membership in the metropolitan water district of Southern California, of which the city now forms a part. Before the city clerk had examined the petition for the purpose of ascertaining whether or not it was signed by the requisite number of qualified voters, he was restrained from proceeding further with the examination by service on him of a preliminary injunction issued out of the superior court of Los Angeles county.

The clerk, having thereafter taken no steps toward the examination and certification of the petition, this petition for a writ of mandate to compel him to act was filed. It is alleged that the petition submitted to the city council has in excess of fourteen hundred more signers than the number required by the Long Beach charter to constitute a sufficient

initiative petition. By way of answer to the petition, the city clerk and certain of the members of the city council pleaded the issuance and service upon the clerk of the preliminary injunction restraining him from proceeding further with the examination. The record in the injunction proceeding is not before us, other than that a copy of the preliminary injunction is made a part of all the answers filed. We are not informed as to the theory on which that proceeding was instituted.

[1] It is the contention of petitioner that it is the duty of the city clerk, under the plain terms of the charter of the city of Long Beach, to examine and report to the city council as to the sufficiency of the petition, and that mandamus is the proper proceeding to compel him to do so. *Wright v. Jordan*, 192 Cal. 704, 710, 221 P. 915. It is further contended that the facts that the respondent city clerk may be a party to the action in the superior court, and that the preliminary injunction affects his action in the matter of the examination of the initiative petition, have no force or effect on his duty, in view of the provisions of section 526 of the Code of Civil Procedure, which expressly declares that "An injunction cannot be granted: * * * To prevent the execution of a public statute by officers of the law for the public benefit." Undoubtedly an injunction granted in derogation of this provision of the Code is void. *Wright v. Jordan*, supra; *Reclamation Dist. v. Superior Court*, 171 Cal. 672, 154 P. 845. But, as we are of the view, as contended by *amici curiæ* for the water district, that the action of the municipality in seeking to withdraw, or in withdrawing, from a duly constituted metropolitan water district is not a municipal affair to be governed by local charter provisions, but is a matter governed by a general state law, the injunction appears to present an immaterial issue, for the question is one of law relating to the jurisdiction of the city clerk to act at all in this matter.

In our decision in *City of Pasadena v. Chamberlain*, 204 Cal. 653, 269 P. 630, the Metropolitan Water District Act (Stats. 1927, p. 694), under which the city of Long Beach became a part of the metropolitan water district of Southern California, was given consideration. It was held (pages 659, 660 of 204 Cal., 269 P. 630, 633) that the act is a general law and that its general purpose "takes it beyond the narrow scope of dealing with a merely municipal affair." The conclusion reached by the court was that the procedure governing the district must be that set out in the act, and not that prescribed in local charters. This conclusion was cited with approval in *Metropolitan Water District v. Whitsett* (Cal. Sup.) 10 P.(2d) 751, 754, wherein it was said, "The general purposes and objects to be subserved by the organization of a district under the

act are not municipal affairs." For like holdings in similar cases, see *People v. City of Los Angeles*, 154 Cal. 220, 228, 229, 97 P. 311; *Allen v. Board of Trustees*, 157 Cal. 720, 723, 109 P. 486; and *Henshaw v. Foster*, 176 Cal. 507, 511, 512, 169 P. 82.

[2] Such being the settled law, it follows that resort must be had to the general law—the Metropolitan Water District Act—for the procedure to be followed when a municipality seeks to withdraw from the district. Section 10 of the act (St. 1927, p. 712) declares that: "Any municipality whose corporate area has become or is a part of any water district may withdraw therefrom in the following manner: The governing body of any such municipality [italics ours] may submit to the electors thereof at any general or special election the proposition of withdrawing from any water district incorporated thereunder. Notice of such election shall be given in the manner provided in subdivision (b) of section 9 hereof. Such election shall be conducted and the returns thereof canvassed in the manner provided by law for the conduct of municipal elections in said city. * * *" This language cannot be properly construed to mean other than that the Legislature, in providing the manner in which territory may be withdrawn from the district, has designated the "governing body" of the municipality as the agency for submitting the proposition to withdraw, and has prescribed the formalities it has deemed necessary to effectuate the withdrawal. That this may be done, and that the power may be conferred only on the legislative body of the municipality, is well established by the decisions, supra. See, also, *People v. Town of Ontario*, 148 Cal. 625, 630, 84 P. 205.

[3-5] We are therefore of the view, without further citation of the many authorities on the question, that the Legislature, in its general act, which is superior to and which controls the charter provisions in the matter of withdrawal from the district has designated the city council of the city of Long Beach as the state agency which may initiate proceedings for the withdrawal of the municipality from the Metropolitan water district of Southern California, of which it at the present time forms a part. The provisions of the charter of the city relating to the initiative apply only to its legislative acts which, unless otherwise authorized, can relate only to municipal affairs, of which this is not one. *Hopping v. Council of City of Richmond*, 170 Cal. 605, 611, 150 P. 977. The matter to which the petition in the hands of the city clerk relates, not being a matter of municipal legislation, that official has no legal duty to perform in relation to it under the charter.

[6] *Amici curiæ* advance the further point that the term "governing body," as used in section 10 of the Metropolitan Water District

Act, *supra*, to designate the body which may submit the question of withdrawing from the district, does not include the electorate of the municipality. That is correct. A reading of section 9 of the act (St. 1927, p. 711), providing for the inclusion or annexation of territory to a water district, confirms such conclusion. That section, considered in the light of the construction given the Water District Act by this court in *City of Pasadena v. Chamberlain*, *supra*, sustains the contention of *amici curiæ*. The decision of this court in *Re Pfahler*, 150 Cal. 71, 89, 90, 88 P. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911, on an almost identical question, supports this view.

[7] For another reason, the mandate here sought should be denied. The proposed ordinance submitted to the city council would not, if adopted, submit to the electors of the city the proposition of withdrawing from the district, as must be done under the provisions of section 10 of the Metropolitan Water District Act. It merely purports to provide that an election shall be called, in the future, by the "legislative body" of the city, at which subsequent election the question of withdrawal shall be submitted to the electors. Action under the petition seems therefore a useless act, which does not warrant the intervention of a writ of mandate.

The alternative writ of mandate is discharged, and the application for a permanent writ is denied.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

217 Cal. 397

BURNHAM v. WITT et al.
L. A. 13853.

Supreme Court of California.
Feb. 9, 1933.

1. Gifts ☞38.

In determining whether undue influence induced gift to donee standing in confidential relationship to donor, presence or absence of independent advice to donor is not necessarily decisive factor.

2. Gifts ☞28(1).

Sums on deposit with building and loan association *held* choses in action, equitable title to which, at least, passed by indorsement of certificates and delivery thereof to donee.

3. Building and loan associations ☞10.

Building and loan association's by-law that, until transfer of certificate was registered on association's books, registered hold-

er should be deemed holder, *held* for association's protection and to preserve its legal rights as against assignee of certificates, but did not affect transfer in other respects.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by J. E. Burnham, as executor of the estate of George A. Ward, commonly known as G. A. Ward, deceased, against Mrs. E. Witt and another. From an adverse judgment, plaintiff appeals.

Affirmed.

J. E. Burnham, Bert L. Cooper, and Nichols, Cooper & Hickson, all of Pomona, for appellant.

T. E. Guerin, and John W. Loucks, both of Pomona, for respondents.

PRESTON, J.

A simple solution of the problems presented by this appeal is at hand. The points urged are all settled by ample findings of the court, which have abundant support in the evidence.

[1] The pleadings set forth a contest between the executor of the estate of George A. Ward on the one hand and defendants on the other, wherein they are rival claimants to three building and loan certificates, two for the principal sum of \$2,500 each and the other for \$1,000. On April 9, 1930, just seventeen days prior to his death, decedent indorsed these certificates in blank and in the presence of witnesses delivered them to defendant Mrs. Witt, purporting to make a gift of them to her. Lack of mental capacity on the part of the deceased and undue influence are both urged by plaintiff in support of the claim of the estate to the property, but the evidence is very strong in support of the findings of the court to the contrary. It is also claimed that a confidential relationship existed between the deceased and said defendant arising out of the fact that she acted for a space of some two years as his housekeeper and during this period did business errands for him from time to time. But plaintiff here, the executor of the estate of decedent, an attorney at law, was found by the court to have been the confidential adviser of the decedent, and it was further found that abundant opportunity existed for consultation by deceased with him relative to said gift to respondent. The claim that independent advice is a prerequisite in such a transaction, even if sound, is amply overcome by evidence that the decedent acted advisedly and in the presence of witnesses in making the gift; one of these witnesses being a sister-in-law. Moreover, decedent told other persons of his intention to make the gift and told still other persons that he had made it. Besides, independent advice is but a

circumstance, and is not necessarily a determining factor in such a transaction. *Brown v. Canadian, etc., Co.*, 209 Cal. 596, 289 P. 613.

[2, 3] The further claim that indorsement of the building and loan certificates and delivery thereof was not sufficient to pass title to the donee is likewise without merit. The sums on deposit with the loan association were chosen in action, the equitable title to which, at least, passed by indorsement of the certificates and delivery thereof to the donee. A by-law of the association to the effect that until such a transfer was registered on the books of the association, the registered holder should, for all purposes, be deemed the holder, was meant for the protection of the association and to preserve its legal rights as against an assignee of the certificates. In other respects it did not affect the transfer. *Ornbaum v. First Nat. Bank of Cloverdale* (Cal. Sup.) 8 P.(2d) 470, 81 A. L. R. 1146.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.



217 Cal. 307

FIDELITY APPRAISAL CO. v. FEDERAL APPRAISAL CO. et al.

S. F. 14340.

Supreme Court of California.

Jan. 31, 1933.

1. Trade-marks and trade-names and unfair competition ⇨68(9).

Only where acts of business rival are manifestly unfair or where former employee is in possession of secret information not readily accessible to others will courts afford injunctive relief.

2. Appeal and error ⇨1010(1).

Findings of trial court will not be disturbed, unless entirely unsupported by evidence.

3. Trade-marks and trade-names and unfair competition ⇨68(9).

Employees are free to leave employment and engage in similar business, without being liable to injunctive process.

4. Conspiracy ⇨1.

For men to agree to enter business together, even though they design to draw patronage from many rivals, or all that particular rival may have, does not constitute them conspirators.

5. Conspiracy ⇨19.

Evidence held not to support finding that former employees entered into a conspiracy to draw away customers and business of former employer.

6. Trade-marks and trade-names and unfair competition ⇨93(3).

Evidence held to support finding that former employees in conduct of rival business were guilty of unfair methods against former employer.

7. Trade-marks and trade-names and unfair competition ⇨68(9).

Where uncompleted negotiations with prospective patrons are pending at time employees discontinue employment and form rival business, they cannot reopen negotiations on their own behalf.

8. Trade-marks and trade-names and unfair competition ⇨68(9).

Fact that unfair methods were employed by former employees who formed rival business cannot deprive them of right to use lawful business name.

9. Trade-marks and trade-names and unfair competition ⇨68(9).

That, pending issuance of new telephone directory, former employer's telephone number appeared as before, could not be imputed to former employees who organized own business and through rent of old quarters procured right to use old telephone number.

10. Trade-marks and trade-names and unfair competition ⇨70(3).

Appropriation of name "Fidelity Appraisal Company" by corporation held not to prevent organizers of competing corporation from selecting the name "Federal Appraisal Company."

11. Trade-marks and trade-names and unfair competition ⇨3(1).

Words in common use are common property, and may be used in combination with other descriptive words, provided combination does not mislead persons possessing ordinary powers of perception.

12. Trade-marks and trade-names and unfair competition ⇨3(1).

Generic terms and words descriptive of place are not subject to exclusive appropriation.

13. Trade-marks and trade-names and unfair competition ⇨70(3).

Both "fidelity" and "federal" are words in common use, are not synonymous, nor are they included within rule of idem sonans, nor do they so closely resemble each other in orthography or visual appearance that use of one suggests the other.

[Ed. Note.—For other definitions of "Federal" and "Fidelity," see Words and Phrases.]

14. Trade-marks and trade-names and unfair competition $\S$ 3(2).

The common words "appraisal company" cannot be exclusively appropriated.

15. Trade-marks and trade-names and unfair competition $\S$ 68(1).

Law of unfair competition does not protect purchasers against falsehoods which tradesmen may tell, but falsehood must be told by article itself.

16. Damages $\S$ 87(1).

Exemplary damages are allowable only in cases where the animus malus is made to appear satisfactorily, and such damages are inflicted by way of penalty for evil intent.

17. Appeal and error $\S$ 1151(2).

Where it is impossible to determine what part of exemplary damages allowed by trial court was attributable to erroneous holding that plaintiff's corporate name was infringed and what part was attributable to a few unfair acts, such damages will be disallowed.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Fidelity Appraisal Company against Federal Appraisal Company and others. From judgment for plaintiff, the defendants appeal.

Modified in part, affirmed in part, and reversed and remanded in part.

J. E. White and Orrick, Palmer & Dahlquist, all of San Francisco, for appellants.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, and Lissner, Roth & Gunter, of Los Angeles, for respondent.

SEAWELL, J.

Plaintiff is incorporated under the name of Fidelity Appraisal Company; defendant is incorporated under the name of Federal Appraisal Company.

By very prolix pleadings plaintiff charged defendant corporation and Arthur L. Froelich, Attorney J. E. White, E. J. Bowater, and certain fictitious parties with entering into and prosecuting a conspiracy to draw away its customers and business, and that as a means of accomplishing its purposes said Froelich, White, and Bowater selected as the name of said defendant corporation the name "Federal Appraisal Company," which name, it is alleged, was selected because it closely resembles plaintiff's name, which circumstance would enable defendants to more readily confuse and mislead the business public as to the identity of the two corporations, to the damage of plaintiff and to the advantage of defendants. It was alleged and found by

the court that Froelich and Bowater, who were the organizers of defendant corporation, were formerly employees of plaintiff, and as such employees business information came into their possession and to their knowledge, which they were wrongfully using in unfair competition with plaintiff in the solicitation of customers and in adopting similar business methods. Certain acts of unfair competition practiced by defendants are alleged in the complaint, but the above general statement is sufficient to characterize the action.

Judgment, which was later amended, went against all of the defendants in the court below, except as to Attorney J. E. White and the fictitious defendants named in the action, for the sum of \$10 actual damages and \$300 punitive damages, with costs of suit. In addition, the trial court permanently enjoined defendant corporation and its officers from continuing to do business under its corporate name, and also from using any combination of words as its corporate name which would include the word "Federal." The words "Fidelity" and "Federal," both of which are unquestionably words of common property and are frequently found in common trade usage, and may not therefore be exclusively appropriated, as is convincingly illustrated by an inspection of public telephone and business directories, in which both frequently appear in business nomenclature, were held by the trial court to be so similar as to deprive all other persons of the right to use either of said words of designation if the first party to engage in a particular business had selected either as its business designation. In addition to the amended judgment permanently enjoining the use by defendant of its corporate name and the use of "Federal" as a part of any name it should select, defendants Froelich and Bowater and the corporation, its officers and agents, were permanently enjoined as follows:

"(a) From soliciting appraisal business from any person, firm or corporation with whom defendants Froelich or Bowater had prior to December 31, 1928, been conducting negotiations for business on behalf of plaintiff, and which negotiations remained uncompleted on December 31, 1928, including any person or firm known to said defendants or either of them to have been solicited for business on behalf of plaintiff.

"(b) From imparting to any of the remaining defendants or to anyone else the name or address or identity of any person, firm or corporation particularly described in subdivision (a) and so solicited for appraisal business by or on behalf of plaintiffs;

"(c) From entering into or executing or carrying out any future contract for the performance of appraisal service by defendants,

Federal Appraisal Company, Froelich, Bowater, or any of them, with any person, firm, or corporation, particularly described in subdivision (a) and heretofore so solicited for appraisal work by or on behalf of plaintiff, whether solicitation by or on behalf of defendant took place before or after the commencement of the action herein, and such restraint and injunction will apply equally if such solicitation shall take place hereafter; provided, however, that nothing herein shall apply to any appraisal business voluntarily offered to said defendants by any person, firm or corporation described in subdivision (a) herein which has not been so solicited for such business, directly or indirectly, by defendants Federal Appraisal Company, Froelich and Bowater, or their agents, servants, employees or attorneys."

The closing subdivision of the decree, (d), enjoins said defendants from using in any manner the name "Federal Appraisal Company" or the name "Federal," or any other name so similar to the name of plaintiff as to be likely to deceive the general public, or any part thereof, into believing that the plaintiff and defendant are identical corporations; or making any representation or doing any acts calculated to deceive the general public, or any part thereof, into believing that the plaintiff and the defendant are identical corporations, or which may tend to confuse the general public as to the identity of said corporations.

Defendants have appealed from the judgment as entered against them on the grounds that the evidence does not sustain the findings, nor do the findings support the judgment. A brief statement of the controversial facts will suffice to illustrate the contentions of the parties.

Plaintiff was organized in 1905 by C. G. B. Schenk at Milwaukee, Wis., with its head office at Milwaukee. Its head office for the states of California, Oregon, and Washington was located at Los Angeles. The business in which it was and is engaged is making appraisements of the value of works of art, furniture, household furnishings, and residential, industrial, and commercial properties for persons who desire appraisals to be made of the kind of property above mentioned. The main purpose and value of such appraisals, as explained by respondent, is that they furnish a basis for the adjustment of losses occasioned by fire in the settlement with insurance carriers, and also for losses and depreciations of values suffered from any cause.

In 1913 plaintiff, under the direction of C. G. B. Schenk, president, opened a branch office at San Francisco in the Monadnock building. The San Francisco office was discontinued in 1918 because of a lack of business to justify its continuance. In 1926, eight years after said San Francisco office had been clos-

ed, plaintiff again opened an office in San Francisco, with Arthur L. Froelich in charge. Froelich had been in the employ of plaintiff at Los Angeles about one year, as a solicitor, when he was placed in charge at San Francisco. Mr. Schenk described him as a seller of soap and automobile accessories at the time he employed him as a solicitor. Froelich was a solicitor merely, as all appraisals were issued from the Los Angeles office. Upon Froelich's arrival in San Francisco, he negotiated for and finally obtained desk room in the law offices of J. E. White, Esq., whose offices were located in the Monadnock building. His use of a portion of the reception room of Mr. White was very restricted. He was not to use the reception room as a place for the general transaction of business, but as a place where he might receive his mail, keep papers and business reports, and make business appointments by use of the telephone. His work as solicitor took him into the field, and it was understood that he could not use Mr. White's office as a meeting place for business prospects. He paid a rental of but \$20 a month, which also entitled him to list the name of plaintiff corporation in the telephone directory, using the same number assigned to Mr. White. The name of plaintiff was placed upon the entrance door.

During the latter part of 1928 Froelich determined to leave the employ of plaintiff and go into business for himself. Bowater, who had been in the employ of plaintiff at Los Angeles for some years, joined him in his business venture. On January 1, 1929, Froelich engaged J. E. White, Esq., to incorporate the proposed new company. The corporate name selected was Federal Appraisal Company, and upon a report from the secretary of state that said name was available, the corporation was duly incorporated on January 7, 1929, by Froelich and Bowater, and, so far as we are advised, no objection was made to the name selected until the present action was filed, which was approximately eleven months after the defendant corporation had commenced doing business under its corporate name. Before Mr. White had any knowledge that Froelich had severed his connections with plaintiff, or intended to do so, he had decided to terminate the tenancy of plaintiff if it should insist upon the right of two of its employees, Kelly and Meyers, to occupy any portion of his office. His uncontradicted testimony on this point was: "I had made up my mind to notify the Fidelity that it would have to do one of two things; that it would either have to remove Mr. Meyers and Mr. Kelly from the office or it would have to remove the whole thing from the office. * * * When Mr. Kelly appeared on the scene that fixed my determination; and as stated in the letter that Mr. Schenk [president of plaintiff corporation] wrote to me, he said it would be impossible for them to con-

tinue in my office if I could not give desk room to Mr. Meyers and Mr. Kelly, which I could not do under any circumstances."

It appears from the testimony of Mr. White that, even before he learned of Mr. Froelich's intent to sever his relations with the Fidelity Company, he had made the exclusion of Mr. Kelly and Mr. Meyers a condition of the occupancy of his office by plaintiff corporation. This condition was rejected by plaintiff, and it established offices elsewhere.

Whether Mr. White had any prior knowledge as to Froelich's intention of forming a corporation is of no particular importance. He had a right to prefer him or his corporation as a tenant if he so chose to any one else.

On January 1, 1929, Froelich engaged Mr. White to incorporate the new company. This done, Federal Appraisal Company made terms with Mr. White and installed its offices with him by retaining the desk room formerly occupied by plaintiff and by renting other space.

Appellant takes exception to a number of the findings of the court which follow the allegations of the complaint quite closely and describe plaintiff's business prestige in rather extravagant language. Examples of such instances are the finding that plaintiff is "the oldest and largest appraisal company in the United States of America," and the findings which concede for it a nation-wide reputation for honesty, ability, and financial responsibility. The testimony upon which such findings are predicated resides in loose and broad statements made by the president of plaintiff corporation which would not be accepted as establishing the facts if said findings were, as a matter of fact, necessary to the judgment. Being immaterial for any purpose, they may be passed over as harmless.

The complaint alleged that a conspiracy was entered into by Froelich, Attorney White, and Bowater to create a corporation with a name similar to that of plaintiff, with the purpose and intent of deceiving, confusing, and misleading the patrons and prospective patrons of plaintiff to its damage by adopting methods of advertising, styles of stationery, business cards, and methods of doing business so closely similar to the manner and style and method of plaintiff that plaintiff has suffered, and will suffer, loss of its business by said alleged deceptive practices and unfair business methods unless defendants are restrained from continuing to do said acts or doing business under its corporate name. The trial court acquitted Attorney White of the charge, but found that Froelich and Bowater entered into a conspiracy to draw from plaintiff its patrons by the adoption of what it found to be unfair business practices.

[1] It is difficult indeed to draw the line between methods or acts which may be de-

nounced as *conspiracies* to acquire the business or a part of the business of competitors, and those which may be considered legitimate acts or methods of competition. No fixed standard or code of business ethics has been adopted by the business world limiting or defining the extent to which business rivals may go in the employment of artifice, cunning, or what are known as the "tricks of the trade" or business craft in drawing trade from one to another. Ingenuity, business thrift, and alertness are a part of the capital stock of those engaged in rival businesses. So also it is difficult in many cases for the law to determine whether an employee should be permitted to solicit the patrons of his former employer. In the first case, it is only when the methods or acts of a business rival are clearly and manifestly unfair, and in the second case, only where the employee is in the possession of secret information not readily accessible to others and acquired by reason of his employment, that courts will afford injunctive relief.

[2-6] Whether the methods adopted by the defendants in the instant case were of that extraordinary character which will justify the court in denouncing them as unfair was a question primarily for the trial court to determine, and this court will not disturb its findings unless they are entirely unsupported by the evidence. That the defendants were free to leave the employ of plaintiff and engage in a similar business there can be no doubt. For men to agree and plan to enter business as associates, even though they have a design to draw their patronage from many rivals, or all that a particular rival may have, does not constitute them conspirators. Practically every copartnership, corporation, or private individual which enters into business does so with the intent of drawing all the business it possibly can from all competitors. If it were not so, there would be no such word as "competition" in business. We think the word "conspiracy" used in the pleadings and findings is a misapplied term, and that there is no question of conspiracy in the case. Certainly no case of criminal conspiracy is made out. The most that can be said from the evidence in this respect is that the defendants, who embarked upon a lawful business, employed unfair methods against plaintiff. Appellants complain that the alleged acts of unfairness were not sustained. While it is true that the alleged specific acts constituting unfairness were but few, and the evidence offered to sustain them was susceptible of two constructions, the court found against appellants, and we are bound by its findings. There is evidence, conflicting it is true, that Mr. Froelich did solicit, after he had severed his connections with plaintiff, certain customers with whom he had negotiated as agent for plaintiff while an employee of said plaintiff. The court further found that the

information which Froelich acquired by reason of his employment by plaintiff was of that confidential character which an employee is not permitted to turn to his own advantage.

[7] We are in accord with the court on the proposition that, if the defendants or either of them were carrying on uncompleted negotiations with prospective patrons on behalf of plaintiff at the time that Mr. Froelich and Mr. Bowater left the employ of plaintiff, or if negotiations were pending at said time, it would not be fair or equitable to permit them to reopen business negotiations with said prospective patrons on behalf of defendant corporation until a reasonable time thereafter should have elapsed. As to whether the information gained by Froelich while in the employ of plaintiff belonged to the confidential class which was peculiar to his employment, or whether it was information which was accessible to third persons generally with the exertion of but little effort, presented a close question, which the court found in favor of plaintiff, and which we are not disposed to discuss at length, for the reason that this finding is rendered unimportant by others which point to the same result.

[8] The various acts complained of, including the alleged misrepresentations, go to the one question of unfair competition, and are referable to injunctive relief and an action for damages, but said acts are not sufficient to deprive the defendants or their successors or a third party of the right to do business in a lawful manner under the name Federal Appraisal Company, or of the use of any other name which may contain the word "Federal."

[9] Other grounds of complaint upon which plaintiff asked for damages consisted in the fact that appellant corporation caused business cards to be printed upon white cardboard, resembling in size and shape and in style of type and arrangement of names the cards of the plaintiff. The printed matter upon each card differs from that on the other, except that the cards of the respective corporations list each company under the same telephone number. This occurs from the fact that plaintiff's cards were printed at a time when it occupied offices in Mr. White's office. When defendant corporation succeeded it as a tenant of Mr. White, it listed itself under Mr. White's telephone number. The fact that respondent's corporate name remained unchanged for a time in the telephone directory under its former telephone number was not a fault imputable to defendants. The duty of seeing that it was listed under the proper telephone number was upon plaintiff. The fact that the telephone number could not be changed until a new issue of the directory was published is a matter of common temporary inconvenience. No question of copyright or trade-mark is involved in the style or printed matter which the cards bear. They

are of the ordinary character, generally similar, but bear different names and reading matter.

Other alleged acts of unfair competition were put in issue, but, being of an evidentiary character, it is not necessary to specifically describe them. It will suffice to state that the court did not regard the damage suffered by plaintiff to have been great, as it awarded nominal damages in the sum of only \$10, and imposed punitive damages in the sum of \$300.

[10-13] We come now to the question as to whether the appropriation of the name "Fidelity Appraisal Company" by one corporation deprives all other persons desiring to engage in the same business, or who being so engaged desire to form a corporation, of the use of the name "Federal Appraisal Company." A mere statement of the proposition suggests an answer in the negative. The doctrine is so well settled by a multitude of cases that it is not necessary to cite specific cases, that words in common use are regarded as common property, and may be used by others in combination with other descriptive words, provided they are not so used in combination with other descriptive words, symbols, or designs as to render it probable that they would mislead persons possessing ordinary powers of perception. Generic terms and words descriptive of place are not subject to exclusive appropriation. Both "Fidelity" and "Federal" are words in common use. They are not synonymous; nor are they included within the rule of idem sonans; nor do they so closely resemble each other in orthography or visual appearance that the use of one suggests the other. An inspection of the telephone directory will show that the first word in more than a score of business and trade companies and corporations is "Federal." Likewise an inspection of said directory under the head of "Fidelity" will disclose more than a dozen trade-names which begin with the word "Fidelity." Appraisal companies are listed in the business directory to the extent of more than a dozen. That all of the words found in appellant's corporate name are words in common use, and that the word "Federal" does not appear as a part of the trade-name of respondent, are not debatable questions. Federal Appraisal Company is no more an infringement upon respondent's corporate name than is the American Appraisal Company, which appears near it in the list of appraisal companies. This being so, the plaintiff has no greater exclusive control over the word "Federal," by reason of having adopted the word "Fidelity" as a part of its corporate name, than it would have to deprive the American Appraisal Company of a part of its name. We think the matter too clear to merit further consideration. The authorities on this subject, setting out examples, are fully considered in *Dunston v. Los Angeles Van & Storage Company*, 165 Cal. 89, 131 P. 115; *Southern*

California Fish Company v. White Star Canning Company, 45 Cal. App. 426, 187 P. 981; Rixford v. Jordan, 214 Cal. 547, 6 P.(2d) 959; American Automobile Association v. American Automobile Owners' Association (Cal. Sup.) 13 P.(2d) 707. Most all of the cases cited by respondent are cases in which rights of trade-mark or copyright have been infringed upon. The instant case is one of corporate existence, which was in the first instance approved by the secretary of state under the provisions of our state statutes. Section 296, Civil Code, as amended by St. 1929, p. 1263, § 6 (substance of section now contained in section 291, Civil Code, St. 1931, p. 1767).

[14, 15] It will be noted that signs or symbols are not used by either corporation in combination with words. The case is one presenting the use of simple language. Of course, it cannot be reasonably contended that the plaintiff has a monopoly on the common words "Appraisal Company." The decisions of this court and of other jurisdictions provide that: "The law of unfair competition does not protect purchasers against falsehoods which the tradesman may tell; the falsehood must be told by the article itself in order to make the law of unfair competition applicable." Southern California Fish Company v. White Star Canning Company, 45 Cal. App. 426, 187 P. 981, 985; American Automobile Association v. American Automobile Owners' Association (Cal. Sup.) 13 P.(2d) 707; Hill Bread Company v. Goodrich Baking Co. (N. J. Ch.) 89 A. 863.

It is clear that the portions of the decree included in section (d) thereof restraining the defendants from the use of the name under which defendant corporation was incorporated, and from employing as a part of its corporate name the word "Federal," cannot be sustained, and it is hereby reversed.

As to that portion of the judgment included in sections (a), (b), and (c), and heretofore set forth, the decree is affirmed. We do not understand the decree means to forever enjoin the defendants from soliciting business from persons who were the former patrons of plaintiff, but merely enjoins them from taking advantage of any secret information the defendants, as former employees, may have gained by reason of their employment. This injunction applies to the solicitation of persons with whom negotiations with plaintiff were pending or with prospective patrons spe-

cifically identified at the time defendants left the employ of plaintiff.

The probabilities are that after a period of more than two years since the judgment was rendered a repetition of the kind of acts enjoined as far as the solicitation of plaintiff's former patrons are concerned has been reduced to the zero point by the changes which time has brought about. The defendant corporation's name appears in the list of present going business firms, and, if it has been continuously in competitive business with plaintiff, as the facts indicate, many grounds of business strife doubtless have faded out.

The portion of subdivision (d) which enjoins the use of the corporate name of defendant corporation or the word "Federal" as a part of the name of any appraisal business is reversed. The balance of said section is probably too indefinite to be enforceable. The specific acts enjoined, however, appear in other provisions of the judgment.

[16, 17] We are also of the view in the circumstances of the case that the award of exemplary damages should not be sustained. Such damages are allowable only in cases where the animus malus is made to appear satisfactorily, and such damages are inflicted in the nature of a penalty for the evil intent. We think that as a matter of law this extraordinary penalty should not be imposed in this action. Especially is this so in the light of the decision of this court holding that the use of the corporate name, "Federal Appraisal Company," is not an encroachment on plaintiff's corporate name. It is impossible for this court to know what portion of the penalty was allocated to the use of its corporate name, which use was held by the learned trial court to be an unlawful invasion of plaintiff's rights, but which we hold herein was a lawful exercise of its right of selection, and what portion was allocated to its findings on other enjoined acts constituting unfair competition. This award, in the sum of \$300, is therefore stricken from the judgment.

The decree and judgment is modified, affirmed, and reversed as herein pointed out. The cause is therefore remanded to the trial court to enter judgment in accordance with the views herein expressed.

It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.

129 Cal.App. 403

BLANK v. BLANK.

Civ. 8749.

District Court of Appeal, First District,
Division 1, California.

Feb. 2, 1933.

Hearing Denied by Supreme Court April 3,
1933.**1. Appeal and error** $\S$ 994(3), 1012(1).

Trial court is sole judge of weight of testimony and credibility of witnesses, and appellate court cannot substitute its judgment, though it may believe evidence warranted different conclusion.

2. Divorce $\S$ 213, 225, 262.

Trial court may grant wife alimony pendente lite, counsel fees, and costs, despite fact husband was destitute of funds and ability to pay, and thereafter suspend husband's divorce action until he could do justice to wife (Civ. Code, $\S$ 137).

3. Divorce $\S$ 211, 223.

Order denying wife, sued for divorce, alimony pendente lite, counsel fees, and costs for husband's inability to pay and wife's ownership of sufficient resources, held no abuse of discretion under evidence (Civ. Code $\S$ 137).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Karl E. Blank against Floriene Blank, in which defendant filed a cross-complaint. From an order denying her motion for alimony pendente lite, counsel fees, and costs, defendant appeals.

Affirmed.

Bodkin & Lucas and G. Stuart Silliman, both of Los Angeles, for appellant.

Don Marlin, of Los Angeles, for respondent.

KNIGHT, J.

The defendant appeals from an order denying her motion for alimony pendente lite, counsel fees, and costs in an action for divorce.

The parties had been married approximately 8 years, and there were two children aged, respectively, 6 years and 18 months. The action was instituted in Los Angeles county in September, 1930, a few days after defendant and the children had departed for Emporia, Kan., to visit defendant's mother. The complaint was based on charges of cruelty. Besides answering, defendant filed a cross-complaint charging cruelty, and she filed therewith her motion for alimony, counsel fees, and costs. She was not present at the hearing and determination of her motion, having remained in Kansas at her mother's home; and the evidence submitted in her behalf con-

sisted of the verified pleadings and two affidavits, one being presented in the form of a questionnaire, the form used evidently being supplied under court order for such purpose. Plaintiff sought to have the questionnaire excluded on the technical ground that it was not authenticated in the manner required by law. The objections were properly overruled and the hearing narrowed down to the issue of the financial resources of the respective parties and their ability to provide for themselves.

Defendant averred in her affidavits that plaintiff was 36 years old, in good health, and had been a real estate salesman for about 4 years; that his present monthly income from all sources was \$175; that during the past year he had earned \$500 in commissions, besides having received \$2,400 in donations from his father, and \$350 from her mother; and that his present net financial worth was \$1,000. She further averred that at one time she was employed as clerk in a retail store, receiving therefor \$130; that her net financial worth amounted to nothing, and that she had no independent income; that she was then living with her mother, in the latter's home; and that she was without funds to make a defense to the action, or to support herself or children, or to defray her expenses to California to appear at the trial of the action or at any hearing to be had therein. She also averred that, when she left California, she did so with the expectation of returning as soon as plaintiff was able to secure employment and provide for her and the children; that he induced her to go, and said nothing whatever about bringing divorce proceedings; and that he brought the action 6 days after her departure.

All of the essential facts stated in defendant's affidavits were denied by plaintiff in the oral testimony given by him at said hearing in his own behalf. According to his testimony he had been employed by his father selling bonds, and for the past year had earned only \$500; that his father, who was well advanced in years, had provided plaintiff and his family with a home, had helped support the family, and given him small amounts of money from time to time as his necessities required; that the total amount of these donations was possibly \$400. He denied having received any money from defendant's mother. He further testified that, when his wife left, she intended to remain away permanently; that the matter of divorce was discussed, and that her mother, who was visiting them at the time, insisted that defendant settle the matter before she left, but that defendant refused to do so; also that defendant told him before she left that she did not intend to return; that her brother in New York had offered her a position of \$300 a month which she intended to accept

and live in New York at her brother's home, leaving the children with her mother. He also stated that defendant's family was the owner of two large flour mills in Kansas valued at approximately \$250,000; and that defendant told him she owned a one-fifth interest therein. Continuing, he stated that the money defendant used to defray her expenses to Kansas was sent to her in the form of a check by said milling company. And he denied generally that he had any money or property of his own, stating that he had paid his attorney only \$25.

[1-3] Section 137 of the Civil Code provides in part that, when an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and the children, or to prosecute or defend the action; and it provides also that a like order may be made against the wife. In the present case, as will be noted, there is a sharp conflict in the evidence as to the financial worth of the respective parties and their ability to support themselves and the children. Evidently the trial court accepted as true the testimony given by plaintiff, which in our opinion is legally sufficient to prevent our holding that there was an abuse of discretion on the part of the trial court in making the adverse order. True, several of the cases cited by defendant involved circumstances somewhat similar to those presented here, and the trial court therein, in the exercise of its discretion, granted the order directing the husband to pay, and such order was sustained on appeal. And it may be conceded in the present case that, if the trial court had seen fit to grant defendant's motion, the evidence adduced in her behalf would have been legally sufficient to sustain such order on appeal. But it did not choose to take such action; and since under settled rules the trial court is the sole judge of the weight of the testimony and the credibility of the witnesses, we have no authority on appeal to substitute our judgment, even though we may believe that the evidence upon which the trial court based its order warranted a different conclusion. It is also true that in situations of this kind the trial court may follow the course suggested in *Farrar v. Farrar*, 45 Cal. App. 584, 188 P. 289, 290, that is, grant the motion despite the fact that the husband was then destitute both of funds and ability to pay, and thereafter suspend his suit for divorce until he could do justice to his wife. In this regard the court in that case quoted the following from *Bishop on Marriage, Divorce and Separation* (2d Ed.) § 981: "If he cannot alimant her, and give her the means of defense, he cannot have his divorce." But there was no duty imposed on the trial court in the present case to follow such course, and,

having found as it did, upon sufficient evidence, that under present conditions plaintiff would be unable to comply with an order for the payment of alimony if such order were made, that he was out of employment and could not get work, and that defendant was provided with sufficient funds and resources of her own to support herself and the children pending the trial of the action, and to advance the cost of her defense, it acted within its legal power in denying the motion, and we find no legal ground upon which it may be held that the rendition of the adverse order constituted an abuse of discretion. As aptly said by the Supreme Court in *Wilder v. Wilder*, 214 Cal. 783, 7 P.(2d) 1032, 1033, in dealing with a similar case: " * * * It cannot be said that the lower court abused its discretion in refusing the allowance, inasmuch as the circumstances of both parties as to age and financial resources were before the court, and the whole matter rested in the sound discretion of the trial court. *Stewart v. Stewart*, 156 Cal. 651, 655, 105 P. 955; 1 Cal. Jur. 992. A reviewing court is not authorized to revise the lower court's judgment even if it should be of the view that it would have dealt more liberally with the appellant had the matter been submitted to its judgment in the first instance. A clear abuse of discretion only will justify its interference with the judgment of the trial court."

The order is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

129 Cal.App. 511
CHAMBERS v. WATERBURY, City Auditor.
Civ. 1418.

District Court of Appeal, Fourth District,
California.
Feb. 7, 1933.

1. Justices of the peace ⇨2.

Creation of police court under charter does not have effect of abolishing city justice's court existing under state law, unless its jurisdiction is coextensive therewith.

2. Criminal law ⇨90(1).

Constitutional and statutory provisions for exercise of municipal police court functions by city justice's court are inapplicable after city police court is created by charter (Code Civ. Proc. § 103; Const. art. 11, § 6).

3. Justices of the peace ⇨2.

While police court is established by city charter, remaining city justice's court is controlled by state laws, and is unaffected by

city charter other than for certain reduction in jurisdiction (Code Civ. Proc. § 103; Const. art. 11, § 6).

4. Courts ⇨42(5).

Provision in new San Diego city charter, designating present city justice of peace to preside over newly created police court until police judge is duly elected, *held* invalid, as beyond authority of city (Code Civ. Proc. § 103; Const. art. 11, § 6).

New charter adopted by city of San Diego, which went into effect on January 1, 1932, contained provision creating a police court. A further provision that the present city justice of the peace should preside over the new police court until the end of his term of office, and until a police judge is elected pursuant to the terms of the charter at the regular municipal election to be held in 1935, was invalid, as being beyond authority and power of city, because the city had no power to take over the services of a county or township officer on its own motion alone, or to partially or entirely destroy the efficiency of another court operating under general state law, and since the city had no power to abolish the city justice's court or to take away its more general jurisdiction, and city could not accomplish same result by taking over judge of such court, and making him a municipal officer, controlled and limited by the charter provisions.

5. Justices of the peace ⇨2.

Where provision in new San Diego charter, designating present city justice of peace to preside over newly created police court until 1935 election, was invalid, city justice court continues during intervening period, with city paying salary of city justice as fixed by state law (Code Civ. Proc. § 103).

6. Mandamus ⇨178.

Order of court in mandamus proceeding is limited by exact terms of alternative writ previously issued.

Original petition by Claude L. Chambers for a writ of mandamus prayed to be directed to G. F. Waterbury, Auditor of the City of San Diego.

Application for peremptory writ of mandate denied.

Charles B. De Long, of San Diego, for petitioner.

C. L. Byers, City Atty., and Gilmore Tillman, Asst. City Atty., both of San Diego, for respondent.

James G. Pfanstiel, Nicholas J. Martin, and Shelley J. Higgins, all of San Diego, amici curiæ.

BARNARD, P. J.

This is a petition for a writ of mandate commanding the respondent, as auditor of the city of San Diego, to audit, approve, and pay a claim of petitioner for salary as police judge, presiding over the police court of said city.

Prior to January 1, 1932, the city of San Diego had no provision in its charter for a police court, and for some years before that date the usual functions of such a court were exercised by and through a city justice's court, established and existing under and by virtue of the general laws of the state. Under this arrangement, all fines levied and collected were paid into the city treasury, and the salary of the city justice was paid by the city. The petitioner was elected city justice at the general election held in November, 1930, and, it is alleged, has been since January, 1931, and now is, acting city justice of the peace of said city. On January 1, 1932, a new charter adopted by the city of San Diego, duly ratified and approved, went into effect containing provisions for a police court, of which the following are material here:

"Section 202. Jurisdiction of City Police Court. There is hereby created and established a Police Court for The City of San Diego, which shall have all the jurisdiction and exercise all the powers which are now or may thereafter be provided for Police Courts in cities by the General Laws of the State of California.

"Section 203. Qualifications of Police Judge. The Police Court of The City of San Diego shall be presided over by a Police Judge, who shall be elected by the qualified electors of said City once every four years.
* * *

"Section 204. Salary. The Police Judge shall receive as compensation for his services such salary as shall be paid to Justices of the Peace of San Diego Township under the General Laws of the State of California.

"Section 209. Present City Court. The present City Justice of the Peace shall preside over the new Police Court established under this Charter until the end of his term of office, and shall continue to hold such office until a Police Judge is elected pursuant to the terms of this Charter at the regular Municipal Election to be held under this Charter in 1935."

The petitioner alleges that he has at all times entered into and discharged the duties of this new police court, as provided for in the city charter; that justices of the peace of San Diego township are paid the sum of \$5,000 per year; that a claim for his salary as said police judge has been regularly filed and presented; and that payment thereof has been refused. It appears that the salary of the city justice of the peace, to which of-

since the petitioner was elected, is \$3,000 per year. There is presented to this court a question as to the validity of section 209 of this charter, as to whether the city of San Diego or the county of San Diego should pay the salary of petitioner, with the further question as to which salary applies in the event of a holding that the city should pay the same.

The respondent concedes that since the jurisdiction of the police court, created by the new charter, is not that of a "municipal court," as defined by section 8½ of article 11 of the Constitution, its creation did not have the effect of abolishing the existing city justice's court. It is contended that two courts now exist, each presided over by the petitioner; that the city may no longer receive fines levied by the city justice court; that the expense of said city justice's court is now a proper charge upon the county; and that the city, authorized to expend city money in the exercise of municipal functions only, is precluded from paying any part of the expense of any court other than the new police court. It is then argued that since these two courts are presided over by one individual who can draw but one salary, he must be paid either by the city as police judge with the county receiving his services as justice of the peace without salary burden, or by the county as city justice with the city receiving free his services as a police judge. While the injustice of this situation is recognized, it is argued that the latter alternative is sanctioned by law.

[1] It is conceded that the jurisdiction of this new police court is not coextensive with that of the existing city justice court. While the right of a city to create, through its charter, a court having exclusive jurisdiction over certain municipal matters is now thoroughly established, it is equally well settled that a court so created does not have the effect of abolishing a city justice's court created in accordance with the state law, unless its jurisdiction be coextensive therewith. *Church v. Board of Supervisors*, 211 Cal. 367, 295 P. 516. Otherwise, the city justice's court continues as a part of the state system. *Graham v. Fresno*, 151 Cal. 465, 91 P. 147. It is clear that the new charter of San Diego has achieved this result after the new police court created thereby is fully established through the election of a police judge in 1935. An attempt has been made to establish such a new police court during the intervening period which, if valid, creates the same situation. However, if these provisions for the interim are valid, during that period there will exist two courts; one created under the charter, and the other existing as part of the state system of justices' courts, both presided over by the same judge operating under a divided authority received from separate political subdivisions, with resulting

services and benefits to each, while the entire salary burden rests upon one alone. The very statement of the situation thus attempted to be created calls for an inquiry as to the validity of the provision responsible therefor, and as to whether a city, in exercising the undoubted right given to it by the Constitution to create its own police court, has the right to thus invade the domain of another court, established and existing as a part of the state system, and to thus interfere with the working thereof.

[2-4] It is contended that this dual arrangement is expressly authorized by section 6 of article 11 of the Constitution permitting municipal functions to be performed by county officers, when the same is authorized both by a city charter and by a county charter, or general law. It is argued that section 103 of the Code of Civil Procedure provides for the exercise of police court functions by city justices' courts, thus bringing this situation within this provision of the Constitution. As we have pointed out, these general provisions for the exercise of municipal police court functions by a city justice's court, while applicable in the absence of charter provisions for a police court, are ineffective and no longer apply to a particular city after such a police court is created by its charter. *Graham v. Fresno*, supra; *McClung v. Johnson*, 106 Cal. App. 264, 289 P. 199. We find nothing in this, or any other, general law to justify a city, after removing itself from the operation of the general law, in taking over the services of a county or township officer on its own motion alone.

It is also argued that the positions of city justice of the peace and police judge under this charter are not incompatible, that the same person may hold both positions, and that this theory is inferentially supported by the case of *People v. Garrett*, 72 Cal. App. 452, 237 P. 829, since that case had reference only to a township justice court and a police court, and was decided on the ground that the people of a township were being deprived of a court to which they were entitled, while, in the instant case, both courts would remain although presided over by the same judge. So far as that case is of value here, it tends to support the theory that a city, through the operation of its police court, may not interfere with the operation of a city justice court to which the people of the township are also entitled. But a somewhat different question is here presented with respect to the right of a city to create a new police court in such a manner that it can operate only by taking over the judge and partially or entirely destroying the efficiency of another court.

It is further argued that the arrangement here attempted is, in effect, merely continuing the former arrangement where the police court functions of the city were performed by

the city justice's court in the absence of a charter provision; that the city justice of the peace is merely made an *ex officio* judge of the police court of the city; and that this exact situation was approved in the case of *Milner v. Reibenstein*, 85 Cal. 593, 24 P. 935. In that case it was held, in respect to the questions before the court, that the provisions of the state Code governed. However, it does appear that the city charter had made no change in the existing situation, because the court had theretofore held, in *People v. Toal*, 85 Cal. 333, 24 P. 603, that these particular provisions of the city charter were null and void. If and when a new police court is established in San Diego, the city justice court still remains, although with a reduced field of jurisdiction, and a situation exists which is very unlike the former arrangement.

In the case of *Graham v. Fresno*, while it was held that the constitutional amendment of 1896 empowered a city to provide by charter for its own police court, making a city supreme in that particular field, it was also pointed out in effect that this amendment was limited to police courts, and did not authorize a city to trench in the slightest degree upon the power of the Legislature to provide for city justices' courts as part of the state system. It was further held that where a city established such a police court by charter, an existing city justice court remained and the city justice of the peace continued as a county or township officer, performing no municipal functions, with his salary to be paid by the county. While a police court thus established is controlled by the city charter and removed from the operation of corresponding provisions of general state laws, it is equally true that the remaining city justice court is controlled by state laws and is unaffected by the provisions of a city charter, other than for a certain reduction in its jurisdiction. Since the city has no power to abolish the city justice court or to take away its more general jurisdiction, it would seem to follow that the city may not accomplish the same result by bodily taking over the judge of such a court and making him a municipal officer, controlled and limited by the charter provisions. Such a city must be equally powerless to say what a city justice shall do with his time, in whole or in part. The provision of the San Diego charter, now under consideration, not only attempts to make

this particular county or township officer also a city officer, performing extensive city functions, but there is an apparent intention that the city shall use practically his entire time, and this, if the respondent's contentions are to prevail, without any expense to the city. While provision is made in our law for a state system of courts and for a separate and distinct city court, where properly established, we know of no provision of law authorizing such a hybrid system as is here proposed, with the same judge presiding over both courts, and no agreement or arrangement between the respective political subdivisions for a division of the benefits and burdens thereof.

[5] A city has the undoubted right to establish a police court instead of using a city justice's court for certain municipal purposes, and whenever it does so, under our decisions, the corresponding portions of section 103 of the Code of Civil Procedure no longer apply to such a city. The city of San Diego has attempted to accomplish this result, and has provided therefor after the city election to be held in 1935. In attempting to so provide during the interim, in respect to the most important requisite of such a court, the only provision made is one which is not only unauthorized by law, but which actually interferes with and more or less destroys another court. We conclude that this may not be done, and that this particular provision of the charter is not valid. No valid provision having been made for the establishment of a new police court until after the election to be held in 1935, it follows that during the intervening period the charter has not replaced the state law, in the respect under consideration. In the meantime the state law governs, and the city justice court continues under the provisions of section 103 of the Code of Civil Procedure, with the city paying the salary of the city justice as provided and fixed by state law.

[6] Since any order we may make in such a proceeding as this is limited by the exact terms of the alternative writ issued (*Gay v. Torrance*, 145 Cal. 144, at page 153, 78 P. 540), an order covering the matter of petitioner's salary as city justice may not be entered herein. For the reasons given, the application for a peremptory writ of mandate is denied.

We concur: MARKS, J.; JENNINGS, J.

129 Cal.App. 305 132 Cal.App. 724

FINK v. WEISMAN et al.

Civ. 8665.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1933.

Rehearing Granted Feb. 27, 1933.

1. Appeal and error ⇨930(1).

Reviewing court must consider evidence most favorable to respondent, where conflicting.

2. Joint adventures ⇨4(1).

Misrepresentation of purchase price, by one having executory purchase contract, to another associated with him under contract for purchasing half interest, *held* actionable wrong.

3. Joint adventures ⇨4(1).

Joint adventurer in purchase of property may not make secret profits.

4. Fraud ⇨41.

Complaint alleging partnership agreement to purchase realty and that defendant misrepresented price, to plaintiff's damage in amount of excess paid for his share, stated case for deceit, so that findings by court were unnecessary.

5. Estoppel ⇨68(2).

That plaintiff in collateral proceeding unsuccessfully urged action was in equity *held* not to estop him from subsequently taking inconsistent position.

6. Appeal and error ⇨882(5).

Defendant, having tried case on theory conspiracy was charged, could not on appeal claim complaint was insufficient in this respect.

7. New trial ⇨102(2).

Refusal of new trial for newly discovered cumulative evidence not proved unobtainable by due diligence *held* not abuse of discretion.

8. Appeal and error ⇨755.

One submitting appeal on briefs filed on another's separate appeal could not claim reviewing court overlooked points favorable to him in other's brief.

9. Appeal and error ⇨882(6).

Defendant, having tried case on theory consistent with evidence, could not on appeal complain of variance.

10. Appeal and error ⇨882(6).

Defendant could not complain on appeal of absence of allegation in complaint, where matter was inferentially charged and case was tried as if matter were in issue.

11. Fraud ⇨30.

One who knowingly aids fiduciary to make secret profits may be held liable jointly with fiduciary.

12. Fraud ⇨30.

One who actively misrepresented price of property to one joint adventurer, to enable other to make secret profits in purchase thereof, could be held jointly liable for secret profits.

13. Brokers ⇨102.

Broker for sellers need not disclose to one joint adventurer, with whom no fiduciary relation exists, amount of price for which latter's coadventurer agreed to purchase property (Civ. Code, § 1710, subd. 3).

14. Fraud ⇨64(1).

In fraud action, instruction on duty of seller's broker to divulge all he knew respecting transaction to purchaser's joint adventurer *held* prejudicial error.

Instruction constituted prejudicial error, since there was no requirement that the jury find that broker owed fiduciary duty, or that he must have known of deceit practiced by purchaser, as against his joint adventurer; and immediately preceding the instruction the court stated that he would now give instructions which were "an explanation of what the court considers the law in regard to his liability."

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Benjamin Fink against William Weisman and another. Judgment for plaintiff, and defendants separately appeal.

Judgment against defendant Weisman affirmed, and judgment against defendant Toplitzky reversed, and cause remanded, with directions.

O'Melveny, Tuller & Myers and Freston & Files, all of Los Angeles, for appellant Joseph Toplitzky.

Smith & Breslin, of Los Angeles, for appellant William Weisman.

Henry E. Carter, Wheeler & Wackerbarth, and Henry O. Wackerbarth, all of Los Angeles, for respondent.

DOOLING, Justice pro tem.

Separate appeals are prosecuted by defendant William Weisman and defendant Joseph Toplitzky from a judgment entered against both defendants pursuant to the verdict of a jury. The action was to recover secret profits in the purchase of four separate pieces of real property, in each of which plaintiff Fink purchased a one-half interest through defendant Weisman at a price in excess of that agreed by Weisman to be paid to the vendor. Defendant Toplitzky was interested in the transactions as a real estate broker; and since the relationship between Fink and Weisman in the transactions and that between

Fink and Toplitzky were substantially different we shall for the sake of clarity consider the two appeals separately.

The Weisman Appeal.

[1] In so far as the evidence may be conflicting, it is axiomatic that on appeal we must consider the evidence most favorable to respondent. Pursuant to that rule we are justified in making the following statement of facts, although as to some of them there was a sharp conflict in the evidence:

Fink came to Los Angeles in March, 1920, and there met Weisman, who is his wife's uncle, and whom he had known for many years. In June or July, 1920, Fink and Weisman discussed the matter of buying real estate together. Thereafter Weisman told Fink that the Woodward Hotel could be purchased for \$245,000, \$210,000 for the building and \$35,000 for the furniture, and suggested that Fink put up one-half the money for a one-half interest in the property; that the deal was to be on a fifty-fifty basis, and they could buy the property and operate the hotel together. Later Weisman introduced Fink to Toplitzky, who was acting for the seller, and Toplitzky, in Weisman's presence, repeated the statement as to the price at which the property could be purchased. Pursuant to these representations, Fink paid \$17,500 for a one-half interest in the furniture, and \$12,500 as one-half the down payment on the realty. In truth the purchase price of building and furniture was \$210,000 in all, and, as a result, Fink paid \$17,500 more than the price of one-half the property. At the time of the purchase by Fink, Weisman had a contract to buy the entire property, but the deed was not received from the seller until after Fink had made his payments. Weisman deeded a one-half interest to Fink; the deed reciting: "There having been no money paid for this deed, no United States Revenue Stamps are required."

Thereafter the Woodward Hotel was operated by Fink and Weisman as a partnership business.

After the purchase of the Woodward Hotel, and in September, 1920, Fink, Weisman, and Toplitzky were together in Toplitzky's office. Both Toplitzky and Weisman told Fink that the Chandler Hotel could be bought for \$235,000 with a payment of \$75,000 in cash, and Toplitzky said that "each of the partners" could pay \$37,500. After this conversation Weisman left Los Angeles, and before going told Fink that Toplitzky would handle the deal. The property was purchased; the seller deeding to Weisman and Weisman in turn deeding a one-half interest to Fink. The deed from Weisman to Fink contained a recital with regard to revenue stamps similar to that quoted above. By reason of the false representations of Weisman and Toplitzky,

Fink paid \$17,500 in excess of one-half of the price of this property.

In October of the same year, Toplitzky and Weisman suggested to Fink that Fink and Weisman buy the Weymouth apartments. Both Weisman and Toplitzky said the price would be \$180,000 or \$185,000 depending upon whether the seller or the buyers paid the commission. Later, Toplitzky stated that "the partnership" was to pay the commission. Weisman himself closed the deal with the owner, who lived in Billings, Mont. The actual purchase price was \$130,000 and Fink paid \$25,000 in excess of one-half that amount. Fink again received a deed from Weisman to a one-half interest; the deed reciting: "This deed is made to complete the transaction wherein William Weisman and Benjamin Fink purchased said property of C. W. Bair and wife and the title thereto was taken in the name of said William Weisman alone; and since no further consideration has been paid by said Benjamin Fink, to said first parties or either of them for this deed no internal revenue stamps are required hereon."

In June, 1921, while Weisman was away from Los Angeles, Toplitzky told Fink that Fink and Weisman could buy the Leonide Hotel for \$250,000, and that the deal could be handled by a \$35,000 down payment by Fink, and a like payment by Weisman. Toplitzky further stated that he had discussed it with Weisman, and that Weisman would be willing to go into the deal. The property was purchased by Fink and Weisman; Fink paying on the basis of the price stated, though in fact the price was \$30,000 less, as a result of which Fink paid \$15,000 in excess of one-half the purchase price.

The judgment is for the sum of \$75,000, the total of Fink's payments in excess of one-half the purchase price of the several properties, with interest on the various sums making up this total from the dates of their payment.

[2, 3] It is first contended on behalf of appellant Weisman that under the evidence Fink and Weisman were not general partners for the purchase of real estate, but that in each case Weisman first contracted to buy the several properties, and then in turn sold a one-half interest to Fink. On the basis of these facts it is then argued that an owner of property who was not a fiduciary at the time that he purchased it may sell an interest in it to one whom he afterwards interests in buying it without being bound to disclose the profit that he may realize from the transaction. In support of this rule appellant cites *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *In re Cape Breton Co.*, L. R. 29, Ch. Div. 725; *Erlanger v. The New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218; *Burland v. Earle*, L. R. App. Cas. (1902) 83; *Ladywell Min. Co. v. Brookes*, L. R. 35 Ch. Div. 400; *Withroder v. Elmore*,

106 Kan. 448, 188 P. 423, 10 A. L. R. 191; *Murray v. Close*, 118 Kan. 51, 234 P. 60. These cases may be fairly said to announce the principle that where one buys property when no fiduciary relationship exists and afterwards sells it or an interest in it to persons whom he associates with himself, since the original purchase was not made at a time when he owed such associates any fiduciary obligation, he need not disclose the original purchase price, and cannot be held liable for any profit that he may make. Conceding this to be the law, in all of these cited cases the acquisition of the property was complete before the fiduciary relation arose. But in each of the four purchases here involved, Weisman at most had an executory contract to purchase the property when he contracted with Fink for the purchase by Fink of a one-half interest therein. When such agreement was made, Weisman then assumed toward Fink a fiduciary relationship. He, in effect, undertook to give Fink a one-half interest in his uncompleted contract to purchase, and made himself Fink's associate therein. This being so, the situation is not the same as if Weisman had previously bought and paid for the property and taken title to it before the negotiations for the sale of a one-half interest to Fink.

In *Humburg v. Lotz*, 4 Cal. App. 438, 88 P. 510, 511, the defendant had an agreement with the owner of a patent giving him the exclusive right to buy for \$5,000 said patent rights in a certain territory, or to sell the same for \$8,000 and receive a \$3,000 commission. While this agreement was in force defendant entered into an agreement with plaintiff by which each purchased a one-half interest in such patent; the plaintiff paying \$4,000. The court said:

"The defendant concealed * * * from the plaintiff that he could purchase the letters patent and devices for \$5,000, and by such concealment procured the plaintiff to pay \$3,000 more into the business than the defendant paid. * * *

"When the plaintiff and defendant agreed to enter into the common enterprise together, each one became the agent of the other in regard to the purchase of the property and the management of the business. They occupied fiduciary relations to each other, and neither one could take advantage of the other for his own benefit by dealings in the name of both and in furtherance of the common enterprise. Defendant was bound to act in the highest good faith to plaintiff. He will not be allowed to obtain any advantage over him by misrepresentation or concealment."

In *Thimsen v. Reigard*, 95 Or. 45, 186 P. 559, 562, the Supreme Court of Oregon quotes the following from *Sandoval v. Randolph*, 222 U. S. 161, 32 S. Ct. 48, 56 L. Ed. 142: "Where one agrees to act as agent to purchase property at not exceeding a specified price, he

cannot avail of an unexpired option antedating the employment to purchase the property at a less price himself and make the difference."

We are satisfied that where one has merely an executory contract to purchase property, and associates another with him in such purchase, under an agreement by which the other advances his share of the purchase price toward the performance of the contract, that they assume toward one another a fiduciary relation, and that the concealment or misrepresentation of the purchase price becomes an actionable wrong. "Joint adventurers in the purchase and sale of property must act in the highest good faith toward each other and may not make any secret profit out of the transaction not shared by the others." *Tufts v. Mann*, 116 Cal. App. 170, 183, 2 P. (2d) 500, 505; *Menefee v. Oxnam*, 42 Cal. App. 81, 183 P. 379; *Keyes v. Nims*, 43 Cal. App. 1, 184 P. 695; *Stenian v. Tashjian*, 178 Cal. 623, 174 P. 883.

[4] It is further claimed that the first four counts in the complaint stated equitable causes of action, and that the failure of the court to make findings thereon is reversible error. The first four counts are in substantially similar language, and the first count may be taken as the pattern of all. It is alleged in the first count that in July, 1920, Fink and Weisman entered into a partnership agreement for the purchase, operation, and sale of realty, each to contribute one-half the purchase price and share equally in the profits; that Weisman thereafter represented that the partnership could purchase the Woodward Hotel for \$210,000 for the realty and \$35,000 for the furniture; that prior to the time such representations were made Weisman and Toplitzky had entered into an agreement to purchase all of said property for \$210,000, with further appropriate allegations of belief and reliance upon such representations, and an allegation that plaintiff thereby paid out \$17,500 more than he would otherwise have paid to his damage in that amount.

Under the authorities, this clearly stated a cause of action for damages for deceit. *Keyes v. Nims*, 43 Cal. App. 1, 184 P. 695; *King v. Wise*, 43 Cal. 628; *Tufts v. Mann*, 116 Cal. App. 170, 183, 2 P. (2d) 500; *Stenian v. Tashjian*, 178 Cal. 623, 174 P. 883. The parties had disposed of all the properties and settled all their accounts long before the action was commenced, the amounts to be recovered were definite and certain, and there was no necessity for recourse to equity. The situation was no different from that in *King v. Wise*, supra, where the court said, at pages 634, 635 of 43 Cal.:

"The rule, which requires a rescission of the contract upon the discovery of fraud, has no application to this case. The contest is not between a vendor, who has made fraudulent

lent misrepresentations in regard to the property sold, and the vendee, who has been misled and injured by the fraud. The plaintiffs may have been willing to purchase the land at the price they paid, or at even a larger price, and may not wish to rescind the sale; but they are none the less entitled to hold the defendant to a strict observance of the trust confided to him, and to enjoy their proportionate benefit of any bargain he may have made. They do not complain that they were induced to pay more than the land was worth, but that they would have paid less if the defendant had been faithful to his trust. By their affirmation of the contract after knowledge of the fraud, they lost any right they may have had to rescind the sale and recover back the purchase money; but it was not a release of their right of action against the defendant for damages resulting from his fraudulent acts. We are of the opinion that the plaintiffs should have judgment upon the facts as found by the Court.

"It is not difficult to arrive at the exact measure of damages which plaintiffs are entitled to recover. The actual value of the land is not an element in the estimate. The plaintiffs should have, from the defendant, the difference between the price of the land purchased by him for the plaintiffs and the amount paid by the plaintiffs."

The case of *King v. Wise*, supra, has been frequently cited, and received the full approval of the Supreme Court as late as *Langford v. Thomas*, 200 Cal. 192, 199, 252 P. 602.

Both as to the right to maintain an action at law in such a case and the proper measure of damages, the rule announced in *King v. Wise*, supra, accords with the general rule stated in 33 C. J., pages 857, 858, § 53, in the following language: "But the defrauded member is not bound to rescind. He may, if he chooses to do so, retain his interest in the contract, and recover damages for the fraud and deceit, the measure thereof being the difference between the amount actually paid by plaintiff and what he would have paid had defendant dealt honestly with him; and the fact that the actual value of the property was greater than the price paid for it does not defeat the action."

The decisions from other jurisdictions to this effect are legion. *Allen v. Barhoff*, 90 Conn. 183, 96 A. 928; *Lowe v. Hendrick*, 86 Conn. 481, 85 A. 795; *Jones v. Kinney*, 146 Wis. 180, 131 N. W. 339, Ann. Cas. 1912C, 200; *Bergeron v. Miles*, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *Johnson v. Gavitt*, 114 Iowa, 183, 86 N. W. 256; *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 539; *Hampson v. Spong*, 103 Kan. 400, 173 P. 909; *Jameson v. Kempton*, 52 Wash. 106, 100 P. 186; *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 P. 40; *Hindle v. Holcomb*, 34 Wash. 336, 75 P. 873.

The complaint asked for no equitable relief, but simply for a money judgment. We conclude that it was an action at law, and after a jury trial findings were unnecessary.

[5] After the entry of judgment, and while motions for new trial were pending, Fink procured an alternative writ of prohibition from the District Court of Appeal of the Second Appellate District, Division 2, by which he attempted to prohibit the trial court from passing on the motions for new trial. The writ was quashed (*Fink v. Superior Court*, 105 Cal. App. 540, 288 P. 124), and the superior court afterwards acted on the motions for new trial and denied them. In his points and authorities in the prohibition proceeding, Fink argued that his action was in equity. It is claimed that by taking that position he has estopped himself from now urging the contrary on this appeal. We fail to see any ground for estoppel. A necessary element of estoppel is prejudice to the party invoking it. If Fink had succeeded in his attempt to prohibit the court from acting on the motion for new trial prejudice to appellants would have resulted, and it might well be held that he would be estopped to take a different position now. But he did not succeed in that attempt. He failed, and the trial court acted upon the motions. How, then, can he be estopped to urge the correct construction as to the nature of his action because he misconceived the law in a collateral proceeding from which he gained no benefit and appellants suffered no detriment?

[6] It is further argued that the fifth count of Fink's amended complaint stated no cause of action because it did not allege a fiduciary relation between Fink and Weisman. The fifth count pleaded a conspiracy between Weisman and Topplitzky to misrepresent the purchase price of all four properties and thereby induce Fink to pay more than one-half thereof. It did not allege in terms a partnership or joint adventure between Fink and Weisman and might have been subject to demurrer; but no demurrer was interposed. The trial proceeded on the theory that it charged a conspiracy to defraud Fink in partnership transactions. Having made this issue on the trial, appellants cannot now attack the insufficiency of the complaint in that regard. *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 P. 90; *Snyder v. City Bond & Finance Co.*, 106 Cal. App. 745, 289 P. 859; *Asnon v. Foley*, 105 Cal. App. 624, 629, 288 P. 792; *Bridges v. Price*, 95 Cal. App. 394, 273 P. 72.

[7] The transactions which are the basis of Fink's recovery occurred in 1920 and 1921. The action was not commenced until 1928. In order to bar the application of the statute of limitations, by an amendment to his amended complaint, Fink alleged that he did not discover the misrepresentations until May, 1927,

at which time he first learned of them through an investigation of the partnership books by an investigator for the Internal Revenue Department, who was investigating their income tax returns, together with facts showing his complete reliance upon Weisman and Topplitzky up to that time and entire trust in them and lack of suspicion of their conduct. As to Weisman, there is no claim in the briefs that these facts, if true, were not sufficient to bar the running of the statute of limitations until the date of discovery. There was a sharp issue on the trial as to when the discovery was made; several witnesses testifying that at a much earlier date Fink told them that Weisman had defrauded him in these transactions. The issue was fairly submitted to the jury and by them decided in favor of Fink. On motion for new trial appellants produced, as newly discovered evidence, the affidavits of several additional witnesses to similar conversations with Fink long prior to 1927. This evidence was merely cumulative, and no sufficient explanation was given of the failure to discover it earlier. Under settled principles, the granting or denying of a new trial on that ground lay peculiarly in the discretion of the trial court, and we are not justified in re-examining the question under the facts appearing here.

[8] By stipulation the appeal of Weisman was submitted on the briefs filed on behalf of Topplitzky. We have covered those points in Topplitzky's briefs which we think fairly relate to Weisman's appeal. This has been somewhat difficult, since Topplitzky's counsel have confined their argument in greater part to Topplitzky's right, and only incidentally, where they conceived that Topplitzky's rights were also involved, have they referred to any claimed error as to Weisman. In view of the manner in which Weisman's appeal was submitted, a needless and onerous burden not contemplated by the law has thus been cast upon us to go through Topplitzky's briefs and cull out those parts which we considered might, if decided in Topplitzky's favor, inure to the benefit of Weisman as well. This burden could have been immeasurably lightened had Weisman filed even a brief memorandum stating those points made by Topplitzky upon which he relied for a reversal. Weisman has given the court not even this assistance, and we apprehend should be foreclosed from claiming that we may have overlooked some point in Topplitzky's briefs favorable to him which has not been herein discussed.

Topplitzky, in his briefs, makes many claims of errors in instructions. Some of the instructions complained of by Topplitzky were given at Weisman's request, many of them concern only Topplitzky's liability, and as to the rest we are satisfied that the jury was fairly instructed as to the facts upon which Weisman might be held liable.

Having discovered no prejudicial error as

to Weisman, we conclude that as to him the judgment should be affirmed.

The Topplitzky Appeal.

[9] In so far as the points discussed hereinabove are common to both appellants, we will not restate them in the consideration of Topplitzky's appeal.

Topplitzky complains of a variance between pleading and proof as to the first four counts because of the allegations therein that Topplitzky and Weisman secured the contracts to purchase the several properties, whereas the proof showed Weisman secured the contracts and Topplitzky's only interest was that of a broker. The trial proceeded on the theory that Topplitzky was a broker and not a principal, and the jury was instructed on that theory. Topplitzky, having tried the case on that theory in the trial court, cannot complain of the variance on appeal.

[10] To Topplitzky's claim that the first four counts do not state a cause of action against him because there is no allegation that Topplitzky knew of the confidential relation between Weisman and Fink there are two answers. Topplitzky did not demur, and the counts at least inferentially charged such knowledge by alleging that Topplitzky represented to Fink that "the partnership" between Fink and Weisman could purchase the properties at certain prices. Second, the trial proceeded on the theory that Topplitzky's knowledge was in issue, and the jury were instructed that if Topplitzky did not know of the confidential relationship he could not be held liable.

[11, 12] As to the fifth count, Topplitzky urges that it stated no cause of action against him because it was an action for deceit, and since the value of the properties was neither alleged nor proved, there can be no recovery. However, as we have said above, the trial proceeded on the theory that the fifth count involved a conspiracy to defraud Fink while he occupied a confidential relation with Weisman, and the jury was instructed on that theory. One who knowingly aids and abets a fiduciary to make secret profits may be held liable jointly with the fiduciary for such secret profits. *Jackson v. Smith*, 254 U. S. 586, 41 S. Ct. 200, 65 L. Ed. 418; *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 97 P. 10, 18 L. R. A. (N. S.) 1106; *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243; *Smith v. Blodget*, 187 Cal. 235, 201 P. 584. There was ample evidence from which the jury might have found that Topplitzky, knowing that Fink was interested jointly with Weisman in the purchase of the properties, actively misrepresented their price to Fink to enable Weisman to make a secret profit. In such circumstances Topplitzky under the above authorities would be jointly liable with Weisman, although he himself may not have profited by the perfidy.

These cases are a complete answer to Top-

litzky's claim that as to him the statute of limitations must be held to have run because the actions against him are not based on fraud. If Toplitzky made fraudulent misstatements to Fink as a result of which Fink was damaged by the payment for one-half the properties of more than one-half their price, the action against Toplitzky sounds in fraud, and the measure of the damages is the difference between what Fink paid and what he would have paid but for Toplitzky's fraud.

[13, 14] However, Toplitzky denied having made any statements to Fink as to the price of the properties or any of them, and the court undertook to instruct the jury as to Toplitzky's liability for concealment as well as active misrepresentation. It seems obvious that Toplitzky could be liable for a failure to disclose to Fink the true purchase price of the properties only if Toplitzky occupied a fiduciary relation to Fink in the transactions. If he actively misrepresented to Fink the purchase prices, he would then be making himself a party to Weisman's fraudulent conduct, and by aiding and abetting Weisman's fraud he would render himself liable to Fink jointly with Weisman. But unless Toplitzky occupied a fiduciary relation to Fink he would be under no duty to speak, and could not render himself liable to Fink by his mere silence. The suppression or concealment of a fact is only actionable when done "by one who is bound to disclose it." Civ. Code, § 1710, subd. 3. "In the absence of confidential relations mere silence, without fraudulent acts or omissions connected therewith, would not be unconscionable." *Heydenfeldt v. Osmond*, 178 Cal. 768, 773, 175 P. 1, 3; 12 Cal. Jur., p. 773, § 44.

It was the claim of Toplitzky that in none of the transactions did he represent Fink; that in two he represented the sellers, in one Weisman, and in one that Weisman handled the details himself; and that at no time did he misrepresent to Fink the prices at which the properties were being purchased. With this evidence in mind, we now approach the instructions given to the jury in relation to Toplitzky.

The court instructed the jury: "If the defendant Toplitzky, at the time when he acted as broker in any of these deals, knew that the property was being purchased for Mr. Fink and Mr. Weisman jointly, then he owed the duty to divulge to Mr. Fink all he knew with respect to the transaction, including the purchase price."

It is to be observed of this instruction that it placed upon Toplitzky the duty of disclosing all he knew with respect to the transaction at the time when he acted as broker if he knew the property was being purchased jointly for Fink and Weisman. This could not be the law in those transactions in which Toplitzky was acting as broker for the seller,

unless he also undertook to act as broker for Fink and Weisman. And yet under this instruction the jury could find Toplitzky liable, even though they might find that in the transaction Toplitzky owed no fiduciary duty to Fink and was acting entirely for the seller, if Toplitzky, knowing Fink was interested in the purchase, did not tell him the purchase price. Why should he be legally bound to do so if, as the jury might have found, he was representing the seller and dealing with both Fink and Weisman at arm's length? It is also to be observed of this instruction that it put the absolute duty upon Toplitzky to disclose to Fink all that he knew of the transaction, regardless of whether Toplitzky knew that Weisman was deceiving Fink or not. Under this instruction the jury might have held Toplitzky liable if they found the following state of facts: That Toplitzky stated the purchase price to Weisman; that Weisman deceived Fink as to the purchase price; that Toplitzky, not knowing of Weisman's deceit, and believing that Fink knew the purchase price, failed to speak of it to Fink. In view of the sharp conflict in the evidence as to the facts, we cannot but conclude that this instruction was prejudicially erroneous. The vice of this particular instruction was aggravated by a statement of the court, which immediately preceded it, to this effect: "Now, Ladies and Gentlemen, with reference to the liability, if any, of the defendant, Joseph Toplitzky, I want to restate an instruction with reference to that, and if the other instructions which I have given you, or any which I may hereafter give you, in respect to his liability may seem to you to be incompatible with the instructions I now give you, you will disregard the other instructions, because the instructions I give you now, are an explanation of what the Court considers the law in regard to his liability."

The instruction hereinabove discussed and held to be erroneous followed immediately. Thus the jury were told that in respect to Toplitzky's liability this particular instruction embodied the court's idea of the law and was to be followed by the jury, and any other instruction which might seem incompatible with it was to be by them disregarded. In the face of this there is no room for the claim that this instruction could have been cured by any other instruction or instructions, or that the instructions taken as a whole were correct. The trial judge was at great pains to single out this erroneous instruction and tell the jury that it and it alone was the correct rule by which to determine Toplitzky's liability.

Other instructions are complained of, but they are not likely to be repeated in their present form in a trial against Toplitzky alone.

It results from what we have said above that the judgment against defendant Toplitzky must be reversed.

The judgment against appellant Weisman is affirmed.

The judgment against appellant Toplitzky is reversed, and the cause as to him remanded for a new trial, with directions to the trial court to allow the amended complaint to be further amended, if plaintiff so desires, to correct the defects therein attacked on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

129 Cal.App. 413

**MINGS v. COMPTON CITY SCHOOL DIST.
OF LOS ANGELES COUNTY.**

Civ. 4537.

District Court of Appeal, Third District,
California.

Feb. 2, 1933.

Rehearing Denied March 4, 1933.

**Hearing Denied by Supreme Court April 3,
1933.**

1. Adverse possession $\S$ 86.

School district need not prove payment of taxes to establish title by adverse possession (Code Civ. Proc. $\S$ 325; Const. art. 13, $\S$ 1).

2. Taxation $\S$ 242(2).

From time adverse use of property exclusively for school purposes commenced, exemption from taxation applied (Const. art. 13, $\S$ 1).

3. Adverse possession $\S$ 27.

Finding that school district had been in possession of property, used, improved it, and constructed building thereon, *held* sufficient to establish possession (Code Civ. Proc. $\S$ 325, subd. 1).

4. Adverse possession $\S$ 19.

Inclosure is unnecessary to prove possession of party claiming prescriptive title, where property is in some way subjected to claimant's control (Code Civ. Proc. $\S$ 325, subd. 1).

5. Adverse possession $\S$ 40.

Statute requiring adverse possession for 20 years *held* inapplicable to ordinary action to quiet title against known defendants (Code Civ. Proc. $\S$ 749).

6. Adverse possession $\S$ 40.

In ordinary action to quiet title against known defendants, adverse possession necessary to establish prescriptive title is five years (Code Civ. Proc. $\S$ 318).

7. Reformation of Instruments $\S$ 45(5).

Evidence *held* sufficient to support finding of mistake in executing deed to school district by omitting part of land intended to be conveyed.

8. Quieting title $\S$ 30(3).

In action to quiet title, wherein defendant filed cross-complaint, it was unnecessary to include plaintiff's grantors as parties, since plaintiff had acquired whatever title they had.

9. Reformation of instruments $\S$ 28.

Written instrument may be reformed against any person named therein as adverse party, or his heirs, or successors in interest with notice.

10. Quieting title $\S$ 52.

Where court found that strip involved was mistakenly omitted from deed to school district, judgment simply quieting title in defendant school district was sufficient without adjudging that deed be reformed.

11. Taxation $\S$ 814(1).

Where plaintiff, in action to quiet title, relied upon title from common grantor, and paid nothing at tax sale shown in record, nor anything thereafter upon faith of such sale, court rendering judgment for defendant was not required to order taxes paid returned.

12. Appeal and error $\S$ 110.

Appeal would not lie from order denying new trial in action to quiet title.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Edith M. Mings against the Compton City School District of the county of Los Angeles, state of California, in which defendant filed a cross-complaint. From the judgment, and from an order denying her motion for a new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Edwin J. Miller and Frederick O. Huber, both of Los Angeles, for appellant.

Everett W. Mattoon and Ernest Purdum, both of Los Angeles, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

Plaintiff seeks herein to quiet title against the defendant school district to a parcel of land comprising a part of the school grounds being used by the defendant for the Tamarind school in the county of Los Angeles. The complaint is in the usual form of quiet title. By its amended answer, defendant denies title in plaintiff; alleges that defendant has been in the quiet and peaceable possession of the disputed tract, holding and claiming the same adversely to plaintiff, and all other persons, for more than nineteen years before the commencement of the action, and that neither the plaintiff nor any of her predecessors or grantors were seized or possessed of said premises, or any portion thereof, within nine-

teen years before the commencement of the action. A further and separate defense is set up that plaintiff derived her claim to title by mesne conveyances from one R. H. Wilson; that defendant is the successor in interest of the said Wilson; that on December 15, 1908, prior to any previous conveyance by him of said premises, said Wilson and his wife executed to defendant a deed; all parties thereto intending thereby that there should be included therein and conveyed to the school district a tract within whose boundaries was included the disputed parcel as well as other land, all being contiguous, but that through error of all parties the disputed parcel was omitted from the description, and that to make the deed conform to the actual intention of the parties, the description should be amended to include the land in dispute. As a third separate defense, all matters elsewhere pleaded in the answer are included by reference, and, further, it is alleged by way of estoppel: That immediately after the execution of said deed from Wilson and wife to defendant, the defendant took possession of the entire tract intended to be conveyed, including the now disputed portion, with the knowledge and acquiescence of the Wilsons, and constructed thereon expensive buildings and improvements, including a building upon said disputed portion; that up to a short time prior to the commencement of this action, Wilson and wife lived within a short distance of said lands, had knowledge of defendant's possession and improvement thereof, made no claim to the property, and acquiesced in all things done by defendant thereon; that the use of the buildings upon the portion of the tract not in dispute will be hampered and interfered with, and their value materially affected if the disputed portion be declared plaintiff's; that the disputed parcel has increased many times in value by reason of defendant's said improvements; that the claim of plaintiff is unconscionable on account of the said acquiescence of her predecessors in title; and that plaintiff is estopped by her conduct and that of her predecessors from making any claim to the premises in dispute. A cross-complaint alleges: That defendant has been in the peaceable and quiet possession and occupancy of the whole tract intended to be conveyed, for more than nineteen years continuously before and up to the time of filing suit; that defendant is the owner and in possession and entitled to the possession of said premises; and that plaintiff makes some claim therein and thereto, but has no right whatsoever in and to the same, or any part thereof. The defendant's prayer is that the deed be reformed; that plaintiff be estopped by her conduct and that of her predecessors; and that defendant's title be quieted against plaintiff; and for general equitable relief. Issue is joined upon all of the material allegations of the cross-complaint. Findings were made in defendant's

favor upon all issues, and the decree declared defendant to be the owner of the entire tract, quieted its title against plaintiff, adjudged the plaintiff to be estopped from setting up any claim to the premises, and granted defendant judgment as prayed for in its cross-complaint. The decree does not contain any specific direction to the effect that the language of the deed from Wilson and wife to defendant shall be reformed or amended, or that a new deed expressing the agreement of the parties as found, be executed and delivered.

Plaintiff appeals from the judgment and from an order denying her motion for a new trial.

The property in question is a strip of land along the west side of lot 12, block 24, of the city of Compton, county of Los Angeles. It is 34.30 feet wide at one end, and 45.45 feet at the other end, and is 155 feet long.

On December 15, 1908, R. H. Wilson and his wife, Lutie Wilson, conveyed by deed to Compton City school district, lots 1 to 5, both inclusive, and lots 7 to 11, both inclusive, in block 24, of the city of Compton. In 1909, and following the execution of this deed, a school was built upon the property, and the school district took possession, not only of the lots described, but also of lot 12, under the mistaken belief that it was described in the deed. Ever since that time lot 12 has been used continuously as a playground in connection with the school.

Several alleged sources of title, designated as "A," "B," and "C," were relied upon at the trial by appellant, but it is admitted that source "A" is the only one entitled to serious consideration here. This title is based upon a quitclaim deed from Mortimer H. Wilson and wife, dated in April, 1927, covering all of lot 12, and running to D. Thuresson, and thereafter the latter brought suit to quiet title to this lot against Lutie Wilson and others. The decree was entered January 18, 1928, in favor of plaintiff. Thereafter, Thuresson deeded the property to plaintiff and appellant. Mortimer Wilson and Lutie Wilson are the sole distributees of the estate of R. H. Wilson, deceased. Plaintiffs have never been in possession of the property, or any part thereof. It thus appears that both parties have a common source of title through R. H. Wilson. Respondent contends that, through a mistake, lot 12 was omitted from its deed which it secured from Wilson. It is conceded that the school district has no record title to the property. Appellant has the record title to the disputed strip.

[1, 2] The school district claims title through adverse possession. Witnesses testified that the property had been used since 1909 as a playground for the school children. There are twelve lots in block 24, and upon other portions of that block there are nu-

merous school buildings. The evidence shows that the property in dispute has never, since 1909, been used for any purpose other than in connection with the school. We are satisfied that there is abundant evidence in the record to support the finding that the possession of the school district, since the date of its deed from Wilson in 1908, has been actual, under claim of right, open, and adverse to all the world. Appellant contends, however, that the other necessary element of adverse possession—the payment of taxes for five years—is lacking in respondent's case. Our Constitution, section 1, article 13, provides that: "Property used exclusively for public schools * * * shall be exempt from taxation." Section 325 of the Code of Civil Procedure provides that the party seeking to establish adverse possession must show that he or his predecessors or grantors have paid all taxes, state, county, or municipal, which have been levied and assessed upon said land for a period of five years continuously. The constitutional provision mentioned has been in force during all the time the school has possessed this property. It follows that, as it would be unlawful for any such taxes to be levied and assessed against the property, it was not incumbent upon the respondent school district to make proof of payment of taxes required by the Code section referred to, in order to establish title by adverse possession. The Constitution does not state that legal title is necessary in order that the exemption from taxation may be invoked. All that is required is that the property be "used exclusively for school purposes." From the very moment that the use commenced, the exemption applied. This is the answer to appellant's contention that the exemption did not apply during the first five years' use, and that the district must prove payment of taxes during that period.

[3, 4] It is contended that adverse possession was not established because it was not proven that the property was protected by a substantial inclosure. Code Civ. Proc. § 325, subd. 1. The court found that the defendant had been in the actual possession of the property, and used and improved the same, and constructed a building thereon. This is a sufficient finding to establish possession. The inclosure mentioned in the Code is merely one method of proving the possession of a party; claiming a prescriptive title, but it is not the exclusive method. An inclosure is not necessary where the property is in some way subjected to the will and control of the claimant. *Andrus v. Smith*, 133 Cal. 78, 65 P. 320; *Coryell v. Cain*, 16 Cal. 574.

[5, 6] Appellant contends that it was necessary for respondent to prove adverse possession for a period of twenty years before title by prescription could be acquired; citing section 749 of the Code of Civil Procedure. That section applies to actions in rem against

unknown defendants, and does not govern an ordinary action to quiet title against known defendants. In the latter case, the adverse possession necessary is five years. Section 318, Code Civ. Proc.

[7-10] There is sufficient evidence to support the finding of a mistake in the execution of the deed to the school district. One of the grantors testified that the intention was to sell all of block 24, and that she told the husband of plaintiff, when he attempted to secure a quitclaim deed from her, that she had sold the property once. It was not necessary to include the grantors as parties to the action, as plaintiff had acquired whatever title they had. 53 C. J., p. 1006, par. 158. The record shows beyond dispute that plaintiff had notice of the mistake, through her husband, who, according to her testimony, acted for her in negotiating for the purchase of the property. "A written instrument may be reformed against any person who is named therein as an adverse party, or his heirs, or successors in interest with notice." 22 Cal. Jur. 728. The findings fully cover the issue of mistake, while the judgment simply quiets the title in defendant. It is not necessary to adjudge that the deed be reformed. It follows as a matter of law that defendant's title is established, and that it is entitled to a decree quieting its title.

[11] Finally, appellants complain of the fact that the trial court did not order the taxes which he had paid returned to her, before granting any relief to defendant, and cites *Beck v. Wilson*, 49 Cal. App. 281, 193 P. 158, 159. The latter case quotes the rule as laid down in *Holland v. Hotchkiss*, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492, as follows: "Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, * * * the taxes, penalties, interest and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward, upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession." In the instant case plaintiff is not relying, as a source of title, upon a tax deed, but is relying upon a title from the common grantor, Wilson. It is true that the record shows a tax sale in 1907, but it is equally clear that plaintiff did not rely upon a tax title, but upon a record title. The amount paid out was trivial. The redemption was made by one R. Thuresson, and not by plaintiff, and the sum paid was \$8.25. It is clear that plaintiff paid nothing at the tax sale, nor anything thereafter upon the faith of such sale, and consequently does not come within the rule quoted.

[12] This appeal purports to be from the judgment and order denying motion for new trial. The Code does not authorize an appeal from such order, except "in an action or proceeding tried by a jury where such trial by jury is a matter of right." *Evans v. Gibson et al.* (Cal. Sup.) 17 P.(2d) 701; *Diamond v. Superior Court*, 189 Cal. 732, 739, 210 P. 36.

It is therefore ordered that the appeal from the order denying motion for new trial be dismissed, and the judgment be affirmed.

We concur: PULLEN, P. J.; IRA F. THOMPSON, J.

129 Cal.App. 497

JACKSON v. MORSE et al.

Civ. 8568.

District Court of Appeal, Second District,
Division 1, California.

Feb. 7, 1933.

1. Appeal and error ⇨801(1).

Where questions presented were so far substantial that appeal should not be dismissed or its merits determined on motion to dismiss appeal, motion was denied.

2. Appeal and error ⇨766.

Where appellant's brief on motion to dismiss appeal did not comply with rule requiring brief to present each point separately under appropriate heading, reviewing court on its own motion granted appellant privilege of correcting brief and serving upon respondent statement specifying claimed error in admitting evidence (Rules for Supreme and District Courts of Appeal, rule 8, § 2).

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Virginia May Jackson, by her guardian ad litem, Robert G. Jackson, against A. W. Morse and others. From the judgment, John T. Woodson appeals. On motion to dismiss appeal or affirm judgment.

Motion denied.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

G. M. Grant, of Los Angeles, Benj. F. Tyler, of San Diego, and Geo. W. McDill, of Los Angeles, for respondent.

PER CURIAM.

This is an action in which the plaintiff recovered judgment for personal injuries of the plaintiff which resulted from negligence of the defendants in the operation of an automobile. Defendant Woodson appeals from the judgment. Respondent has presented this motion under rule V, section 3, of the rules of this court, that the appeal be dismissed or the judgment affirmed upon the ground that the appeal was taken for delay only, and that the questions upon which the

decision depends are so unsubstantial as not to need further argument.

[1] From an examination of the record, together with appellant's opening brief, we conclude that there are some questions presented which are so far substantial that the appeal should not be dismissed or its merits determined at this time.

[2] For the benefit of counsel in the further argument of the case by briefs or otherwise, we call attention to the fact that appellant in his opening brief has not satisfactorily complied with that part of rule VIII, section 2, which states that a brief must *present each point separately*, under an appropriate heading. In that part of the brief which discusses "errors in the admission of evidence" there is no direct assignment of the errors supposed to be presented under that heading. Therefore the court of its own motion allows appellant to insert at page 85 of the brief, and serve upon respondent a statement specifying the claimed errors of the trial court in relation to the admission of evidence; provided that such amendment of the brief be made within 15 days from entry of this order.

The motion to dismiss or affirm judgment is denied.

129 Cal.App. 476

SWINNEY v. LEGG et al.

Civ. 7215.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1933.

Hearing Denied by Supreme Court April 6, 1933.

1. Jury ⇨13(18).

Denial of jury trial of action by payee's transferee against makers who, though denying transfer and that any amounts were due, depended upon cancellation of notes held not error; issues being of equitable cognizance.

2. Licenses ⇨39.

Shares of preferred stock and promise to deliver shares of common stock whenever released from escrow by corporation commissioner held not illegal consideration for notes, though commissioner issued no permit allowing disposition of common stock.

Consideration for which notes were executed was not illegal, since the makers merely took their chance with the payee upon the question whether the corporation commissioner would ever allow the common stock to go upon the market, and the fact that the stock was never delivered to the makers amounted to a partial failure of consideration for the notes, and no more.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by E. B. Swinney against F. M. Legg and another, wherein defendants filed a cross-

complaint. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

C. A. Stice, of Los Angeles, for appellants.

Francis B. Cobb, of Los Angeles, for respondent.

WORKS, P. J.

Plaintiff was the holder, by transfer from the original payee, of four promissory notes which had been executed by defendants. This action was brought to recover on the paper. Judgment went for plaintiff, and defendants appeal.

[1] Upon demand therefor in proper form, appellants were denied a jury trial of the action and they now assign the denial as error. In their answer appellants did not controvert the allegations of the complaint to the effect that they made the notes, but did deny the alleged transfer of them to respondent. They also denied allegations showing the amounts said to be due on the respective obligations, and denied that any sums were due. In addition to the issues presented because of these denials, affirmative issues were tendered by the answer, and a cross-complaint was filed. The affirmative allegations of the answer, however, were also carried into the cross-complaint, which latter pleading was presented for the purpose of procuring a cancellation of the notes sued on. In the last analysis, then, the issues framed by the pleadings were matters of equitable cognizance, with the exception of the denial of the transfer of the notes and the denial that any amounts were due; and even as to this last matter, a view of appellants' pleadings throughout indicates that it depended upon the solution of the question of cancellation or no cancellation of the notes. Under the circumstances appellants were not entitled to a jury trial; the controversy being almost wholly a matter of equity. In re Estate of Dorn, 69 Cal. App. 413, 231 P. 346; Pomeroy v. Collins, 198 Cal. 46, 243 P. 657.

[2] It is contended that the notes were void because given for an illegal consideration. The consideration was certain shares of preferred stock of a corporation, certificate for which was delivered at the time of the execution of the notes, and a promise to deliver certain shares of the common stock of the organization "whenever the same was released from escrow by the Corporation Commissioner." No permit was ever issued by that officer allowing disposition of the common stock, and the promise to deliver to appellants was therefore never kept. We can see nothing savoring of illegality, between the parties, in the consideration for which the notes were executed. The preferred stock, which was part of the consideration, had been legally issued. As to

the common stock, appellants merely took their chance with respondent's assignor upon the question whether the corporation commissioner would ever allow it to go upon the market. If the fact that this stock was never delivered amounted to a partial failure of consideration for the notes, we can see no more. This case is nothing like one in which an individual gives a promissory note for a gambling debt he owes the payee, or in which one executes a similar obligation in consideration of the promise of the payee to commit a crime, although both parties argue the appeal as if it were.

Appellants make a third point, plainly without merit, and a fourth, which they do not argue.

Judgment affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

129 Cal.App. 487
HARVEY v. DE GARMO et al.
Civ. 999.

District Court of Appeal, Fourth District,
California.
Feb. 6, 1933.

1. Pleading $\S$ 245(3).

Where trial amendment was only a re-statement of causes of action alleged in original complaint, no error was committed in allowing it.

2. Sales $\S$ 89.

Fact that manufacturer delivered and buyers accepted deliveries for 18 months after dates fixed did not work modification in written contracts as to deliveries not made, where neither consideration nor manufacturer's consent is shown (Civ. Code, §§ 1549, 1661, 1698, and § 1689, subd. 5).

3. Appeal and error $\S$ 1033(1).

Buyers cannot complain of error in their own favor in court's calculation of manufacturer's damages.

4. Judgment $\S$ 222.

Court may award damages in lump sum, though more than one cause of action is involved.

5. Sales $\S$ 383.

Manufacturer's uncontradicted evidence that prices paid by him on sale of material buyers refused to accept were reasonable and at then market price held sufficient to support findings as to value (Civ. Code, §§ 3051, 3052).

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by Leo M. Harvey against G. C. De Garmo and another. From judgment for plaintiff, defendants appeal.

Affirmed.

G. C. De Garmo and W. M. Crane, both of Los Angeles, for appellants.

Pacht, Pelton & Warne and Charles A. Bank, all of Los Angeles, for respondent.

VAN ZANTE, Justice pro tem.

This is an appeal by the defendants from a judgment rendered against them in the sum of \$4,500 as damages for breach of certain contracts.

Plaintiff brought suit against defendants to recover damages for breach of contracts and for an accounting. The original complaint contained six causes of action, the first of which was based on a general contract, and the second, third, fourth, and fifth on two specific written contracts, designated as order No. 458 and order No. 159, which were made pursuant to the general contract. The sixth cause of action was for an accounting.

At the close of the trial, the plaintiff was permitted to file an amendment to his complaint. Defendants contend this is reversible error, and cite the case of *Union Lumber Co. v. J. W. Schouten & Co.*, 25 Cal. App. 80, 142 P. 910, in support of their contention. Plaintiff relies on this same case.

[1] We find that the complaint as amended contains the same subject-matter as the original complaint, and in effect is only a restatement of the several causes of action contained in the original complaint. We believe the trial court committed no error in allowing plaintiff to amend his complaint, and that the above-named case fully sustains the court's ruling.

Under the pleadings as amended, damages were awarded under the two specific written contracts designated as order No. 458 and order No. 159, but none were awarded under the general contract and no accounting was allowed. As the general contract forms the basis for the above-named orders, it is set forth in *hæc verba* as follows:

"This agreement entered between the Sunset Specialty Company, a copartnership, and Harvey Machine Company.

"For and in consideration of the mutual covenants therein contained, the parties hereto agree as follows:

"Harvey Machine Co. agrees to manufacture Ease-A-Just Brackets for Wind Deflectors for the Sunset Specialty Company at Three Dollars and Fifty Cents (\$3.50) per set. Harvey Machine Co. is to furnish its own

tools and dies for making said brackets for Wind Deflectors.

"Sunset Specialty Co. agrees to give the exclusive right to the Harvey Machine Co. for the manufacture of said Brackets for Wind Deflectors, during the entire duration of their contract with Mr. Miller, by which contract the Sunset Specialty Co. holds the exclusive right to make, vend and sell said Wind Deflectors, patent for same being issued August 2nd, 1921, Patent No. 1,386,418.

"Harvey Machine Company agrees to manufacture any number of Brackets for Wind Deflectors the Sunset Specialty Company may need, in the course of its business, within a reasonable time after the order has been placed.

"Harvey Machine Company agrees to replace Brackets for Wind Deflectors that are defective, free of charge. Harvey Machine Company also agrees to keep sufficient stock on hand to be able to supply at all times the needs of the Sunset Specialty Company for Brackets for Wind Deflectors.

"Harvey Machine Company agrees to protect the Sunset Specialty Company against any raise in price of said Brackets and give them any benefit that may be derived by reason of any reduction in cost of labor and material.

"It is further agreed that should the Sunset Specialty Company discontinue to use or sell any more Wind Deflectors, that it will so notify, in writing, to the Harvey Machine Company and agree to take and pay for any Brackets for Wind Deflectors the Harvey Machine Company may have on hand at the time completed or in the course of construction."

Plaintiff executed the contract herein under the fictitious name of Harvey Machine Company, and defendants executed the same under the fictitious name of Sunset Specialty Company.

Pursuant to the general contract, and on the 2d day of September, 1924, defendants placed order No. 458 with plaintiff for five thousand sets of brackets at \$2.50 per set. This order provided that the sets were to be delivered "as wanted" and were "to be taken in full before April 1st, 1925." On the 20th day of December, 1924, pursuant to the same general contract, defendants placed order No. 159 with plaintiff for one thousand sets of brackets at \$3 per set. This order contains the following notation: "Deliver 500 sets Jan. 1st balance 500 sets by Jan. 15th. We must have delivery by these dates and order placed accordingly." Under order No. 458, between the 1st day of October, 1924, and the 26th day of March, 1926, numerous deliveries of sets of brackets were made, amounting in all to 1134. Under order No. 159, between the 2d day of January, 1925, and the

6th day of April, 1926, numerous deliveries of sets of brackets were made, amounting in all to 235. On each order the greater number of sets were delivered after the time fixed in the respective orders. It appears from the record that deliveries were generally made at the instance of the defendants, but it also appears that the plaintiff constantly urged defendants to accept deliveries, and on the 26th day of March, 1926, plaintiff made an arbitrary tender to defendants of one hundred sets of brackets under each order, which the defendants refused to accept at that time, but later accepted deliveries as above indicated. The defendants contend the evidence shows an intention on the part of all the parties to modify and alter the terms of the above-named orders. Their position is probably best stated in their own words, and we quote from their opening brief as follows:

"While Orders 458 and 159, according to their written provisions, required appellants to take the brackets thereunder as specified, the evidence clearly establishes that almost immediately after these orders were signed appellants and respondent, by a mutual implied agreement and understanding, modified their terms to the extent that appellants should be bound only to take brackets as the requirements of their business should dictate. For nearly a year and a half thereafter the written provisions as to quantities and dates concerning the delivery of brackets were completely ignored by both parties, and appellants requested, and respondent delivered, brackets in absolute disregard of said written terms. This customary practice effected a cancellation and modification of the original written provisions which both parties acquiesced in, ratified and carried out, thereby fully and completely executing this parol alteration and modification, with the result that the written specifications were superseded, extinguished and became legally non-existent."

We find very little in the record to sustain defendants' position as to modification, alteration, or cancellation of contract, but, on the contrary, we do find plaintiff testified as follows: "A. I called up Mr. Williams, in their employ. I called up Mr. Learock and I personally went there a number of times and talked to them. 'Why don't they take the brackets.' 'Well, we can't use them now.'"

"Q. Do you know, about what date did you first call attention of the defendants to their failure to take brackets as specified? A. Personally I called their attention a number of times.

"Q. Do you know about when? A. In November, December, and January, 1924, and continuously in 1925. It became a regular nuisance in the factory. I did not know what to do with them. I have been there

almost every week asking them when they would take the brackets. * * *

"Q. What was discussed about the orders in issue here? A. Well, he said they are going to take them as soon as they can.

"Q. What did you say? A. Well, I said, 'You agreed to take them as specified in this order.' 'Well,' he says, 'I can't tell you anything about that.'"

There is considerable other evidence of like import in the record.

[2] The authorities cited by defendants do not sustain their position. The record does not show consent to rescind the contracts as contemplated by section 1689, subdivision 5, of the Civil Code, nor an executed oral agreement to alter or modify the contract as contemplated by section 1698 of the same Code. The record does not disclose that the plaintiff derived any benefit nor that the defendants suffered any damage by reason of the delays in effecting deliveries of the brackets; hence there was no consideration to sustain a modification of contracts as claimed by defendants. "Obviously, the executed oral agreement, which may be proved for the purpose of altering a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing." *Mackenzie v. Hodgkin*, 126 Cal. 591, at page 598, 59 P. 36, 38, 77 Am. St. Rep. 209. "There can be no doubt of the principle contended for by the appellant, that an agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it, though this, of course, may consist either in a new consideration, or in some favorable modification of the original contract. [Citing cases.] An executory contract may, indeed, be altered or modified by the parties. Civ. Code, § 1698. 'But * * * the variation of a contract is as much a matter of contract as the original agreement.' *Festerman v. Parker* [10 Ired. (32 N. C.) 474], supra. And a contract for such variation, equally with other contracts, requires a consideration." *Main Street, etc., Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 305, 61 P. 937, 938.

The fact that plaintiff delivered, and that defendants accepted deliveries of sets of brackets for a year and a half after the dates fixed in the orders does not work a modification of contract. And, even if there was an understanding, or oral agreement, that plaintiff would deliver sets of brackets when defendants wanted them, such an understanding or oral agreement would be executory. "It is well settled by an abundance of authority in this state that a written agreement may be modified by an oral agreement only when the oral agreement has been executed.

[Citing cases.] According to section 1661 of the Civil Code an executed agreement is one 'the object of which is fully performed. All others are executory.' The distinction between an executory contract and an executed contract has been pointed out in *Reed v. Schon*, 2 Cal. App. 55, 58, 83 P. 77, 79, in the following language—speaking of an executed contract: 'Something which has been but is no longer a contract as defined in the Code. Civ. Code, § 1549.' The principle is well established that an agreement, in order to be executed, must be fully performed on both sides. This principle is strictly enforced when an attempt is made to set up a modification of a written contract by an oral one, under section 1698 of the Civil Code." *Klein Norton Co. v. Cohen*, 107 Cal. App. 325, 330, 290 P. 613, 616. See, also, 6 Cal. Jur. 27; *Pearsall v. Henry*, 153 Cal. 314, 95 P. 154, 159; *Dean v. Sedan Milling Co.*, 19 Cal. App. 28, 124 P. 736.

"The date when an oral agreement takes effect as altering a written contract is the date when it is executed." *Platt v. Butcher*, 112 Cal. 634, 636, 44 P. 1060, 1061.

"In her petition for hearing in bank her counsel calls our attention to section 1698 of the Civil Code, which reads as follows: 'A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' Under the principle of this section the plaintiff was entitled to recover interest at 1 per cent. per month for the time during which she refused to accept, and did not accept, interest at 8 per cent. per annum. She did not contract in writing to change the interest as expressed by the written terms of the note, and her acceptance of the 8 per cent. was of no higher dignity than an express oral agreement. But it was an executed agreement only as to months for which she accepted the interest at 8 per cent.; as to the future, it was executory [Citing cases] and void under said section of the Code." *Thompson v. Gorner*, 104 Cal. 168, 170, 37 P. 900, 901, 43 Am. St. Rep. 81.

[3] Defendants contend that findings as to cost of manufacturing the brackets under orders 458 and 159, and loss of profits thereon, are not supported by the evidence. We find that error was committed in computing damages as to each order. But the error was in favor of defendants, and therefore they cannot complain. "While this finding was clearly unsupported by the evidence, being in its favor, appellant cannot complain." *Easom v. General Mortgage Co.*, 101 Cal. App. 186, 194, 281 P. 514, 517. See, also, *Reher v. Reed*, 179 Cal. 235, 176 P. 170; *Illinois Trust & Savings Bank v. Pacific Railway Co.*, 117 Cal. 332, 49 P. 197; *Epperson v. Cappellino*, 113 Cal. App. 473, 298 P. 533.

[4] Defendants complain that the trial court erred in awarding general damages in that the findings are not supported by the evidence. It is apparent that the evidence would warrant a larger amount in favor of plaintiff. Defendants cannot complain of such error. *Easom v. General Mortgage Co.*, supra. They further complain that the award is improper, for the reason that there is no allocation or segregation of these damages under orders 458 and 159. We know no authority requiring a trial court to allocate damages in cases of this character. "It has been held that courts may find damages in a lump sum, and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it." *Erskine v. Marchant*, 37 Cal. App. 590, 593, 174 P. 74, 75.

[5] Defendants also complain that the lower court committed reversible error in applying the rule of damages. It appears from the record that plaintiff proceeded to sell the material he had acquired for manufacturing brackets for orders 458 and 159, under the provisions of sections 3051 and 3052 of the Civil Code. At the time fixed in the notice of sale, no purchaser appeared, and plaintiff purchased this material at what he determined to be the reasonable market value. The only testimony as to the reasonable market value of this material was given by plaintiff, and is as follows:

"Q. Do you know what the reasonable market value of the materials to which you referred, was, on or about that day in August on which you held the sale? A. I do.

"Q. And what was the reasonable market value? A. The market value of the brass was the same price as we are selling brass that we cannot use—called scrap brass, and which was left over from the orders that I was supposed to make. That was six cents a pound. And the steel, we paid for the material 5.4 cents a pound, and we allowed them four cents on it at the time we made the purchase. The screws and nuts were entirely obsolete. Couldn't be used. I still have them on hand. Can't use them unless I sell them for scrap again.

"Q. Were the prices you designated, the reasonable market value of that material as of that date? A. Yes, that is what I thought the reasonable market value is."

This evidence stands uncontradicted, and we believe supports the finding as to reasonable value of this material and the damages sustained by the plaintiff under section 3300 of the Civil Code. See, also, *Cederberg v. Robison*, 100 Cal. 93, 34 P. 625; *Blair v. Brownstone Oil & Refining Co.*, 35 Cal. App. 394, 170 P. 160; 17 Cor. Jur. 855.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

129 Cal.App. 449

LLEWELLYN IRON WORKS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (two cases).

Civ. 8478, 8553.

District Court of Appeal, Second District,
Division 2, California.

Feb. 3, 1933.

Hearing Denied by Supreme Court April 3,
1933.**1. Master and servant ☞417(4½).**

Petition to review Industrial Commission's order filed before petition for rehearing order was denied *held* premature (St. 1917, p. 873, § 64 (b)).

2. Master and servant ☞416.

Industrial Commission may make indefinite order respecting nursing services for employee to continue after 245 weeks period where disability is permanent.

3. Master and servant ☞416½.

Order enforcing compensation award of Industrial Commission is neither rescission, alteration, nor amendment of such award.

4. Master and servant ☞416.

Where Industrial Commission ordered employer to pay weekly sum for nursing services to continue until termination of need therefor, subsequent order denying employee's petition for continuation thereof after date employer stopped payments *held* not void because made after 245-week period.

5. Master and servant ☞416.

Referee's findings on order of Industrial Commission are not jurisdictional except possibly in order of award (St. 1917, p. 871, § 60 (a)).

6. Master and servant ☞416.

Industrial Commission's order purporting to vacate previous valid order after petition for rehearing was denied by operation of law *held* unauthorized (St. 1917, p. 873, § 64).

Certiorari to Industrial Accident Commission.

Petition by Llewellyn Iron Works against the Industrial Accident Commission and another, to review an order of the Commission declaring a previous order void, and a petition by Llewellyn Iron Works against the Industrial Accident Commission and another for a rehearing of the order declaring a previous order void. The petitions were denied, and petitioner applies for certiorari.

First petition dismissed, and in the second case order annulled.

F. Britton McConnell, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

ARCHBALD, Justice pro tem.

On December 21, 1922, respondent E. J. Crider, while employed by petitioner, sustained an injury during the course of such employment. Subsequently, on December 19, 1923, respondent commission awarded Crider compensation for such injury. On August 29, 1927, the commission amended its findings and award theretofore made by making new findings of 100 per cent. disability, with the following additional compensation: \$500 for medical, hospital, and nursing services, payable forthwith, "and the further sum of \$15.00 weekly beginning March 4, 1927, and continuing indefinitely and until the termination of the need for said nursing services."

Petitioner paid such additional nursing charge to May 8, 1931, and no more. On August 5 of that year respondent Crider filed his petition with the commission for an order compelling Llewellyn Iron Works to reimburse him for nursing services since May 8, 1931, at the rate of \$15 per week to continue to pay such sum in accordance with said order of August 29, 1927. The answer of Llewellyn Iron Works to such petition alleged as a defense that Crider had not been in need of nursing services since the date mentioned. The taking of testimony on the issue thus raised was finished December 29, 1931, and the matter was by the referee submitted on briefs to be thereafter filed. On March 3, 1932, the decision of the referee denying the relief prayed for was approved and made the decision of the commission. May 4, 1932, the commission filed a document entitled, "Decision on Defendant's petition for rehearing filed March 23, 1932," in which it finds that the order of March 3 "was null and void and beyond the jurisdiction of the commission"; that it "is void on its face and that it is not necessary to grant defendant's petition for rehearing * * * or to act on said petition for rehearing within 30 days after the date of filing said petition"; that "the need for nursing services as heretofore found in the decision rendered herein on August 29, 1927, still continues"; that "the said award made and filed herein on August 29, 1927, is still in force and effect and requires no supplemental orders that it be continued"; and "that the period of 245 weeks having elapsed since the date of the injury herein, this commission has no jurisdiction to rescind, alter or amend the decision herein." It was then ordered: (1) That the relief requested by defendant in his petition for a rehearing be granted, and (2) the order of March 3, 1932, was annulled as of the same date. On May 24, 1932, said Llewellyn Iron Works filed its petition for a rehearing of the order of May 4, which petition was denied by the commission June 14, 1932.

[1] Prior to the filing of said petition, however, Llewellyn Iron Works filed a petition to review said order of May 4, 1932, which was given number 8478 in the files of this court. Respondent Crider filed his petition for a review of the order of March 3, 1932, after thirty days from the filing of said petition had expired without action thereon by the commission. Section 64, Workmen's Compensation, Insurance and Safety Act, 1917 (St. 1917, p. 873). Petitioner Llewellyn Iron Works was not aggrieved by said denial by operation of law and was not in any way aggrieved until the order of the commission of May 4 was made, which purported to vacate the order of March 3, 1932, which order was favorable to said Llewellyn Iron Works. No cause of action accrued to said Llewellyn Iron Works until its petition for rehearing of said order of May 4 was denied by the commission. Section 64 (b). As a consequence the petition in case No. 8478 was prematurely filed.

Respondent commission urges that its order of March 3, 1932, was an attempted amendment of its award of August 29, 1927, after the expiration of 245 weeks, and is consequently null and void on its face. It is apparent from a reading of that order, which is entitled, "Decision on Defendant's petition for Rehearing filed March 23, 1932," that it was merely an attempt, on motion of the commission, to rid its records of what was deemed to be a void order. Such action, in our opinion, can only be supported upon that theory, in view of the fact that the petition for rehearing was denied by operation of law on April 22d, no extension of time having been made within which to act thereon. Section 64 (f). Assuming, therefore, without deciding, that the commission had the power to clear its records of an order void on its face, the issue is squarely raised as to whether the order of March 3, 1932, is void because made after the period of 245 weeks provided by the act.

[2] The order of August 29, 1927, so far as it related to continuing nursing services, is not a definite order. It reads (italics ours): "and the further sum of \$15.00 weekly beginning March 4, 1927, and continuing indefinitely and until the termination of the need for said nursing services." If the order had been definitely made as to the time and the necessity for a continuance of such payments, granting that it could have been so made, the only issue that could have been raised before the commission would have been as to the amount not paid. All other questions would have been conclusively settled by the original award. Petitioner here admitted that payments had not been made since May 8, 1931,

and its defense before the commission was that such services were not necessary after that date. The form of the award left that question open and undecided, and the answer of Llewellyn Iron Works raised it for decision. That the commission has the jurisdiction to make such an indefinite order continuing in force after the 245 weeks period has expired, where the disability is permanent, is settled. *U. S. Fidelity & Guaranty Co. v. Department of Industrial Relations, etc.*, 207 Cal. 144, 277 P. 492.

[3,4] That an order enforcing a compensation award of the commission is neither a rescission, an alteration, nor an amendment of such award, has been determined. *U. S. Fidelity, etc., Co. v. Dept. of Industrial Relations, supra*. That the jurisdiction to enforce such an order as is in question here necessarily includes the jurisdiction to decide if it should be enforced, viz., whether the "necessity for nursing services" still exists, seems to be sound logic. And the jurisdiction to so decide necessarily implies the jurisdiction to deny if the necessity does not exist. That is just what the commission did by its order of March 3, 1932. If we were to adopt the contention of the commission the result would be to effectually amend the original award by making it a definite award of \$15 a week for the life of the applicant, instead of an indefinite award during the period of necessity only. As it is, under the order of March 3, 1932, the original award is not amended. The applicant does not get any more or any less than such award gives.

[5] Respondent Crider, in his brief filed here as *amicus curiæ*, urges in addition to the point raised by the commission several others which in our opinion are mere informalities which have no effect on the order of March 3, 1932. Section 60 (a). Among them is the fact that the referee made no findings on such order. In our opinion findings are not jurisdictional, except possibly in an order of award. The same questions were raised by respondent Crider in his petition for a review of said order of March 3, 1932, which petition (Civ. No. 8459) was denied by this court¹ and a petition to have same heard by the Supreme Court was likewise denied September 22, 1932.¹

[6] In our opinion the order of May 4, 1932, was in excess of the powers of the commission.

The petition in Civil No. 8478 is dismissed. In Civil No. 8553 the order is annulled.

We concur: WORKS, P. J.; STEPHENS, J.

¹ No opinion filed.

PETERS v. BINNARD et al.

BINNARD v. PETERS.*

Civ. 8654.

District Court of Appeal, First District,
Division 2, California.

Jan. 27, 1933.

Hearing Granted by Supreme Court Feb. 25,
1933.

Specific performance ¶99.

Plaintiff seeking specific performance, having defaulted on contract to buy notes from third person and sell them to defendants, could not complain because he failed to receive proceeds of contract with defendants.

Plaintiff could not complain because he had forfeited first payment made by him to third person, which defendants had agreed to repay to plaintiff under their contract with him to buy notes then owned by third person, nor because certain note previously executed by plaintiff had not been canceled and returned to him as part of agreed purchase price payable by defendants under their contract, even though it appeared that third person, after plaintiff's default, had sold notes directly to defendants.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer and William C. Doran, Judges.

On petition for rehearing.

Petition denied.

Prior opinion, 17 P. (2d) 797.

William Ellis Lady, of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondent.

PER CURIAM.

The petition for a rehearing is denied.

D. L. Peters agreed to sell to B. Binnard and National Thrift Corporation of America for \$20,000 certain notes owned by Louisa Woods; and the purchasers agreed to repay D. L. Peters \$3,500, that being the first payment made by him to Louisa Woods, and to return to D. L. Peters a certain promissory note theretofore executed by the latter. The transaction was to be conducted by opening an escrow. Our attention is not called to any evidence that D. L. Peters within the life of his contract ever tendered to the purchasers the notes so owned by Louisa Woods or that he ever demanded that the purchasers complete the escrow. He did not complete his contract of purchase with Louisa Woods, and she rescinded. It is said that she sold

the notes directly to B. Binnard and his associates; but no facts are set forth showing that she did so before D. L. Peters fell into default nor showing that B. Binnard made the purchase before D. L. Peters fell into default on his agreement to sell to B. Binnard. Under these circumstances, D. L. Peters may not complain because he has forfeited the \$3,500 paid to Louisa Woods nor because his note has not been returned to him marked "Paid," and it is immaterial whether B. Binnard or Mrs. Binnard is the owner of said note.

129 Cal.App. 534

NEWMAN v. INDUSTRIAL ACCIDENT
COMMISSION et al.

Civ. 8716.

District Court of Appeal, Second District,
Division 2, California.

Feb. 9, 1933.

Hearing Denied by Supreme Court April 10,
1933.

1. Evidence ¶11.

Court takes judicial notice that unemployment was rife and that many men were glad to procure employment at very low rates in November, 1931.

2. Master and servant ¶405(6).

Industrial Accident Commission's finding that injured oil well derrickman's daily earning capacity was only amount payable in cash held proper.

The employment contract, dated in November, 1931, when unemployment was rife, provided for payment of \$11.50 per day, of which \$2.50 per day was payable in cash each 15 days, and balance when, as, and if, well produced oil in paying quantities; and oil had not been struck at time of employee's injury.

Certiorari to Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by Frank Newman, employee, opposed by the Scott Brothers Well Drilling Company, employer, and the Pacific Indemnity Company, insurer. To review an order of the Industrial Accident Commission awarding compensation in an unsatisfactory amount, the employee brings certiorari.

Award affirmed.

Goldman & Lieberman, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

WORKS, P. J.

[1, 2] The sole question in this proceeding is whether respondent commission, in allowing an adjustment of compensation to petitioner, correctly found as a basis for the award that his daily earning capacity was \$2.50. At the time of his injury petitioner was working under a contract of employment which read, in part: "That said employee shall be employed * * * for the purpose of aiding and assisting in drilling an oil well; * * * the salary to be paid said employee is \$11.50 per day, which is to be paid as follows: \$2.50 per day in cash payable each 15 days during said employment and the balance of said wages shall be paid when and as and if said well produces oil in paying quantities and then 20% of said oil shall be set aside and sold by said employer and the funds as received in from the sale of said oil shall be paid proportionately to all the employees of said employer who are working under this or similar agreements." This quotation from the agreement should be supplemented by the statement that the work done under it by petitioner was that of a derrickman.

No precedent to aid in the construction of such a contract as this is presented to us, and we must do the best we can with a troublesome question of first impression. The contract is properly susceptible of either of two interpretations: (1) Petitioner's services were worth no more than \$2.50 the day; but the employer was willing to pay him a bonus, along with its other employees, in the event that what was something in the nature of a gamble should turn out to the employer's advantage. (2) Petitioner's services were worth \$11.50 the day; but the employer had not the means to pay, or was unwilling to pay, that much in the event that the venture upon which it was embarked should turn out disastrously. These alternatives are really alike in one respect, and as to that matter they but show the same thing in rhetorically different forms. Under each of them, and pursuant to the contract, petitioner was willing to work for the employer at an ultimate wage of \$2.50 the day. Also, the contract was dated in November, 1931. Under familiar rules of law, we take judicial notice of the fact that at that time unemployment was rife in the land, and that many men were then glad to procure employment at very low rates. It is to be noted, too, that petitioner was employed, not as a foreman or for any position of command over others, but only as a derrickman. It is also worthy of note that at the time of petitioner's injury no bonus had been earned. Oil had not been "struck."

Under these circumstances, which we may read into the contract, and consequently under the contract itself, we conclude that re-

spondent commission was right in determining that petitioner's earning capacity was but \$2.50 the day.

Award affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

129 Cal.App. 496
JENICEK v. BARMAN et al.
Civ. 8081.

District Court of Appeal, Second District,
Division 1, California.
Feb. 7, 1933.

1. Principal and surety ⇨155.

Complaint in suit on bond alleging plaintiff's judgment against obligees constituted lien on realty did not fail to allege nonpayment of judgment (Rules of the Supreme and District Court of Appeal, Rule 5, § 3).

2. Appeal and error ⇨193(9).

Defendant in suit on bond could not for first time on appeal urge complaint failed to state cause of action for defective allegation of payment of judgment (Rules of the Supreme and District Court of Appeals, Rule 5, § 3).

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Henry Jenicek against Fred Barman and another. From the judgment, defendants appeal. On motion to dismiss appeal or to affirm judgment.

Appeal dismissed, and judgment affirmed.

W. R. Law, of Los Angeles, for appellants.

Henry M. Lee, of Los Angeles, for respondent.

PER CURIAM.

[1, 2] On motion to dismiss or affirm, under rule V, section 3. It seems clear that there is no merit in the points mentioned in the brief for appellant. The bond contains a direct condition that the defendant will pay the obligations of respondent up to the sum of \$3,000 specified in the bond. Jenicek had a judgment against the obligees, which was a lien on their property. The complaint did not directly allege nonpayment of the said judgment, but it did allege that said judgment constituted a lien on the described real property. From this we conclude that there is not a total failure to allege nonpayment. It is now too late for appellant on this appeal to urge for the first time that, by rea-

son of such a defect, the complaint does not state a cause of action. It is the opinion of the court that the motion should be granted. It is granted, and the judgment is affirmed.

123 Cal.App. 625

Ex parte CUNHA.

Cr. 1648.

District Court of Appeal, First District,
Division 2, California.

June 3, 1932.

Habeas corpus ⇨90.

Rehearing in District Court of Appeal, after its release of habeas corpus petitioner from commitment for contempt of court, is not authorized (Pen. Code, § 1506).

On petition for rehearing.

Petition denied.

For original opinion, see 11 P.(2d) 902.

Dean Cunha and Harry I. Stafford, both of San Francisco, for petitioner.

Earl Warren, Dist. Atty., J. Frank Coakley, Asst. Dist. Atty., and George C. Perkins, Deputy Dist. Atty., all of Oakland, for respondent.

PER CURIAM.

There is no provision of law for a rehearing in this court in habeas corpus cases, except in those cases specified in section 1506 of the Penal Code, of which this is not one. Ex parte Robinson, 71 Cal. 608, 611, 12 P. 794; In re Washer, 200 Cal. 598, 609, 254 P. 951; In re Edwards, 99 Cal. App. 541, 545, 278 P. 910, 290 P. 591; In re Livingston, 108 Cal. App. 716, 720, 292 P. 285.

Petition for rehearing denied.

129 Cal.App. 447

EDWARDS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8625.

District Court of Appeal, Second District,
Division 2, California.

Feb. 3, 1933.

Hearing Denied by Supreme Court April 3, 1933.

1. Master and servant ⇨367.

One hired to repair roof with materials purchased by building owner, who paid bill presented, *held* not independent contractor.

2. Master and servant ⇨362.

Roofing repairs, completed in less than 10 days, *held* casual work, precluding workmen's recovery of compensation from employer for injuries sustained.

Proceeding for compensation under the Workmen's Compensation Act by Francis M. Grubb, employee, opposed by Fred Austin Edwards, employer. To review awards of compensation by the Industrial Accident Commission, the employer brings certiorari.

Awards annulled.

Bicksler, Parke & Catlin, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

STEPHENS, J.

The Industrial Accident Commission made a substantial award to Grubb, the applicant, who was before it asking compensation for injuries sustained in the course of his employment by Edwards, petitioner herein. Thereafter an additional award was made by the commission to applicant for medical costs.

Petitioner asks, by way of certiorari, that the awards be vacated for several reasons but presents but two, viz.: That Grubb was an independent contractor and that the work was casual and not in the regular course of trade, business, or occupation of petitioner. The facts necessary to an understanding of our decision may be very briefly stated.

[1, 2] Petitioner is a bookbinder but has not been able to follow that vocation for several years. He owns a two-story building, the first story being divided into four small store rooms which are rented for small businesses. The second floor is divided into six apartments which are furnished and rented for living purposes. Petitioner and his wife live in one of them. No service of any kind is furnished the stores or apartments by petitioner. Occasionally petitioner makes small upkeep repairs about the premises and upon several occasions Grubb has been employed to make such repairs. Some roofing repairs were needed in the rear of one of the stores and petitioner asked Grubb to attend to it. Petitioner got trace of and secured prices upon some second-hand material and requested Grubb to look at it as to its condition. He did this, and the material was sent to petitioner C. O. D. Grubb furnished his own tools, employed a helper, and the two went to work. While engaged thereon, Grubb suffered the accident for which the awards were made.

Grubb and petitioner had agreed upon no definite compensation nor upon the time at which the work was to be done or completed except petitioner had expressed the wish that

the work would be commenced the Monday following the engagement. Petitioner did not carry industrial accident insurance. After the accident, Grubb's son helped finish the job and petitioner paid the son and the helper \$16 which was the amount of their bill. The whole job cost much less than \$100 and took less than 10 days to complete. Grubb had been employed by petitioner in the same way before for which he had been paid a reasonable compensation. We do not think the facts constitute Grubb an independent contractor, but it is our opinion they indicate that the work was casual and not in the regular course of trade, business, or occupation of petitioner herein. For a complete consideration of the question see *Sink v. Pharaoh*, 170 Minn. 137, 212 N. W. 192, 50 A. L. R. 1176.

Upon the authority of *Lauzier v. Industrial Accident Commission*, 43 Cal. App. 725, 185 P. 870, and *Ford v. Industrial Accident Commission*, 53 Cal. App. 542, 200 P. 667, we order that the findings and the awards herein referred to be and they are hereby annulled.

We concur: WORKS, P. J.; CRAIG, J.

129 Cal.App. 473

GATES v. McPHERSON.

Civ. 8768.

District Court of Appeal, Second District, Division 1, California.

Feb. 6, 1933.

1. Appeal and error ¶607(1).

Affidavits concerning continuance, not being documents which should be brought into record as part of clerk's transcript, should have been included in request for transcript (Code Civ. Proc. § 953a).

2. Appeal and error ¶616(2).

Clerk's certificate to transcript is insufficient to show that affidavits for continuance on file in trial court were used therein (Code Civ. Proc. § 953a).

3. Continuance ¶33.

Refusing second continuance because of defendant's absence held not error, plaintiff stipulating that defendant would testify to matters stated in affidavit.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Harvey H. Gates against Aimee Semple McPherson. Judgment for plaintiff, and defendant appeals. Motion by plaintiff to dismiss the appeal or affirm the judgment.

Motion by defendant that the court add to the record on appeal by directing that the clerk of the superior court prepare a certified copy of the entries made on the register of actions and certified copies of certain affidavits and a motion for a continuance.

Defendant's motion denied, plaintiff's motion granted, and judgment affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Everett H. Mills and Frank James, both of Los Angeles, for respondent.

CONREY, P. J.

In this action to recover a sum claimed as due under a contract, the cause came on for trial on June 24, 1932, and resulted in findings regularly made by the court, and judgment for the plaintiff. The defendant appeals from the judgment. On this appeal, as shown by the brief of appellant, the only assignment of error is that on said 24th day of June the court erred "in refusing to continue the trial of the action when said court denied the application of counsel for appellant to present a motion for said continuance"; for which reason it is contended the court erred in rendering the judgment from which the appeal is taken.

Pursuant to notice given, respondent on November 28, 1932, presented to this court his motion to dismiss the appeal or affirm the judgment upon the ground that the appeal was taken for delay only, and that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument; and upon other grounds which we need not discuss. The motion having been submitted appellant thereafter, in accordance with notice given, presented his motion to resubmit said motion of respondent, and in that connection that the court add to the record on appeal by directing that the clerk of the superior court make up and prepare a certified copy of the entries made on the register of actions in this case in the court below, and certified copies of the affidavits and the motion for a continuance noticed for the 24th day of June, 1932, in said action. In support of her motion appellant has attached to her notice of motion filed herein copies of certain affidavits on file in the office of the clerk of the superior court, together with a copy of said register of actions in the case, with a certificate of the clerk of the superior court that said affidavits and register of actions entries are true and correct copies of said documents on file in said action. With one exception, said affidavits appear to have been filed on or before the 12th day of June, 1932; but there is no certificate that they were used on said motion for continuance of the trial, or that they were introduced in evidence.

From the reporter's transcript of the proceedings at the beginning of the trial on June 24, 1932, the following facts appear: Counsel for appellant asked leave of court "to present an application for continuance on the grounds of the absence of our client." It was then stated and admitted that earlier in the day the motion had been presented to Judge Wilson, who was sitting in the calendar department of the court; that Judge Wilson had denied the application. Thereupon Judge Crum denied the application for leave to again present said motion for continuance. Thereupon counsel for appellant stated that: "Judge McComb heard a similar application for a continuance about two weeks ago, he was sitting in the calendar department. The application was presented on substantially the same grounds that existed in support of the application that was made before Judge Wilson this morning." Counsel then suggested the fact that at the time of the hearing before Judge McComb the attorney for plaintiff had stipulated that the defendant, if personally present at the trial, would testify to the matters and things set forth in the affidavit which was used in support of the motion for continuance. In reply to this suggestion counsel for plaintiff renewed said stipulation, "subject, however, to all legal objections to her testimony upon the usual grounds." The judge then said: "I assume that at the proper time in the case, the matter will be called to the court's attention by your offer to read this affidavit into evidence. Of course, I realize that this is a part of the files in the case; it is not evidence. We can pass that by for the time being." It was upon the foregoing state of the record with reference to the application for continuance, that the court proceeded with the trial of the case.

[1, 2] Appellant has not shown here any defect in the record as contained in the transcripts on file. The affidavits which were on file in the trial court, relating to the subject-matter of the motions for continuance, are not documents which should be brought into the record on appeal as part of the "clerk's transcript." The clerk's certificate would not be sufficient to show that the affidavits were used in the proceedings before the trial court. If appellant desired to bring them to this court, she should have included them in her request for a transcript, in the court below. Section 953a, Code Civ. Proc. If so requested they would, in due course, be included in the transcript to be certified, as to its truth and correctness, by the judge. *Pierce v. Works*, 171 Cal. 684, 154 P. 852. "It has long been settled, with regard to the affidavits used on a motion, that they must be identified and authenticated by the trial judge before they can be considered by this court." *Waymire v. Cal. Trona Co.*, 176 Cal. 395, 398,

168 P. 563, 565; *Espinosa v. Gould*, 47 Cal. App. 316, 190 P. 481.

[3] It does not appear from the facts shown in the record of this cause that the court erred in its refusal to allow any further postponement of the trial. It is not claimed that there is any other ground of appeal.

The motion of appellant is denied. The motion of respondent is granted, and the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

129 Cal.App. 439
SKLAR v. GLOBE INDEMNITY CO.
Civ. 7520.

District Court of Appeal, Second District, Division 2, California.
Feb. 3, 1933.

Insurance §425.

Proprietor who, after short absence, returned to store and found money missing from cash register, could not recover under policy covering "robbery."

Policy in question defined "robbery" as used therein as forcible taking of property by putting custodian in fear of violence or as overt felonious act committed in presence of custodian, and of which he was actually cognizant at the time.

[Ed. Note.—For other definitions of "Robbery," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Samuel Sklar against the Globe Indemnity Company. From a judgment on an instructed verdict for defendant, plaintiff appeals.

Affirmed.

Sherman & Sherman, of Los Angeles, for appellant.

Kidd, Schell & Delamer, of Los Angeles, for respondent.

WORKS, P. J.

This action, tried by a jury, was for a recovery of judgment under an insurance policy. The jury rendered an instructed verdict for defendant, and plaintiff appeals from the resulting judgment.

The policy insured against robbery. The facts were stipulated. Appellant kept a store with a cash register in the place. Adjoining

the store he also had a pool and billiard room; the latter and the store being connected by an archway. Appellant cashed a check for a certain person in the store, and the two then went into the pool room, where the recipient of the cash played pool with a third person. Appellant was at once called on to attend upon a customer, who immediately left the place. Appellant then stood behind a counter in the pool room, and, while he remained there, the customer whom he had just served returned and called into the pool room, "Your building is on fire." Appellant ran from the front door of the pool room into the street, thence to a small adjoining building referred to as a storeroom. There, according to the stipulation as to the facts, "he saw some paper and oiled sacks in an opening underneath said storeroom," and "at the time plaintiff arrived there said paper and rags were burning freely; that all the occupants of the store accompanied plaintiff to the scene of the fire, and an attempt was made by the people, including the plaintiff, to put it out." On the day preceding these occurrences, appellant "had inspected said premises * * * and at that time saw no paper or sacks at the place where the fire was; plaintiff stayed at the scene of the fire for three to five minutes, and then returned to the store via the entrance into the billiard hall and then through the archway into the gent's furnishing place; at that time he found that the cash register was open, and that \$1,985.04 was missing from said cash register; that there were no marks nor any other indications about said cash register to indicate that any force had been applied to said cash register. * * *"

Appellant contends that he was entitled to recover under either of two clauses of the policy defining the term "robbery" as employed therein. One of these was "a felonious and forcible taking of property * * * by putting" the custodian "in fear of violence." We can see under the facts above recited nothing which could have put appellant in fear of violence, nor that he was in such fear.

Another clause of the definition of robbery refers to a similar taking of property "by an overt felonious act committed in the presence of" the custodians, "and of which they were actually cognizant at the time." If the fire was ignited by an overt felonious act—and we are not enlightened upon this subject—it was not committed in the presence of appellant, nor was he cognizant of such an act then or at any time. Perhaps the cash was abstracted from the register by means of an overt felonious act, but, if so, the act was not committed in the presence of appellant, nor was he ever cognizant of it, except through process of imagination.

The trial judge was right when he instruct-

ed the jury to render judgment in favor of defendant.

Judgment affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

129 Cal.App. 531
PEOPLE v. SANDERSON.
 Cr. 2312.

District Court of Appeal, Second District,
 Division 2, California.

Feb. 9, 1933.

1. Criminal law ☞742(1).

Whether state's witnesses or defendant's witnesses testifying to contradictory statements were telling truth, and whether alleged inconsistencies justified repudiation of testimony of state's witnesses, *held* questions for jury.

2. Criminal law ☞406(4).

In burglary prosecution, accused's statement at preliminary examination indicating desire to plead guilty *held* admissible.

Accused's statement at preliminary examination that he desired to plead guilty in the Superior Court was competent, with other evidence, on the question whether the accused committed the burglary, and had a direct bearing on the issue raised by the plea of not guilty.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Roy Sanderson was convicted of burglary, and he appeals.

Judgment and order denying motion for new trial affirmed.

Lois B. Preston, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Paul, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was charged in an information filed against him with the crime of burglary and with having theretofore been convicted of two separate felonies. From the judgment of conviction entered on the verdict of guilty returned by the jury, as well as from an order denying his motion for a new trial, he has prosecuted this appeal.

Appellant urges (1) that the evidence is insufficient to sustain the verdict and judgment, and (2) that the court erred in admitting cer-

tain evidence over his objection, the producing of which evidence is also urged as misconduct on the part of the district attorney.

[1] 1. There is ample evidence to support the verdict and judgment, but appellant contends that the prosecution's witnesses were impeached by contradictory statements which make their evidence insufficient as a matter of law. With such contention we cannot agree. The stories told by those witnesses dovetail with the physical facts related, which place the stolen property in the possession of appellant and tie him up so clearly as being the one who broke into the building at the time of the burglary that the truth of the stories is vividly impressed upon the reader of the transcript herein, in spite of attempted impeachment by contradictory statements in some particulars. However that may be, the jurors were the judges of whether the witnesses for the prosecution or the ones testifying to the contradictory statements were telling the truth, as well as whether the alleged inconsistencies justified a repudiation of the testimony of the people's witnesses; and their verdict expresses their conclusion thereon and is binding on us.

[2] 2. Over the objection of appellant's counsel that it was incompetent, irrelevant, and immaterial, a witness was asked if he heard the defendant make a statement at the preliminary examination with reference to pleading guilty, to which the witness answered, "I did." The asking of this question was also cited as misconduct. Thereafter the witness stated that defendant stated at the time in question that "he wished to waive his entire preliminary and plead guilty in the superior court." Such evidence would seem very competent to be considered, with the other evidence, on the question whether or not appellant committed the burglary. The statement seemed to be voluntarily made by defendant himself, and it had a direct bearing on the issue raised by the plea of not guilty. In the case of *People v. Boyd*, 67 Cal. App. 302, 227 P. 783, 786, the prosecuting attorney introduced in evidence, over defendant's objection, an offer by the latter, made in open court at a former trial, to plead guilty to one offense charged in the information if a continuance he desired was granted. Influenced by the authority of *People v. Ryan*, 82 Cal. 617, 23 P. 121, this court decided that it was erroneous to admit such evidence, but that nevertheless no prejudice resulted therefrom. The Supreme Court, however, in denying a petition to have the cause heard by it, disagreed with such conclusion, and said: "The action of the defendant in that regard was an admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury." The Supreme Court held fur-

ther that the fact that the admission was made in court did not detract from its relevancy or competency, and also that the case of *People v. Ryan* seemed to be out of harmony with what it, the Supreme Court, believed the law to be. We see no error in the overruling of such objection, and, of course, no misconduct in offering the evidence.

Judgment and order affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 454
BERNSTEIN et ux. v. DODIK et al.
Civ. 8771.

District Court of Appeal, First District, Division 1, California.

Feb. 4, 1933.

Hearing Denied by Supreme Court April 3, 1933.

1. Easements $\S$ 61(9/2).

Whether use of driveway covering parts of adjoining lots was under claim of right held for court in injunction action.

The question whether use of driveway was under claim of right or as mere matter of neighborly accommodation was question of fact to be determined by trial court in light of relation of parties, their conduct, situation of property, and all surrounding circumstances.

2. Easements $\S$ 7(5).

Respecting adverse use of easement, reasonable periods of vacancy incident to change of possession or of tenants do not destroy continuity of possession.

Periods of vacancy incident to or occasioned by change of possession, or by substitution of one tenant for another, which periods are not of longer duration than is reasonable in view of character of land and uses to which it is adapted and devoted, do not constitute interruption of possession destroying its continuity in legal contemplation, where there is no intention to abandon possession.

3. Easements $\S$ 5.

To acquire easement, such as driveway, use must be adverse to landowner.

4. Easements $\S$ 36(1).

Continuous or openly and notoriously adverse use of easement creates presumptive knowledge in owner that person using easement is doing so under claim of right.

5. Adverse possession $\S$ 25.

One claiming by adverse possession need not be in personal occupation; tenant's occupation inuring to claimant's benefit.

6. Easements Ⓒ8(4).

Adverse use of driveway covering parts of two adjoining lots by owners and their grantors of one of such lots held not impaired by use of driveway by adjoining landowners and others.

7. Easements Ⓒ8(1).

Payment of taxes, though essential to title by adverse possession, is not necessary as regards mere easement not separately assessed for taxation (Code Civ. Proc. § 325).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by W. H. Bernstein and wife against Stanley Dodik and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

N. B. Nelson, of Los Angeles, for appellants.

L. Lee Bernstein, of Los Angeles, for respondents.

JAMISON, Justice pro tem.

This action was brought by plaintiffs to quiet title to an easement and to enjoin defendants from interfering with and obstructing plaintiffs' use of same, and for damages. Judgment was rendered for plaintiffs, quieting their title to said easement, permanently enjoining defendants from interfering with or obstructing same, and for \$50 damages. From this judgment defendants appealed.

Plaintiffs own lot 49 in Barclay Brown's Thirty-Eighth place in Los Angeles, and defendants are the owners of the adjoining lot 48. Robert B. McGaffey and his wife acquired title to lot 48 in 1914 and purchased lot 49 on contract in 1916. Robert B. McGaffey and wife purchased lot 49 on a contract from Los Angeles Trust & Savings Bank. In 1917 Robert B. McGaffey died, and in 1920, following administration upon his estate, distribution of lots 48 and 49 was made to Carrie Merrick, the widow of said Robert B. McGaffey, who after his death married Willard F. Merrick. She completed payments on the contract for lot 49, and in 1920 the Los Angeles Trust & Savings Bank executed a deed to her and her husband as joint tenants for said lot 49. Carrie Merrick died in 1923. Thereupon title to lot 49 vested in Willard F. Merrick by operation of law. In 1928 Merrick and a subsequent wife deeded lot 49 to one Alford, who executed a deed of trust on the property, which was foreclosed, and the Pacific States Savings & Loan Company became the purchaser at the foreclosure sale; in September, 1929, that company deeded said lot 49 to respondents.

Lot 48 was, upon the administration of the estate of Carrie Merrick, in accordance with her will, distributed to Percival B. McGaffey and Robert D. McGaffey on February 25, 1930. They conveyed same to appellants as joint tenants on May 27, 1930. Between lots 48 and 49 there is a driveway 7.7 feet wide which runs back to some garages near the rear of the lots. A strip 4.6 feet of this driveway is on lot 49 and a strip 3.1 feet is on lot 48. The driveway is the alleged easement involved on this appeal.

Respondents produced evidence to the effect that in 1922 four or five garages or compartments for automobiles were erected at the rear of this driveway, most of them being on lot 49, but that they projected over and into lot 48; that in this same year the Merricks built a duplex bungalow on lot 49; that for convenience in passing over said driveway they had concrete strips laid along the driveway to said garages, one of said strips being placed on lot 49 and the other on lot 48; that there is no other way of getting to the rear of lot 49 except by means of this driveway; that where the driveway met Thirty-Eighth street at the front, the curb was lowered and a concrete apron was placed there, presumably to enable vehicles to go and come over the said driveway; that from 1922 to 1930 the said driveway was used for ingress and egress to and from the rear of both of said lots and by the tenants of lot 49, some of said tenants owning automobiles and using the garages at the rear end of the driveway.

Johnson, a witness for respondents, testified that he had a conversation with Percival B. McGaffey and Robert D. McGaffey in 1928 while they were the owners of lot 48, and that they stated to him that there was a community driveway between the two lots.

Appellants contend that the evidence is insufficient to justify the decision of the court, and that the decision is against law.

[1] The trial court found that since 1921 the respondents and their predecessors in interest have been in the possession of said easement and have openly, notoriously, and adversely used the same for ingress and egress to and from the rear of lot 49 with notice to and knowledge of appellants and their predecessors, and have thereby acquired the ownership of the said easement. Appellants claim that the use of said easement by respondents was permissive, was not continuous, and was not adverse. By its finding that respondents were the owners of said easement, the trial court necessarily found against appellants upon each of these claims. The question as to whether or not the use of the driveway was under a claim of right or as a mere matter of neighborly accommodation was a question of fact to be determined

by the trial court in the light of the relation of the parties, their conduct, the situation of the property, and all the surrounding circumstances. *Abbott v. Pond*, 142 Cal. 393, 76 P. 60; *Humphreys v. Blasingame*, 104 Cal. 40, 37 P. 804.

[2] Periods of vacancy incident to or occasioned by change of possession, or by substitution of one tenant for another, and which are not of longer duration than is reasonable in view of the character of the land and the uses to which it is adapted and devoted, do not constitute interruption of possession destroying its continuity in legal contemplation, where there is no intention to abandon possession. 1 Cal. Jur. 554; 1 Cyc. 1021; *Botsford v. Eyraud*, 148 Cal. 431, 83 P. 1008; *Goodrich v. Mortimer*, 44 Cal. App. 576, 186 P. 844.

[3, 4] In the instant case, while there were periods during which the duplex bungalow was vacant while substituting one tenant for another, there is no evidence that there was any intention to abandon this right of way by the owners of lot 49. While it is a well-established principle that the use must be adverse, yet it is an equally well-established principle that where the use of the easement is continuous or openly and notoriously adverse to the owner, it creates the presumptive knowledge in him that the person using the easement is doing so under a claim of right. *Wells v. Dias*, 57 Cal. App. 670, 207 P. 913; *Yuba Cons. Goldfields v. Hilton*, 16 Cal. App. 228, 116 P. 712, 715; *Weyse v. Biedebach*, 86 Cal. App. 712, 261 P. 1088.

Appellant Stanley Dodik testified that he looked after the Merrick place (lot 49) for Merrick for about two years, beginning in the spring of 1925; that during that time he saw tenants of Merrick using the driveway.

[5, 6] It is not necessary that one claiming by adverse possession be in personal occupation, since occupation by a tenant inures to his benefit. *Weyse v. Biedebach*, supra; *Beckett v. City of Petaluma*, 171 Cal. 309, 153 P. 20. The use of said right of way by respondents and their grantors was not impaired by the enjoyment of a like right by appellants and others. *Wells v. Dias*, supra; *Lund v. Johnson*, 162 Wash. 525, 298 P. 702.

[7] While the payment of taxes is essential to the successful assertion of title by adverse possession, that requirement does not apply to a mere easement which is not separately assessed for the purpose of taxation. *Humphreys v. Blasingame*, supra.

In the case of *Smith v. Smith*, 21 Cal. App. 378, 131 P. 890, 891, which was an action to restrain the defendant from obstructing an alleyway, the court said: "It is only the payment of taxes levied and assessed which, by section 325 of the Code of Civil Procedure, is

made a condition for acquiring title by adverse possession. The easement in the alleyway being attached to the abutting property and forming a part thereof, it will be presumed, nothing to the contrary appearing, that the same and the value thereof was * * * assessed against the lots."

In *Ferguson v. Standley*, 89 Mont. 489, 500, 300 P. 245, 250, it was held that the provision as to payment of taxes has no application to the acquisition of an easement which is merely appurtenant to the dominant estate and is not taxable separate and apart from it. In *Silva v. Hawn*, 10 Cal. App. 544-551, 102 P. 952, the court held that the law does not require an easement to be assessed.

We are of the opinion that the evidence supports the findings of the trial court that the driveway was used by the respondents and their grantors for more than the statutory period under a claim of right to such use, and that it was not permissive; that the owners of lot 48 made no objection to such use until after the period of limitation had expired, and that the finding of the court that appellants on or about the 1st of August, 1930, did tear up and remove a portion of the driveway; did threaten to close same and thereby to interfere with and obstruct respondents' said right of way and easement is also supported by substantial evidence.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

129 Cal.App. 499
LAURENCE v. LOS ANGELES JUNK CO.
Civ. 7328.

District Court of Appeal, Second District,
Division 2, California.
Feb. 7, 1933.

1. Appeal and error $\S$ 1050(1).

In action for breach of contract for sale and delivery of old newspapers, admitting letter of defendant's competitor quoting price and testimony that another competitor telephoned it could not make delivery held harmless error, where competitor's manager testified that market value of paper was same as price quoted (Civ. Code, $\S\S$ 3308, 3354).

2. Sales $\S$ 417.

In action for breach of contract for sale and delivery of old newspapers, conflicting evidence as to whether contract called for special pack and as to market value of paper called for by contract sustained court's finding that market value of paper exceeded contract price by \$6 per ton.

3. Sales $\S$ 181(11).

In action for breach of contract for sale and delivery of old newspapers, providing for payment after steamship company issued bills of lading, by ordering steamship company not to release bills of lading, evidence sustained finding that buyer was ready, willing, and able to receive newspapers.

4. New trial $\S$ 102(1).

In action for breach of contract for sale and delivery of old newspapers, defendant held not entitled to new trial for alleged newly discovered evidence regarding market value of paper contracted for, where defendant had opportunity to produce such evidence at trial.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by C. R. Laurence against the Los Angeles Junk Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Abe Richman, of Los Angeles, for appellant.

Everett V. Prindle and Arch G. McLay, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff and defendant entered into a contract December 15, 1928, in which defendant agreed to sell plaintiff "six hundred tons of old newspapers, Clear No. 1, not to exceed 3% colored matter. To be packed either 272 lbs. or 280 lbs. to the bale, at the option of the said C. R. Laurence, and guaranteed not to exceed 60 cubic feet to the ton; price to be \$21.00 per net ton of 2000 lbs. f. o. b. Los Angeles harbor, if packed in ordinary second hand burlap," or "\$20.50 per net ton of 2000 lbs. if packed in cement burlap. Three hundred tons of the above mentioned newspapers are to be delivered to the Los Angeles wharf for shipment per steamer during the month of February, 1929," and the balance during the month of March, 1929. Reservation for steamer space for the bales was to be made by plaintiff, who was to "furnish the said Los Angeles Junk Co., Inc., with all shipping instructions, permission to deliver the above named material to the Los Angeles wharf, stencils, marks, etc., at least fifteen days prior to the scheduled sailing of the steamer on which space reservation has been made." The contract also provided that "the above material is to be packed with 4 hoops (painted red) to each bale. Payment to be made to said Los Angeles Junk Co., Inc., after the steamship company issues bill of lading for the above named material." Apparently plaintiff notified defendant as to the number of pounds to be packed in each bale, and evidently selected the secondhand burlap pack as the one to be

used. Defendant delivered 730,200 pounds under the contract and was paid for the same by plaintiff. On about the 18th and 20th of March, 1929, defendant delivered a total of approximately 231,920 pounds, baled as aforesaid, to the wharf at Los Angeles Harbor, at which latter date it insisted upon being paid for the two lots so delivered and instructed the steamship company to hold the bills of lading and not deliver them to plaintiff except on defendant's order. Plaintiff refused to pay until the bills of lading were released, whereupon defendant declared the contract to be null and void and refused to proceed thereunder. From a judgment against it in the sum of \$1,409.40, defendant has appealed.

The evidence is undisputed that the steamship company received its shipping instructions from plaintiff on March 22 and prepared bills of lading covering the two lots of bales on the same day, and that it would have delivered them to plaintiff had he called for them at any time prior to defendant's order of March 23 not to release them to plaintiff. It also appears without dispute that there were only four firms in Los Angeles that baled newspapers, including defendant. Plaintiff immediately addressed letters to the other three asking their prices to fill the contract, and over defendant's objection introduced in evidence two letters received in reply thereto. One such letter advised that the writer could not make deliveries in March, and the other, from Fireboard Products, Inc., agreed to do so, quoting a price of \$27 per ton. Plaintiff was also permitted to testify that the third firm written to telephoned that it could not make delivery.

[1] We agree with appellant that it was error to present such evidence as to the market or other price of paper to be furnished. Such error was harmless, however, as to the letter and telephone conversation saying that delivery could not be made. With regard to the letter of the Fireboard Products, Inc., Mr. M. C. Cooper, manager of the paper stock deliveries of such company, who wrote the letter and who was produced in court by plaintiff, testified that in his opinion the market value on March 26th of the paper called for by defendant's contract was \$27 per ton, and that the price for the standard pack during March, 1929, was "around \$22.50"; that the "market was up"; and that the expense of the special pack called for by the contract, and the necessity of doing it "all on overtime to get it out on the short time delivery," made the difference in cost. Apparently there was no paper similarly packed on the market, and we do not see how a more practical method of ascertaining the value of the paper to be delivered under the contract, under such circumstances and under sections 3308 or 3354 of the Civil Code, could be employed. No question was raised as to lack of quali-

cation of the witness as an expert, and in view of the testimony we do not see how defendant was prejudiced by the introduction of the letter, which said no more than the witness.

[2] Appellant also urges that the evidence does not sustain the finding made by the court to the effect that the excess value of the newspapers undelivered in the month of March, over and above the contract price, was \$1,409.50—the difference between the value of the undelivered papers at \$27 per ton and the contract price of \$21. The only testimony on the part of plaintiff is that of Mr. Cooper. Defendant produced evidence that the market value of paper called for by the contract was between \$20.50 and \$21.50 per ton. There being a conflict in the evidence both as to price and as to whether or not the contract called for a special pack, and the trial court having adopted the higher price as the correct one—which necessarily implied a finding that a special pack was called for—it is not for us to say that the court did not properly act, so long as there is any evidence supporting the finding.

[3] It is further contended that the court erred in finding that respondent was ready, willing, and able to receive the balance of such papers. We find no merit in such contention. It is true that one of plaintiff's letters to defendant covering the dispute states that the goods "are not f. o. b. Los Angeles Harbor until they are loaded on board the steamer." A later letter, however, calls defendant's attention to the fact that plaintiff was informed by the steamship company that defendant had not released the paper, "so they are unable to issue bills of lading. I will not pay you for this paper until it is released." The letter further states that if defendant will abide by the terms of the contract all that would be necessary was for them to render invoices, "which will be paid in accordance with the terms of the contract." Appellant could have obtained the invoices from the steamship company at any time after delivery of the bales on the wharf and presented them to respondent, who would have been obliged to pay under the contract. There seems to be no complaint in the evidence that respondent did not do everything required of him under the contract, and the only fault found seems to be that he did not

pay the invoices when submitted. He was only required to pay "after the steamship company issues bills of lading," and this he seemed willing to do, but appellant's stop order made it impossible. There is ample evidence to support the finding complained of.

[4] The claim is made that appellant's motion for a new trial should have been granted. Several affidavits were filed in support of the motion. One was by the president of defendant company, which stated in effect that he had talked with the witness Cooper some time before the trial and was told that the latter would be present at the trial and would testify that the paper described by the contract was "standard pack" the market value of which was \$22 per ton, and that relying on such statement he did not go to the expense of procuring other witnesses from San Francisco as he otherwise would have done. Five affidavits from brokers or others dealing in old newspapers in San Francisco were also filed, which in effect stated that the paper called for by the contract in question was "standard pack," and that the market price of same in March, 1929, was \$23, \$21.50, \$20.50/20.75, \$22, and \$22.50, respectively, f. o. b. wharf at either San Francisco or Los Angeles. The affidavit of Mr. Cooper, filed by respondent, denied the conversation as stated. The trial commenced December 19, 1929. From the record before us we are unable to tell how many days were consumed, but on the last day the case was continued to December 30th for argument. Appellant apparently did not ask for an opportunity to produce the San Francisco witnesses, of whom he must have known at all times, because of the surprise caused by the testimony of Cooper, and there would seem to have been ample time to have done so. The trial judge remarked at the time the motion for new trial was denied: "Certainly, if the court re-opened cases for newly discovered evidence under situations such as are shown in this case there would be no end of litigation. You had every opportunity to cross-examine Mr. Cooper and to get evidence here at the time of trial, if you were surprised in any way." With that statement we are compelled to agree.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

129 Cal.App. 38

AITKEN v. STEWART.

Civ. 8764.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1933.

1. Corporations $\S$ 487(3).

On issue whether note and trust deed on corporation's land were ultra vires, purchaser of land *held*, as against lender, in no better position than corporation.

2. Corporations $\S$ 385.

Where corporation's acts merely exceed charter powers without transgressing law or public policy, ultra vires defense is regarded unfavorably.

3. Corporations $\S$ 487(3).

Where corporation and comaker executed note and trust deed on corporation's land, purchaser of land could not avoid repaying lender by pleading ultra vires.

4. Corporations $\S$ 487(3).

Allegation that corporation never authorized note and trust deed *held* modified by subsequent allegations that lack of authority consisted in noncompliance with by-laws requiring entry in minutes of terms of loan.

5. Corporations $\S$ 477(1).

Though payee of note secured by trust deed on corporation's land had notice of by-laws requiring entry in minutes of terms of loan, purchaser of land could not avoid payment because of absence of such entry.

6. Corporations $\S$ 487(3).

As against lender, purchaser of corporation's land could not contend that corporation's executing trust deed thereon was ultra vires.

It appeared that, at time of execution of note for loan secured by trust deed in question, purchaser of corporation's land had no interest in property covered by trust deed and was not connected with corporation; that when he purchased land, transaction between corporation and lender had been closed and money lent; and that neither state nor corporation nor its officers or stockholders complained that transaction was ultra vires.

7. Corporations $\S$ 387(3).

Unless contract is declared void, violation of statutes designed to aid sovereign in regulating businesses can be asserted only by sovereign in direct proceeding.

8. Corporations $\S$ 387(2).

Corporation's authority to make loan to one dealing with corporation as authorized cannot be raised collaterally by individuals.

9. Bills and notes $\S$ 460.

Any or all makers may be sued for full amount of joint and several note (Code Civ. Proc. $\S$ 383; Civ. Code, $\S$ 1659).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Frank W. Aitken against Andrew W. Stewart. Judgment for defendant, and plaintiff appeals.

Affirmed.

Frank W. Aitken, of San Francisco, in pro. per., and Aitken & Aitken, of San Francisco, for appellant.

Black, Hammack & Black and Carey McWilliams, all of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This appeal is from a judgment entered upon an order sustaining a demurrer to an amended complaint without leave to further amend. The cause arose out of a sale under a trust deed. So far as necessary to a decision of this appeal, the facts alleged in the amended complaint are as follows: From November 12, 1925, until April 30, 1926, the parcel of land described therein was owned by the Pacific Rock Company, a corporation, hereinafter referred to as the rock company, and on the day last named it sold the same to the plaintiff; that on or about November 12, 1925, one James F. Welsh and one J. B. Stevens, without authority, signed the name of the rock company to an instrument in form of a deed of trust, purporting to convey to a trustee, in trust for the defendant, the aforesaid real property to secure the payment of a certain promissory note in the sum of \$32,640; that said note was executed by the same persons in the name of the rock company, but also without authority; that said purported deed and note were both signed by Fewel-Webb Company, another corporation, and that more than \$20,000 advanced by the defendant on said note and deed of trust was loaned to the latter company, and less than \$7,000 to the rock company; that the execution of said note and deed of trust "were and are beyond the powers of said Pacific Rock Company, and ultra vires and void." This last allegation is followed by others setting forth in full what purports, under the articles of incorporation, to be the purposes for which the corporation was formed; that the company was not thereby "authorized or empowered in or by said articles of incorporation to guarantee the obligations of any other corporation, or to mortgage its property as security for the payment of money borrowed by any other corporation, or to contract for the repayment of money borrowed by any other corporation, or to guarantee any of the

obligations thereof. That said note and said deed of trust were not, nor was either of them, as to the money advanced by Andrew W. Stewart to Fewel-Webb Company, an obligation or contract essential to the transaction of the affairs of Pacific Rock Company or for the purposes of said Pacific Rock Company"; that the by-laws of said rock company authorized its board of directors to borrow money and to give security therefor, the amount thereof and the terms of the loan to be entered on the minutes of the board; that the president and secretary were to sign all written obligations to pay indebtedness and all instruments of security; that in the instant case the board of directors did not cause to be entered in the minutes the terms of either the trust deed or note; that the defendant has at all times claimed that there was loaned by him to the rock company on said note and deed of trust not less than \$32,000 that had become due; that the plaintiff in this action has paid to the defendant on said indebtedness the sum of \$12,562.80, and thereby the defendant has been overpaid the \$7,000 which, according to plaintiff's information and belief, was advanced by the defendant, and that the excess should be returned to this plaintiff; that the same was paid through a want of knowledge of the true amount due the defendant from the rock company; that an accounting should be had between the parties, and, when the true sum ascertained, plaintiff should have judgment for such overpayment; that on May 21, 1930, the defendant claimed that there was a balance due him on said note from the rock company in the sum of \$16,909.26, and thereafter caused the property in controversy to be sold under the terms of the trust deed to satisfy said note, and defendant purchased said property for the sum of \$5,000; that at the time of purchase and at the present time said property is worth the sum of \$75,000; that said property was not subject to the deed of trust; that at the time of the sale the defendant had full knowledge of the facts alleged in the amended complaint. The prayer is for an accounting and a judgment for the excess paid by the plaintiff over and above the amount actually found due the defendant from the rock company; that the sale under the trust deed be set aside; that the defendant be enjoined from attempting to enforce the collection of the note by a sale of the property, and also for general relief.

[1, 2] It is contended that, as the amended complaint sets forth all of the powers of the rock company conferred upon it by its articles of incorporation, and it does not appear therefrom that it is given power to become a surety or guarantor for the debt of another, the Fewel-Webb Company, having received more than \$20,000 of the loan secured by the trust deed, that portion of the loan so secured is ultra vires and void. In

considering the doctrine of ultra vires, it must be borne in mind that the plaintiff, as successor in interest of the real property involved, cannot stand in any better position than his grantor, the rock company. The note and deed of trust which it is sought to have set aside are not obnoxious either to law or public policy, but merely in excess of the powers of the corporation as prescribed by its charter. Under such circumstances the defense of ultra vires is looked upon by the courts with disfavor. In Cal. Jur. vol. 6A, p. 1287, § 740, it is said: "Since the defense of ultra vires is purely legal in aspect and in a sense technical, involving as it does a harsh and unyielding bar which if sustained necessarily precludes a consideration of the ethical features of a case and is thereby calculated to result in wrong to innocent parties, it does not appeal strongly to a court of equity. In other words, it is the policy of the law and the endeavor of the courts to hold corporations, as well as natural persons, to their contracts and make them liable for the obligations they have incurred." See, also, *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *McKee v. Title Insurance, etc., Co.*, 159 Cal. 206, 113 P. 140; *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 P. 399; *Davis v. Pacific Studios Corp.*, 34 Cal. App. 611, 258 P. 440. It might not be amiss to say that the doctrine of ultra vires, as applied to the facts of this case, has, since their occurrence, been abolished. Section 345, Civ. Code.

[3] As shown by the pleading in the case at bar, the rock company executed with the Fewel-Webb Company a joint and several note together with a trust deed upon land owned by it to secure the repayment to the defendant herein of all the money so loaned. Its successor in interest now seeks to avoid payment by pleading that the corporation had no power to secure the debt, at least so far as the portion of the money which went to the Fewel-Webb Company. We are of the opinion that such a position cannot be successfully maintained. In a note to § 740 of volume 6A, Cal. Jur. p. 1287, it is held that one cannot hold on to property and plead ultra vires against an obligation to pay for it. Such doctrine "has no recognition or support in the law," citing in support thereof *McKee v. Title Ins., etc., Co.*, supra, and *Lowe v. Los Angeles Suburban Gas Co.*, supra. There is no difference in principle between the cases last cited and the one at bar. As stated in the syllabi of the *McKee* Case, supra: "The failure to observe the requirements of section 359 of the Civil Code in reference to the manner of issuing the bonds does not render their issuance ultra vires and void, if the corporation has received and holds the proceeds of the sale of the bonds." In the instant case the defendant paid out his money on the strength of the note and deed of

trust, and neither the maker thereof nor its successors in interest should be permitted to avoid payment because of a technical defense created by the act of the corporation itself, by which the defendant loaned its money, even though part of it went to the comaker.

One of the cases relied upon by plaintiff in support of his claim that he has a right to raise the question of ultra vires is *Fontana Land Co. v. Laughlin*, 199 Cal. 625, 250 P. 669, 48 A. L. R. 1308, but that case is not in point. Its holding on this subject is best stated in the last paragraph of the syllabi as follows: "Outlawed Mortgage—Assumption.—Unless the grantee in a deed assumes or agrees to pay a mortgage, or unless the amount of the mortgage is deducted from the purchase price, a purchaser who merely takes subject to the mortgage is not estopped from showing that it has been paid or that the amount claimed is not legally owing upon it." But the question here is not the effect of an outlawed mortgage, but involves plaintiff's right to usurp a right which at best belongs to a corporation acting through its board of directors, its stockholders, or the state.

[4] The appellant also claims that: "The deed of trust was never authorized by the corporation whose name was signed to it." It is alleged that Welsh and Stevans executed the note and trust deed in the name of the rock company but without authority to do so. It is the contention that this allegation is a sufficient statement of fact to raise the issue of execution of said instruments, and therefore a cause of action is stated. A further examination of the pleading discloses that in other paragraphs it is alleged the note and deed of trust were executed without conforming to the method prescribed in the by-laws, which require that the amount and terms of the loan shall be entered in the minutes of the corporation; that the president and secretary shall sign officially all written obligations to pay indebtedness and all instruments of security; that the said board of directors were not authorized to borrow money or give security in any other manner; and that they did not enter, or cause to be entered, in the minutes the amount and terms of the loan, "and no such entry was made therein." We are of the opinion that the general averment, that the note and deed of trust were executed by Welsh and Stevans in the name of the corporation, but without authority, is modified by the subsequent statement that the lack of authority consisted in their failure to enter the amount and terms of the loan in the minutes of the corporation. Such conclusion finds ample support in the authorities of this state. In 21 Cal. Jur. p. 50, § 28, it is said: "In determining the sufficiency of a pleading, the whole of its averments must be taken together."

[5] In California, etc., *Ass'n. v. Rindge L. & N. Co.*, 199 Cal. 168, 179, 248 P. 658, 662, 47 A. L. R. 904, it is said: "'Where a plaintiff alleges performance of a contract on his part in general language, 'the general allegation will not save the complaint where, in addition, plaintiff sets out what he has actually done, and such facts fall short of due performance.'" 13 C. J. 727; *McNulty v. New Richmond Land Co.*, 44 Cal. App. 744, 747, 187 P. 97." In *Denman v. City of Pasadena*, 101 Cal. App. 769, 776, 282 P. 820, 824, it is said: "But 'where a conclusion is alleged, and also the special facts from which the conclusion is drawn, if the special facts are inconsistent with and do not support the conclusion, the former control, and the sufficiency of the complaint is to be determined from the special facts pleaded.'" *Little v. Union Oil Co. of Cal.*, 73 Cal. App. 612, 619, 238 P. 1066, 1068, where many cases are cited." We think that the rule thus promulgated is applicable to the facts pleaded in the case at bar, and that the only want of authority thus pleaded is the failure to enter in the minutes of the corporation the amount and terms of the loan represented by the note and deed of trust. Is such failure sufficient to state a cause of action against the defendant? Volume 6A, Cal. Jur. p. 325, § 169, in speaking of the by-laws of a corporation, says: "The by-laws are of no binding force upon third persons having no knowledge of them."

It is said in *Underhill v. Santa Barbara, etc., Co.*, 93 Cal. 300, 28 P. 1049, 1051, "It is also claimed that the creation of the indebtedness was ultra vires by force of a by-law of the corporation which provides that 'no indebtedness shall be incurred by the board of directors * * * which in the aggregate shall exceed the amount of capital stock actually subscribed at the time such indebtedness is incurred.'" This by-law is the creature of the corporation, acting through and by its stockholders, and generally for their benefit alone, and the same authority that enacted it may repeal it. *Tayl. Corp.* § 584; *Smith v. Nelson*, 18 Vt. 511. Furthermore, if a course of action contrary to a by-law of a private corporation is acquiesced in by the shareholders, the by-law is thereby waived, and will not affect the rights of persons dealing with the corporation in good faith, (*Tayl. Corp.* § 197, and cases there cited,) even though such persons may be shareholders, if they did not have actual notice of the by-law; and, where notice is material, "it must be proved against shareholders and agents, as well as against strangers, by direct or presumptive evidence, and cannot be imputed by an arbitrary rule of law." In *Newton v. Johnston Organ, etc., Mfg. Co.*, 180 Cal. 185, 180 P. 7, it is held that the by-laws of a corporation are of no binding force upon third persons having no knowledge of them.

We are of the opinion from the foregoing

that, to entitle the plaintiff to relief under the conditions above set out, it was necessary for him to plead that the defendant herein had actual notice of the requirements of the by-laws before the amended complaint would state a cause of action. Having failed to plead such fact, we are of the opinion that this claim of appellant is not well founded. We are also of the opinion, from what has already been said upon the rights of the corporation to exceed the powers conferred by the articles of incorporation under the circumstances of this case, that, even if knowledge of this defendant of the existence of such by-laws had been pleaded, a cause of action would not have been stated.

[6] The foregoing considerations have been based upon the theory that the appellant, as successor in interest of the property covered by the deed of trust, had the right to raise the question of ultra vires. We have been unable to find any authority under the facts shown bearing directly upon this question. However, at the time of the execution of the note and deed of trust, the appellant was not in any manner interested in the property covered by the deed of trust, nor was he connected with the corporation. The transaction had been closed and the money loaned to the parties by the defendant herein, and neither the corporation nor its officers or stockholders, nor the state, are here complaining. It would therefore appear logical that the appellant cannot raise the question.

In *Fletcher, Cyclopedia Corporations*, vol. 3, p. 2648, § 1575, it is said: "If the mortgage here in question be ultra vires, no one can take advantage of the defect of power involved but the state. As to all other parties, it must be held valid, and may be enforced accordingly."

[7, 8] In 7 Cal. Jur. page 63, § 554, it is said: "There is a vital distinction between contracts based upon fraud or made in violation * * * of statutes designed to aid the sovereign power in the regulation of certain kinds of business." *Blochman Com., etc., Bank v. F. G. Investment Co.*, 177 Cal. 762, 171 P. 943. Unless the contract is declared to be void, the violation of a provision of the latter class of statutes can be taken advantage of only at the instance of the state or sovereign power in a direct proceeding; it cannot be raised collaterally by individuals, and the same rule applies as to the authority of a corporation to make a loan to one who dealt with the company as having such authority. In *Fletcher, Cyclopedia Corporations*, vol. 3, p. 2589, § 1527, it is said: "Except where it is otherwise provided by statute, it is a general rule, subject to certain exceptions, that a plea of ultra vires cannot be interposed by a stranger not a party to the contract." While it is true that strangers may complain when they show

that they are injured, in the case at bar plaintiff was a total stranger when the contract was closed, and was not injured.

In Cal. Jur. vol. 6A, p. 1284, § 739, it is said: "Generally one may not complain or defend who is not injured or concerned as a stockholder."

In *State Ins. Co. v. Farmers' Mutual Ins. Co.*, 65 Neb. 34, 41, 90 N. W. 997, 1000: "The rule seems to be based upon the proposition that he only can invoke the doctrine of ultra vires who can show the violation of some duty owing to himself." We think the foregoing rule is consistent with the facts of the instant case. When the note and trust deed were made, and the money changed hands, and ever since that time the plaintiff has been, and is, a stranger to the corporation, no duty was owed to him by either party to the contract, and he cannot now be heard to complain of the transaction.

In *Daniels v. Belvidere Cemetery Ass'n*, 193 Ill. 181, 61 N. E. 1031, a second mortgagee sought to have a first mortgage set aside as having been ultra vires, by reason of an assignment to the corporation then holding it by reason of an exercise in excess of its powers. The court held that the first mortgage was a valid lien when the second mortgage was given. So, in the case at bar, at the time plaintiff purchased the land, it was subject to the deed of trust, and was a valid and subsisting transfer of the property subject to defeasance by the corporation in accordance with its terms, and the plaintiff took title subject thereto, and is not entitled to question the same.

[9] It is also a claim that the note has been paid. This contention is founded upon the allegations of the amended complaint that the plaintiff has repaid all of the money which the defendant has loaned to the rock company. To this we think there are several answers. The note and deed of trust were, until the sale of the property by virtue of the terms of the trust deed and note, a subsisting and unpaid obligation which could not be attacked by either the corporation or the defendant. Again, the note being joint and several, any one or all of the makers may be sued thereon for the full amount due. *Merchants' Trust Co. v. Bentel*, 10 Cal. App. 75, 101 P. 31; *Code Civ. Proc.* § 383; *Civ. Code*, § 1659; 19 Cal. Jur. p. 971, § 138, and cases there cited. If the last conclusion is correct, then no accounting is necessary or proper, for there is no claim made that the full amount of the note has been paid.

Plaintiff further sets up that, as he alleges the value of the property was at all times \$75,000 and defendant purchased it for \$5,000, he has shown a damage which entitles him to maintain this action. However, there are no irregularities in the sale, nor fraud or mistake alleged, and in demanding

the sale defendant was clearly within his legal right.

As we understand, counsel does not complain that the court has not given him further opportunity to amend his complaint. The record discloses that the complaint in issue is a second amended complaint with two subsequent amendments thereto, but he argues that a cause of action has been stated, and, such being the case, the court committed error in sustaining the demurrer. We have already held that a cause of action has not been stated.

The foregoing is conclusive of the rights of the parties upon this appeal, and no further discussion is deemed necessary. The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

129 Cal.App. 434

HERLIHY v. WARD.

Civ. 8504.

District Court of Appeal, First District,
Division 2, California.

Feb. 3, 1933.

Hearing Denied by Supreme Court April 3, 1933.

1. Appeal and error ⇨758(3).

Presentation of plaintiff's appeal from judgment after verdict held insufficient, where only heading showing nature of question presented dealt with sufficiency of complaint.

2. Appeal and error ⇨758(3).

Headings in appellant's opening brief should so state points involved as to compel reversal in event points were well taken.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Margaret Herlihy against Dr. Robertson Ward. Judgment for defendant, and plaintiff appeals.

Affirmed.

M. Jas. McGranahan, of San Francisco, for appellant.

Hartley F. Peart, Gus L. Baraty, and Russell Shearer, all of San Francisco, for respondent.

SPENCE, J.

Upon a trial by jury a verdict was rendered in favor of defendant Dr. Robertson Ward, and, from a judgment entered on the verdict, plaintiff appeals.

The events leading up to this litigation cover a long period of time, commencing with an operation for the removal of a goiter performed upon plaintiff by Dr. W. I. Terry in March, 1926, at the University of California Hospital, and continuing down to the arrest of plaintiff on July 27, 1929. Defendant took no part in performing the operation, but was chief resident surgeon at the hospital at the time. He subsequently became associated with Dr. Terry, his father-in-law, in private practice. Shortly after the operation had been performed, plaintiff began complaining about the results thereof, and the alleged failure of Dr. Terry to bring her relief from her trouble. Plaintiff made frequent visits to see the doctors which we need not describe in detail. She appears to have been seriously disturbed mentally over her condition. She was obsessed first with the idea that Dr. Terry had permitted Mr. Fung, an interne, to perform the operation, and subsequently with the idea that Dr. Terry had permitted defendant to do so. Her numerous contacts with the doctors at their offices, at the hospital, and on the streets were all loud, boisterous, and disturbing, and were frequently accompanied by profane language, threats of violence, and sometimes actual violence. In referring to one occasion in 1928, plaintiff herself spoke of the time when she "beat up" or had "an altercation with Dr. Terry in his office." Finally in July, 1929, pursuant to the demand of plaintiff for her original hospital record, defendant arranged to meet plaintiff at the hospital. He had previously advised her that the original record could not be taken from the hospital, but he arranged to have her see the original and take a copy. As plaintiff had frequently threatened defendant and had attacked him on two previous occasions, defendant phoned to the police department asking them to have some one present at the hospital. On July 27, 1929, defendant met plaintiff at the hospital and again explained to her that she could not have the original record, but could see the original, and have a copy of it. She became boisterous, calling defendant a pup and a dirty cur, said she did not want a copy as defendant could fake a copy any way he wanted to, and she insisted that she was going to have the original record. The conversation lasted several minutes, and defendant attempted to further explain why she could not take the original record, but plaintiff continued to act in a boisterous manner. Finally defendant said: "I have done this and if you are not satisfied, Mrs. Herlihy, with seeing the record and having a copy, I cannot do anything more." Defendant started to leave, whereupon the plaintiff grabbed his coat and said: "You are not going to get away from me without giving me the record." She pulled at defendant's clothing, tearing the same and

struck defendant on the neck, whereupon two officers stepped up and caused her to release her hold on defendant. She thereafter struck and kicked the officers and attempted to again get hold of the defendant. Plaintiff continued to insist that she was going to have the original record, and said that if she didn't get it, she was going to kill the defendant and didn't care if she hung for it. One of the officers asked: "Doctor, what do you want done with the woman?" Defendant answered: "I don't know what to do with her." The officer then said: "We can put her in jail for disturbing the peace or take her to the hospital. What do you think about it?" The defendant replied: "I don't think this woman is responsible for what she is doing. I don't think she has committed a crime; she ought not to be put in jail. I think she needs treatment. She ought to be in the hospital for observation." The officer said: "We cannot take her to the hospital without you swearing to a complaint," and defendant said: "If that is necessary, I will do it." The officers then took plaintiff to the detention hospital, arriving there at about 1 o'clock Saturday afternoon. Plaintiff struggled and resisted throughout the trip. Defendant changed his clothes, and took a taxi to the hospital. No complaint was signed that afternoon; but defendant was instructed at the hospital to return on Monday morning for that purpose. In the meantime plaintiff's brother-in-law got in touch with defendant, assured him that he would do his best to control the plaintiff, and asked that he go no further. Defendant told him that all he wanted was protection from plaintiff, and again the brother-in-law assured defendant of his co-operation. Plaintiff was thereupon released from the detention hospital on Monday morning, and no complaint was signed. Subsequently this action was commenced, and the judgment in favor of defendant resulted.

[1, 2] In appellant's opening brief, we find three headings as follows: "Summary of facts"; "The complaint states an action for false imprisonment"; and "Exceptions." The only heading which purports to show the "nature of the question to be presented" as required is the second above-mentioned heading dealing with the sufficiency of the complaint to state a cause of action for false imprisonment. The point made under that heading is therefore the only point which is presented in a manner requiring consideration or comment on this appeal. *Landa v. Steinberg* (Cal. App.) 14 P.(2d) 532; *Frank Graves Sash, Door & Mill Co. v. Keener* (Cal. App.) 16 P.(2d) 195; *Skipitarey v. Fitts* (Cal. App.) 17 P.(2d) 159; *Milano v. Bulleri* (Cal. App.) 13 P.(2d) 521; *Kaltenberger v. Alexander Hotel Co.* (Cal. App.) 12 P.(2d) 59.

It may be conceded that the complaint stat-

ed a cause of action for false imprisonment; but as the action was tried and a verdict rendered for the defendant, it is obvious that appellant is not entitled to a reversal merely because of the sufficiency of her pleading. We have previously had occasion to point out that the headings in an appellant's opening brief should state the points involved on the appeal in such manner as to compel a reversal in the event that the points so stated in the headings are well taken. *Richmond Terminal Corp. v. Parr Terminal Co.*, 116 Cal. App. 368, 2 P.(2d) 579. Otherwise the headings are of but little, if any, assistance to the court. But regardless of the insufficiency of the presentation of the appeal, we have examined the briefs and the entire record, including the evidence, and are satisfied that the alleged errors have not resulted in a miscarriage of justice. Const., art. 6, § 4½.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

129 Cal.App. 468
**HAMMEL RADIATOR CORPORATION v.
MORTGAGE GUARANTEE CO.**
Civ. 7465.

District Court of Appeal, Second District,
Division 1, California.

Feb. 4, 1933.

Hearing Denied by Supreme Court April 3,
1933.

1. Fixtures ⇨20.

Rights of unpaid conditional seller which installed gas steam radiators in apartment house held junior to rights of holder of prior recorded trust deed covering building and improvements, where, though radiators could be removed without damage to building, their removal would substantially diminish mortgagee's security.

2. Fixtures ⇨27(3).

Mortgagor's agreement that, upon default in payment of purchase price, seller could remove gas steam radiators from apartment house, held ineffective after radiators were installed, as against mortgagee who, without notice, lent money on security of building and improvements.

Appeal from Superior Court, Los Angeles County, Joseph P. Sproul, Judge.

Action by the Hammel Radiator Corporation against the Mortgage Guarantee Company. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

O'Melveny, Tuller & Myers, William W. Clary, and Geo. H. Wood, all of Los Angeles, for appellant.

Janeway, Beach & Hankey, of Los Angeles, for respondent.

CONREY, P. J.

In the year 1927, El Paula Holding Company, Inc., owner of a parcel of land in the city of Los Angeles, desired to build thereon an apartment house, which, with improved judgment, it named La Paula Apartments. For that purpose it borrowed from Mortgage Guarantee Company the sum of \$250,000, to be advanced in specified installments as a building loan. A trust deed was executed to secure the loan, and the apartment house was constructed. The trust deed was duly recorded before the commencement of building operations. The plans and specifications submitted by the owner in applying for the loan specified gas steam radiators as the sole method for heating every apartment. The trust deed purported to cover said land with the appurtenances, including water, water rights, pipes, and ditches, "and all buildings and improvements thereon, or that may be placed thereon."

During the progress of construction of the building, the plaintiff, Hammel Radiator Corporation, entered into a written contract with the owner for the sale and installation in said La Paula apartments of one hundred twenty-five gas steam radiators at the agreed price of \$3,162, payable upon completion of installation. This contract was in the form commonly known as a conditional sales contract, providing, among other things, that title to said radiators should remain in the plaintiff until full payment of the purchase price, etc., and that upon default of payment thereof the plaintiff might, at its option, enter upon said property and remove said radiators. The radiators were installed, but the price was not paid. The installation was completed on or about February 8, 1928. At that time the defendant had advanced upon its construction loan a large part thereof, and the remainder thereof, approximately \$48,000, was advanced and paid out to or for the benefit of the owner after the radiators had been installed, but not until after the apartments had been inspected by the Mortgage Guarantee Company's agent to see that the radiators had been installed, and that they were all in place and connected up.

Thereafter the owner defaulted in the matter of payments due from him to the Mortgage Guarantee Company, and in accordance with the power of sale vested by the trust deed the property was sold and conveyed to appellant. The plaintiff demanded permission to remove the radiators from the premises. Defendant refused, upon the ground the radiators had become attached to the realty in such manner as to become fixtures thereof,

and as such fixtures became the property of the defendant. Thereupon the plaintiff brought this action, seeking to recover damages as for conversion of the property by the defendant. Judgment was entered in favor of the plaintiff, and defendant appeals therefrom.

The principal questions of law presented by this appeal were discussed by the Supreme Court of California in the recent case of Dauch v. Ginsburg, 214 Cal. 540, 6 P.(2d) 952, 954. In that case, as here, it became necessary to determine the matter of priority of rights as between the plaintiff, a vendor who had furnished and installed fixtures in a building in the course of construction, and a prior incumbrancer who had advanced money to the owner for the purpose of having the building constructed. As a background for the particular question to be decided, the court observed that an agreement by the owner of land in favor of the owner of an article, to the effect that the article shall retain its personal character or be removable as personality, even though affixed to the land, is valid and effective against the owner of the realty, and precludes him from contending that the article has become part of the realty by virtue of the fact that it has become affixed thereto; also that such an agreement has no force and effect as against a subsequent purchaser or incumbrancer who becomes such without notice of the claims of the conditional vendor. Proceeding then to discuss the rights of one in the position of a prior incumbrancer who has advanced money to the owner of the real property for the purpose of having the latter construct a hotel building thereon, and when the parties contemplated that the security for the loan "should not only be the real property, but also the completed hotel building," the court said: "Although no case seems to have been decided directly in point in this state, the rule is well settled elsewhere that usually the subsequent conditional vendor, will prevail over a prior incumbrancer, for the reason that the prior incumbrancer has not been misled and has advanced nothing on the faith of such annexation. 26 Cor. Jur. 684, § 49. Plaintiff herein seeks to bring himself within that rule. However, to that rule there is a well-recognized exception, and that is that it has no application where a severance of the fixtures will substantially injure or diminish the security of the prior incumbrancer. 26 Cor. Jur. 686, § 52, and cases cited therein. That exception applies with particular force to the instant case. The plaintiff herein caused these articles to become attached to the real property. He knew that there was a prior incumbrance against the completed structure. He knew and so testified that the hotel could not be operated as a hotel if these fixtures were removed. He knew that the building was being erected for a hotel property and for no other use. He must be

charged with notice of the fact that the removal of those fixtures would render practically worthless the main security for the loan. In such a case, it is our opinion that, where the removal of the fixtures will substantially damage or injure the security of the prior incumbrancer, the conditional vendor's rights must be relegated to those of the former. It is true that the trial court found that the articles herein could be removed without substantial damage to the realty, but that finding was not intended as a finding that the articles could be removed without substantial injury to the security of defendant. All that finding amounts to is a finding that the articles can be removed without injury to the basic structure to which they have been affixed."

[1] In the case at bar, the record does not show that the plaintiff's representative testified that he knew that the apartment house could not be operated as an apartment house if the heating fixtures were removed. But the plaintiff did itself attach the radiators to the real property, and had notice (constructive, by virtue of recording of the trust deed) that there was a prior incumbrance. It was a necessary inference from what it knew about the building, and therefore it should be held to be known, that the apartment house could not be operated as an apartment house if the heating fixtures were removed. Necessarily it knew the purpose for which the building was being erected. Under these circumstances we think that the same rule as above stated must be applicable here, and that removal of the fixtures would substantially damage or injure the security of the prior incumbrancer, and it follows that the conditional vendor's rights must be relegated to those of the prior incumbrancer. In *Dauch v. Ginsburg*, the mode of attachment of the heating fixtures to the rough plumbing or pipes of the building was by means of slip joint threaded unions and flanges, and were in some cases hung from brackets attached by screws to the wall or rested upon the floors. In the case at bar the attachment of the radiators to the pipes is also by threaded unions. In each case it is apparent that the heating fixtures or radiators could be removed without damage to the basic structure. It is true that in *Dauch v. Ginsburg*, *supra*, the subject of controversy included bathtubs

which could not be removed without ripping out part of the tiled wall; but the court in its decision did not apply one rule to the bathtubs and another to the plumbing or heating fixtures. Counsel on each side of this case have been diligent in furnishing to the court citations and quotations from numerous cases dealing with controversies more or less akin to this present case; but we think it is not necessary to give them an extensive discussion here, since the principles involved, and their application to a case of this kind, appear to be settled by said decision in *Dauch v. Ginsburg*.

[2] In addition to the rights of appellant which it obtained by virtue of its prior recorded trust deed, we have the fact that appellant did not pay out the last \$48,000 of its loan until after it had inspected the premises, and found that the heaters were installed and attached to the building in the manner which has been described. In *Dauch v. Ginsburg*, *supra*, at page 544 of 214 Cal., 6 P. (2d) 952, 954, the court said, that an agreement by the owner of land in favor of the owner of an article, to the effect that the article shall retain its personal character or be removable as personalty, even though affixed to the land, "has no force and effect as against a subsequent purchaser or incumbrancer who becomes such without notice of the claims of the conditional vendor." That is the situation in the present case. It is true that appellant's inspector, who examined the premises before the final installment of the loan was paid out, admitted that he knew that heaters were sold by means of conditional sales contracts, and that the Hammel Radiator Corporation sold its heaters that way. But he also testified that he did not know that these particular radiators were sold in that way. This amounted to no more than an admission of a fact generally known that it is common practice, but not necessarily an exclusive practice, to use conditional sales contracts in sales of such property.

For the foregoing reasons we are of the opinion the trial court erred in its decision that the defendant converted to its own use the said personal property, to the plaintiff's damage.

The judgment is reversed.

We concur: HOUSER, J; YORK, J.

129 Cal.App. 529

FORTENBERY v. RIDDLE.

Civ. 8601.

District Court of Appeal, Second District,
Division 1, California.

Feb. 9, 1933.

Appeal and error ⇨ 1056(1).

Error, if any, in excluding paper containing witness' estimate of speed of automobile, *held* harmless in automobile accident case.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Bessie Fortenbery against K. S. Riddle. Judgment for plaintiff, and defendant appeals.

Affirmed.

Voltaire Perkins, of Los Angeles, for appellant.

Clark & Morgan, of Alhambra, for respondent.

CONREY, P. J.

This action was brought to recover damages for personal injuries suffered by the plaintiff as the result of defendant's negligence in the driving of an automobile. The appeal is from the judgment entered in favor of the plaintiff. The injuries received by the plaintiff were incidental to a collision between her automobile and the automobile of the defendant. One of the witnesses, Mrs. Clare Hansen, testified to some of the circumstances surrounding the accident, but her testimony did not include any statement or estimate of the speed of the cars, or of either of them. On the contrary, she said that she did not notice the speed. On cross-examination counsel for defendant asked this witness some questions concerning the speed at which the cars were moving at the time when she observed them. The witness replied that she did not remember and was not able to estimate the speed. Thereupon appellant, after exhibiting to the witness a paper which had been signed by Mrs. Hansen a few days after the date of the accident offered the document in evidence. The court sustained the objections of the plaintiff to this evidence on the ground that it was hearsay and not admissible for the purpose of impeaching the witness. The paper contained the statement that "Mrs. Fortenbery was coming too fast"; also that each vehicle was moving at "abt 10 m. p. h. or more." The sole ground of appeal shown in the brief of appellant is that the court erred in refusing the offer of defendant to introduce said document in evidence. Respondent has now presented her motion, under rule V, section 3, of the rules of this court, that the appeal be dismissed or judgment affirmed, because the

question upon which the appeal depends is so unsubstantial as not to need further argument.

We are inclined to think that the document, or at least that part of it hereinabove quoted, was admissible in evidence (*McFadden v. Santa Ana, etc., Ry. Co.*, 87 Cal. 464, 470, 25 P. 681, 11 L. R. A. 252); but only for the purposes of cross-examination to test in some form the credibility and reliability of the testimony of the witness (*Albert v. McKay & Co.*, 174 Cal. 451, 456, 163 P. 666; *Mattson v. Maryland Casualty Co.*, 100 Cal. App. 96, 279 P. 1045). However, even if the court's ruling was erroneous, the record before us does not show any convincing reason for holding that the error was prejudicial, or that it led to any miscarriage of justice.

The motion is granted, and the judgment is affirmed.

We concur: **HOUSER, J.; YORK, J.**

129 Cal.App. 460

**CITY OF SAN GABRIEL v. PACIFIC
ELECTRIC RY. CO. et al.**

Civ. 8292.

District Court of Appeal, First District,
Division 1, California.

Feb. 4, 1933.

Hearing Denied by Supreme Court April 3, 1933.

1. Eminent domain ⇨ 317(2).

Where easement is sufficient for proposed use, fee will not be deemed appropriated, unless so stated expressly or by necessary implication.

2. Eminent domain ⇨ 317(2).

Municipal resolution of intention to acquire "strip of land" for widening driveway *held* not to establish that property condemned was fee (Code Civ. Proc. § 1239, subd. 2).

3. Eminent domain ⇨ 243(2).

Determination in city's condemnation proceedings that trolley company owned perpetual easement and third parties owned fee constituted adjudication of conflicting interests.

4. Railroads ⇨ 69.

Deed granting right of way to electric interurban railway granted perpetual easement, though not expressly so providing.

5. Railroads ⇨ 82(1).

City's removal of fence along electric railway company's right of way did not forfeit railway's title under deed requiring that line be defined by fence (Civ. Code, § 1442).

6. Eminent domain ⇨128(1).

Usually law will not notice any difference in value between easement for railroad right of way and fee title.

7. Eminent domain ⇨149.

Award of nominal damages to fee owners in proceedings to condemn right of way of interurban electric railway *held* proper, notwithstanding reserved right and reversionary interest.

The deed to the interurban electric railway company granted right of way for electric railway purposes, reserving right to use any part not used by the company and on condition that line of right of way should be defined by low fence or cement curb, with reversion when whole or any part of the property ceased to be used as right of way for electric railway.

8. Eminent domain ⇨95.

In proceedings for longitudinal condemnation of railroad right of way, for road widening, judgment properly allowed damages for cost of relocating tracks (St. 1925, p. 880, § 31, as amended by St. 1927, p. 1339).

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by the City of San Gabriel against the Pacific Electric Railway Company, William Chapman, and Eta Chapman. From the judgment, defendants Chapman appeal.

Affirmed.

Charles Lantz and Winslow P. Hyatt, both of Los Angeles, for appellants.

Dryer, Castle & Richards, of Los Angeles, R. B. McConlogue, of Cedar Rapids, Iowa, Frank Karr and C. W. Cornell, both of Los Angeles, for respondents.

PER CURIAM.

The city of San Gabriel brought this action, under the "Acquisition and Improvement Act of 1925," (St. 1925, p. 849, as amended) to condemn, for the widening of Las Tunas drive, a strip of land 32 feet wide and 5,912 feet long, used by respondent Pacific Electric Railway Company (hereinafter called the company) as part of its right of way for the operation of its interurban electric railway between Los Angeles and San Gabriel. As to 300 feet in length of such strip, appellants owned the fee, subject to an easement in favor of the company. The remaining length was owned in fee by the company. The interlocutory judgment in condemnation awarded, as damages to appellants for the value of their interest in such 300 feet, the sum of \$1 and to the Company for the value of its interest in the entire strip, together with improvements thereon, the sum of \$43,276,

and for compensation, by reason of the necessity of the relocation and structural changes in the interurban railway tracks and structures, the sum of \$97,035. Appellants appeal from the portion of the judgment awarding them \$1.

[1, 2] Relying upon the particular wording of the resolution of intention, complaint and interlocutory judgment, appellants argue that the city sought and obtained the condemnation of the fee, rather than the easement. The resolution provided as follows: "Sec. 1. That the public interest and necessity require, and that it is the intention of the City Council * * * to order the following *acquisitions* for Las Tunas Drive. * * * Sec. 2. That the *property* necessary to be taken for such widening * * * [is] described as follows: That certain *strip of land*. * * *" The complaint alleges that for the purpose of widening Las Tunas drive, "It is necessary that plaintiff take and condemn for public use the *lands* described * * * towit: That certain *strip of land*," "That the names of all the owners and claimants of the *property* sought to be condemned * * * are set forth, * * *" and that the lands to be taken "embrace that *piece or parcel of land* particularly described as * * * That certain *strip of land*. * * *" (Italics ours.) The judgment decrees that the real property shall be condemned to the use of the city and the public, and shall be dedicated for the widening of Las Tunas drive. It may be conceded, as appellants contend, that in none of the three documents is there any limitation of the estate taken to an easement, but it does not follow, therefore, that the fee was condemned. Where an easement is sufficient for the purposes of the use, the fee will not be deemed to be appropriated, unless so stated expressly or by necessary implication in the statute or judgment of condemnation. *McCarty v. Southern Pacific Co.*, 148 Cal. 211, 82 P. 615. Under section 1239, subdivision 2, of the Code of Civil Procedure, the city might have condemned either an easement or a fee, but, if it wished the latter, it was necessary for its council, by resolution, to have determined that the taking of a fee was necessary. *City of Oakland v. Schenck*, 197 Cal. 456, 241 P. 545. Since the resolution of intention did not so determine, an easement only was condemned.

[3] The respective answers of the company and appellants raised conflicting claims to the property, which section 1247 of the Code of Civil Procedure empowered the trial court to determine. *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585; *City of Los Angeles v. Darms*, 92 Cal. App. 501, 268 P. 487. The court found that the company owned a *perpetual* easement for railroad purposes over and upon said 300 feet and that appellants owned the fee thereof, subject to the *perpetu-*

al easement for *railroad* uses granted to the company by appellants; such grant of easement being subject to condition subsequent and conditioned upon the use of the property as a right of way for an *electric* railway. This determination of the diverse interests of the parties not only established one factor, governing the award of damages, but also constituted an adjudication of their conflicting interests. *Anderson v. Citizens' Sav., etc., Co.*, 185 Cal. 386, 197 P. 113. As this finding is based solely upon a deed from appellants to the company, the correctness of the finding can be determined by an examination of that instrument. The deed, so far as here important, granted the right of way for electric railway purposes (1) reserving the right to use any part not used by the company (2) upon the condition, a breach of which worked a forfeiture, and that the line of said right of way shall be defined by a low fence or cement curb and (3) with a reversion when the whole or any part ceased to be used as a right of way for an electric railway. Other conditions subsequent not here involved are omitted.

[4] The deed, although unlimited as to time, does not use the word "perpetual," but the insertion of that adjective in the finding does not lengthen the life of the grant, because perpetuity is an inherent characteristic of a railroad right of way, so created. 51 C. J. 540; 22 R. C. L. 861. In discussing the nature of a railroad right of way, created by a congressional grant, the United States Supreme Court, in *New Mexico v. United States Trust Co.*, 172 U. S. 171, 183, 19 S. Ct. 128, 133, 43 L. Ed. 407, said:

"But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted,—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.

"In *Smith v. Hall* [103 Iowa, 95], 72 N. W. 427, the supreme court of Iowa says, speaking of the right of way of a railroad: "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad, which is usually a permanent improvement,—a perpetual highway of travel and commerce,—and will rarely be abandoned by non-user. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easements will be perpetual; so that ordinarily the fee is of little or no value unless the land is underlaid by a quarry or mine."

"The right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen v. Boston & Maine Railroad*, 2 Gray [Mass.] 574, 580."

More recent enunciation and application of

the same principle, with citation of additional authorities, may be found in *Midland Valley R. Co. v. Jarvis* (C. C. A.) 29 F.(2d) 539, 61 A. L. R. 1064. While conceding the rule as to steam railroads, appellants, without advancement of any reason or citation of any authority except *City of Los Angeles v. Zeller*, 176 Cal. 194, 167 P. 849, where, in the course of argument, an opinion as to the relative permanency of steam and interurban railways was expressed, which subsequent events has proven incorrect, deny its applicability to an interurban railway. An electric interurban railway is a sort of hybrid, having in some respects the characteristics of a steam or commercial railroad and in others those of a street railroad. *San Francisco, etc., R. Co. v. Scott*, 142 Cal. 222, 232, 75 P. 575. As to its construction and operation over a private right of way, it has the character of a steam railroad. *Simoneau v. Pacific Electric R. Co.*, 159 Cal. 494, 115 P. 320; *City of Los Angeles v. Los Angeles Pacific Co.*, 31 Cal. App. 100, 159 P. 992; *Lindsey v. Pacific Electric R. Co.*, 111 Cal. App. 482, 296 P. 131. While superficial differences, in the means and manner of performing the same public service exist between the two types, such as in motive power (unimportant because of Civ. Code, § 465a), track construction, equipment, and distance of travel, yet each is a permanent improvement, a perpetual highway of travel and commerce, subject to the same possibility of abandonment, and each require the same exclusive use of the surface of the right of way. Since the reasons for holding the right of way of a steam railroad as a perpetual easement are equally applicable to that of an electric interurban railway, the rule should be, and is, the same as to both kinds of railroads.

[5] The omission, in the forepart of the finding, of the adjective "electric" from the phrases "for railroad purposes" and "for railroad uses," did not extend beyond the terms of the grant, the purposes or uses to which the right of way could be put, because the end of the finding states that the easement was granted upon the condition that it be used for an electric railway. The conflict, if any, between the two parts, would, at most, merely create an ambiguity, which would be removed by an inspection of the grant expressly referred to in the finding. Any doubt is entirely dissipated by the interlocutory judgment, which decreed that the company is the owner of a perpetual easement or right of way for electric railway purposes and that appellants are the owners of the fee, subject to a perpetual easement for a right of way for an electric railway, granted by the deed, identified by place of recordation. The city's act, in removing the fence and installing a cement curb, under an order for immediate possession obtained upon commencement of this action, did not work a forfeiture of the company's title, because obviously it was not

responsible for the exercise by the city of its legal right. Since the condition subsequent merely says that the line of the right of way shall be defined by a fence or curb without stating who should construct either, appellants, under a strict interpretation required by section 1442 of the Civil Code, have not clearly established any duty resting upon the company, a breach of which would work a forfeiture. Neither the finding nor the judgment expressly mention either the reservation or the reversion. The finding very evidently, when speaking of the right of way as conditioned upon use for an electric railway, confused, as is commonly done, condition with reservation and reversion, and intended to include all three. Any uncertainty as to appellants' rights is entirely removed by express reference in the finding and the judgment to the deed creating the easement.

[6, 7] Usually there is no substantial difference in value between such an easement and the fee of which the law will take notice. *Southern Pac. R. Co. v. S. F. Sav. Union*, 146 Cal. 290, 79 P. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962. Under the deed, appellants had, in theory, a reserved right to use such parts of the right of way as the company did not, and a reversionary interest arising from forfeiture or nonuser. At the time fixed by law for the valuation of their interest, the reservation was not being used nor had the reversion occurred. The enjoyment of these rights was entirely dependent upon the volition of the company. The possibility of their enjoyment is so remote, speculative, and contingent that they cannot be said to add any value to appellants' interest. As long as the easement existed, it has for all practical purposes entirely absorbed the full value of the fee. *Southern Pac. R. Co. v. S. F. Sav. Union*, supra.

[8] By quoting a portion only of a finding, appellants make it appear that the court awarded \$43,276, as the value of the land condemned, together with improvements thereon and \$97,035 as damage to the improvements on the same land, and, from this false premise, argued that there was duplicate compensation for damages to the same improvement. The finding however, does not so provide, but, in accordance with section 31 of the "Acquisition and Improvement Act of 1925," (As amended by St. 1927, p. 1369) correctly allowed the first sum as the value of the land condemned with improvements thereon and the second amount as the cost of relocating tracks and other structural changes. While this action only involved the condemnation of land for the widening of Las Tunas drive, the proceedings of which this action forms only a part included also the improvement of the land taken by the physical construction of the improvement. No question is raised that the improvement of the land

condemned as proposed in the resolution of intention will not necessitate such relocation and structural change nor that the costs allowed are too high. The case of *City of Oakland v. Schenck*, supra, cited by appellants, is authority for the rule that in condemning a railroad right of way for a street crossing the city is not required to pay the cost of structural changes in the railroad tracks. Here Las Tunas drive is being widened by a longitudinal condemnation of a right of way, not being extended across a right of way. The right to these items of damage in longitudinal condemnation is recognized in *City of Los Angeles v. Zeller*, supra, and *City of Los Angeles v. Allen*, 32 Cal. App. 553, 163 P. 697.

The judgment is affirmed.

CRESCENT CITY v. DODD, City Clerk. *
Civ. 4854.

District Court of Appeal, Third District,
California.
Jan. 30, 1933.

Rehearing Granted Feb. 28, 1933.

1. Municipal corporations ⇨29(2).

Municipality cannot extend boundaries except as provided for by statute or Constitution.

2. Municipal corporations ⇨24.

Ordinance describing city's boundaries could not exclude tract included within boundary by definite description contained in statutes establishing city, notwithstanding acquiescence in attempted change since 1885, as regards liability for city tax (St. 1854, p. 197; St. 1883, p. 259, § 787, as amended by St. 1921, p. 576; St. 1891, p. 92).

3. Municipal corporations ⇨24.

That title to some land included within city boundaries was vested in state and some in United States *held* immaterial on question whether ordinance could change boundary.

4. Municipal corporations ⇨971(2).

City's duty to assess lands within boundaries *held* not dependent on date owner acquired title from government.

Proceeding for a writ of mandate by Crescent City against G. Fletcher Dodd, as City Clerk and ex officio Assessor of Crescent City.

Writ granted.

H. A. Postlethwaite, of San Francisco, for petitioner.

G. Fletcher Dodd, of Crescent City, in pro. per.

Mr. Justice PLUMMER delivered the opinion of the court.

The petitioner in this proceeding seeks a writ of mandate directed to the respondent directing him to assess, in accordance with the provisions of section 787 of the act providing for the organization, incorporation, and government of municipal corporations, approved March 13, 1883 (page 259), as amended by an act approved May 24, 1921, Stats. 1921, page 576, all the property lying within the exterior boundaries of the city of Crescent City, as delineated upon the map of said city, based upon a survey thereof made by one T. P. Robinson in 1853, which map was recorded in what is now the county of Del Norte, on the 28th day of May, 1853, and particularly to assess and include in the list of his assessment certain tracts known as and called "Battery Point" and "Eldridge Addition."

By an act of the Legislature passed April 13, 1854 (St. 1854, p. 197) the city of Crescent City was organized and established as a municipal corporation, and the exterior boundaries thereof fixed. Since that date no action has been taken to exclude therefrom, or include therein, other territory than was included within the exterior boundaries by the description contained in the act establishing the petitioner as a municipal corporation.

On May 4, 1885, at a general municipal election held in Crescent City, that city was reorganized under the general laws of the state of California, as a city of the sixth class, and a certificate evidencing such reorganization, dated May 6, 1885, was filed in the office of the secretary of state of the state of California on the 14th day of May, 1885. Since the date of its reorganization the city of Crescent City has continued to be, and now is, a municipal corporation of the sixth class.

In 1868 certain tidelands and water front lands were, at a Legislature of the state of California, granted and conveyed to the city of Crescent City. In 1864 certain lands adjacent to the city of Crescent City were granted to it by the United States of America. It appears that in the grants of the lands above referred to some of the lands granted were lying outside of the original boundaries of the city of Crescent City and outside of the boundaries as described by the act creating the petitioner as a municipal corporation, and outside of the map based upon the survey of T. P. Robinson hereinbefore referred to.

On the 7th day of July, 1885, the city council of the city of Crescent City adopted an ordinance purporting to set forth the boundaries of said city. In this ordinance some of the lands included within the exterior boundaries of the city as described in the act creating the petitioner a municipal corporation

were omitted, and excluded, particularly the two tracts, one of which is known as "Battery Point" and the other as the "Eldridge Addition."

The petition further sets forth that, unless required to do so by the order of this court, the respondent will fail to assess and list upon the assessment roll of said city, for taxation purposes, the tracts so excluded by the ordinance, even though said tracts were included and are within the exterior boundaries of the city of Crescent City, as the same were established as herein stated.

It is admitted by the parties hereto that the exterior boundaries of the city as delineated in the act creating the petitioner as a municipal corporation have never been uncertain or indefinite or not readily located. The only issue presented is whether the action of the city council, in passing an ordinance describing the exterior boundaries of the petitioner, was effectual in excluding from the exterior boundaries of the city tracts theretofore included therein and created as a part of the city of Crescent City by an act of the Legislature.

By an act approved March 11, 1891, Statutes 1891, page 92, the Legislature passed an act validating the proceedings of all municipal corporations within the state claiming to have been reorganized under and in accordance with acts approved March 13, 1883, relating to the reorganization of municipal corporations, and also in accordance with an act to provide for the classification of municipal corporations, approved March 2, 1883 (St. 1883, p. 24). This act, however, does not purport to, nor does it, affect in any way the boundaries of reorganized municipalities. While the fact of reorganization of the petitioner herein is set forth in the record before us, it does not appear that in the reorganization proceedings any attempt was made to change the exterior boundaries of the city of Crescent City as established by the act of the Legislature creating the petitioner as a municipal corporation.

Since the passage of the ordinance herein referred to purporting to describe the exterior boundaries of the petitioner, there has arisen not an uncertainty as to the boundaries of the petitioner as created by the act of the Legislature, nor as to any uncertainty as to the boundaries set forth in the ordinance passed by the city council of the petitioner, but only as to whether the action of the city council actually excluded from the exterior boundaries the premises hereinbefore referred to by an ordinance purporting to adopt a description of the boundaries of said city not including such premises. As before stated herein, no attempt has ever been made to change the exterior boundaries of the petitioner since its creation as a municipal corporation, in any manner provided by law.

[1] The law appears to be well settled that a municipality or its corporate authorities have no power to extend its boundaries, other than that provided for by legislative enactment or constitutional provisions. See the long list of cases cited in 64 A. L. R. p. 1341; McQuillin on Municipal Corporations (2d), vol. 1, pp. 706 and 718-746. On the latter page the language of the text is as follows: "The municipal authorities can in no case alter the corporate boundaries, unless the power to do so has been duly conferred." This covers both the question of annexation and exclusion. The authorities supporting the rule that there can be no exclusion or inclusion of territory, or change in the boundaries of a municipal corporation, except in the manner provided by law, are so numerous that we need cite but one: *People v. Ontario*, 148 Cal. 625, 84 P. 205.

[2] The contention, however, in this case appears to be based upon acquiescence in the attempted changed boundaries of the city since 1885. This contention, however, finds no support in the cases cited to uphold it.

The case of *City of Alameda v. City of Oakland*, 198 Cal. 466, 246 P. 69, 73, upon which the respondent relies, was an action where the location of the boundary between the two cities was uncertain and indefinite. The true boundary could not be definitely ascertained. The court in its opinion points out the circumstances under which acquiescence may be considered in fixing the location of boundary lines. We quote therefrom: "This proceeding is predicated on uncertainty and indefiniteness in the location of the boundary line. The act under which it was taken provides for a proceeding thereunder only when the location of the boundary lines of the city are 'indefinite or uncertain or have been obliterated.' * * * The issues presented in this case from the standpoint of both the law and the facts were properly the subject of legitimate controversy because of the uncertainty of the location of said boundary line, and were therefore the proper subject of the application of the doctrine of acquiescence"—citing 1 McQuillin on Corporations, § 260; 23 Cyc. 182; *People v. Town of Antioch*, 17 Cal. App. 751, 121 P. 945; *Belknap v. City of Louisville*, 93 Ky. 444, 20 S. W. 309; *Louisiana v. Mississippi*, 202 U. S. 1, 26 S. Ct. 408, 50 L. Ed. 913.

The latest exposition of the doctrine of acquiescence, with its application to an interesting state of facts in the consideration of the present controversy, is found in *Michigan v. Wisconsin*, 270 U. S. 295, 46 S. Ct. 290, 70 L. Ed. 595, decided by the Supreme Court of the United States on March 1, 1926.

An examination of the opinion in the case of *People v. Town of Antioch*, 17 Cal. App. 751, 121 P. 945, discloses that the doctrine of acquiescence was applied on account of the

ambiguity or uncertainty in the acts purporting to delineate the exterior boundaries of the city. By reason of the fact that there is no uncertainty or ambiguity nor any obliteration of the boundary lines of the petitioner, as originally set forth and fixed by the act of the Legislature in 1854, the cases based upon acquiescence are not controlling.

[3, 4] The fact that title to some of the lands included within the exterior boundaries of the petitioner was vested, some in the state of California, and, as to some, in the United States, has no bearing upon the issues here presented. The record shows that the title to the lands referred to subsequently passed from the state of California, and also from the United States to the city of Crescent City, and the rights of the occupants thereon were not changed or altered thereby, but were only confirmed. *Lockwitz v. Larson*, 16 Utah, 275, 52 P. 279, 280; *Scully v. Squier*, 215 U. S. 144, 30 S. Ct. 51, 54 L. Ed. 134; *Id.*, 13 Idaho, 417, 90 P. 573, 30 L. R. A. (N. S.) 189. The duty of the respondent to assess all lands and premises within the exterior boundaries of the municipality does not depend upon the date of acquiring title from the government by the occupant of the premises. Title, however, is not involved in this action.

Being of the opinion that the boundaries of the petitioner, as a municipal corporation, are as set forth in the Robinson survey, and as described in the act of the Legislature creating the petitioner as a municipal corporation, it follows that the writ of mandate herein should be granted as prayed for. And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

Richard HANSEN, Petitioner, v. G. Fletcher DODD, as City Clerk and Ex Officio Assessor of the City of Crescent City, Respondent.*

Civ. 4855.

District Court of Appeal, Third District,
California.
Jan. 30, 1933.

Rehearing Granted Feb. 28, 1933.

Application for writ of mandate prayed to be directed to respondent as city clerk and ex officio assessor of the city of Crescent City, requiring him to assess property within the exterior boundaries of said city as described in a certain ordinance adopted by the city council of said city in 1885.

Writ denied.

Samuel W. Gardiner, of San Francisco, for petitioner.

G. Fletcher Dodd, of Crescent City, in pro. per.

Mr. Justice PLUMMER delivered the opinion of the court.

This proceeding has for its object the requiring of the respondent, as assessor, to make assessments of property within the exterior boundaries of the city of Crescent City, as described in the city ordinance adopted by the city council of said city in 1885.

What we have said in the case of City of Crescent City, a Municipal Corporation, Petitioner, v. G. Fletcher Dodd, as City Clerk and Ex Officio Assessor of the City of Crescent City, Respondent, 18 P.(2d) 999, is controlling here, and it follows therefrom that the petition for a writ of mandate in this proceeding should be denied, and it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

129 Cal.App. 479

SMITH v. HERRON et al.
Civ. 4730.

District Court of Appeal, Third District,
California.

Feb. 6, 1933.

Hearing Denied by Supreme Court April 6,
1933.

1. Appeal and error ⇨174, 187(4).

Objection, for first time on appeal, to intervention or lack of capacity of plaintiff to sue, comes too late (Code Civ. Proc. §§ 378, 430).

In absence of objection to intervention or disqualification of party plaintiff, either by demurrer or motion to strike or otherwise, if order of court is duly made upon notice and motion therefor, permitting one to intervene as party plaintiff, objection on ground of misjoinder of parties or lack of capacity to sue is waived and may not be raised for first time on appeal.

2. Pleading ⇨122.

Denial of answer on information and belief respecting formal orders of court of record recited in complaint and readily accessible to defendant raises no issue requiring evidence to support findings of such alleged facts.

3. Bankruptcy ⇨115.

Bankruptcy receiver authorized to employ counsel and appear in action against

bankrupt and others to recover bankrupt's assets on behalf of creditors, and substituted for plaintiff in such action without objection, *held* to have capacity to sue (Code Civ. Proc. § 378).

4. Bankruptcy ⇨115.

In suit by mineral lessee's bankruptcy receiver against lessor to obtain possession of premises and personalty for benefit of creditors, findings regarding alleged abandonment of lease and property *held* in irreconcilable conflict, requiring reversal.

Answer alleged that lessee abandoned premises and ceased all work thereon and thereupon lessor, through agent, took possession of leased premises and claimed to hold premises free of any claim or interest of lessee or any creditors of lessee; and court found that allegations of such subdivision of answer were "true," but that lessor's claim to hold property was without right, and such finding was in irreconcilable conflict with other finding that lease and premises were not abandoned.

5. Trial ⇨396(7).

Findings in conflict with unequivocal admissions of pleadings do not support judgment and should be disregarded.

6. Bankruptcy ⇨115.

In suit on behalf of creditors of bankrupt mineral lessee, a partnership, to obtain possession of premises from lessor, complaint *held* not construable as admitting that premises were abandoned by lessee.

Such alleged admission was to effect that one of partners, with knowledge and consent of lessor's agent and at his instigation, "caused it to appear" that there was no one upon premises and that leasehold estate and real property had been abandoned by lessee and caused all work and building operations to cease thereon, "although * * * [lessor and lessee] then and there knew that said property had not been abandoned by said" lessee.

7. Appeal and error ⇨1033(7).

Appellant *held* not entitled to complain of allegedly conflicting findings favorable to appellant.

8. Bankruptcy ⇨115.

In suit on behalf of bankrupt mineral lessee's creditors to obtain possession of premises from lessor, plaintiffs were entitled to possession if lessee did not abandon property, though lessor, in obtaining possession, was free from fraud.

9. Appeal and error ⇨1012(1).

Weight of evidence is for trial judge.

10. Contracts ⇨318.

Law does not favor forfeiture.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Suit by Dorothy O. Smith against R. H. Herron, Jennie S. Herron, Smith & Barmore, a partnership, and others, in which Edward H. Marxen, receiver in bankruptcy of the partnership of Smith & Barmore, was substituted as plaintiff. From a judgment in favor of plaintiff, defendants Herron appeal.

Reversed.

Griffith & Thornburgh, of Santa Barbara, for appellants.

Marshall D. Andrews, of Los Angeles, and Major McGregor, of Santa Barbara, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment for plaintiff in a creditor's suit in equity to establish the validity and secure the benefit of the proceeds derived from the operation of a lease upon state tidelands for the development of oil, gas, and other hydrocarbon substances.

This suit was commenced by Dorothy O. Smith, under the provisions of section 382 of the Code of Civil Procedure, for the benefit of all parties interested in the lease. The defendant Jennie S. Herron held a lease upon 160 acres of state tideland in the vicinity of Summerland from the state of California under the provisions of the Mineral Land Act of California (see St. 1921, p. 404, as amended) for the purpose of prospecting for oil, gas, and other hydrocarbon substances. October 17, 1925, this lease was transferred to O. H. Smith for a term of ten years, in consideration of one-eighth royalty of the gross products therefrom, with the agreement that Smith should diligently prospect for oil and gas by sinking thereon at least ten wells each year. With the consent of Jennie S. Herron, a one-half interest in this lease was transferred to E. H. Barmore, Sr., with whom Smith formed a partnership for the purpose of prospecting this land for oil and gas. During the first year of this sublease Smith & Barmore succeeded in sinking six wells upon the premises according to agreement. Due to causes over which Smith & Barmore had no control, they were unable to sink the remaining four wells. This failure was specifically waived by Mrs. Herron. During the first year of the term of this assigned lease, Smith & Barmore incurred indebtedness in operating the prospecting enterprise amounting to the sum of \$58,848, which they were unable to pay. The plaintiff is one of these creditors to whom they owe the sum of \$34,000. On September 6, 1927, these defendants, Smith & Barmore, were declared bankrupt. This plaintiff, Edward H. Marxen, was appointed and qualified as receiver of the estate

of said bankrupts. Upon due notice and application therefor he was authorized by the United States District Court of Southern California, wherein said bankrupt estate was pending, to appear and represent the creditors of said estate in this equitable action. Upon notice and application therefor it was ordered that the said Edward H. Marxen, as receiver of the estate of Smith & Barmore, bankrupts, be substituted as plaintiff in this action instead of the said Dorothy O. Smith, in behalf of the creditors of the partnership and all parties interested in this litigation. An amended and supplemental complaint was then filed by the plaintiff in this proceeding.

The amended and supplemental complaint alleged the foregoing facts, and charged that the defendants R. H. and Jennie S. Herron fraudulently conspired with Smith and Barmore to wrongfully procure the abandonment of their lease, and that the Herrons thereupon seized and now illegally hold possession of the leased premises together with the products developed therefrom and all machinery incident thereto of the value of \$10,000, and are proceeding to operate the same with a claim of ownership thereof, to the great and irreparable loss of the creditors of said partnership and of the plaintiff; that at the time of the pretended abandonment of the lease, one well on said premises was producing more than eighty barrels of oil a day. The complaint seeks an accounting and an adjudication of the title of Smith & Barmore to the lease and property described, and prays for the appointment of a receiver to take charge of said property for the benefit of the creditors of the partnership, and that the defendants be restrained from disposing of any of said property pending this litigation.

R. H. and Jennie S. Herron are the only defendants who appeared or answered the complaint. They denied all the material allegations thereof, except that the capacity of the plaintiff to maintain the action was not raised by objection, demurrer or motion to strike. Upon trial the court adopted findings favorable to the plaintiff sustaining all the material allegations of the complaint, except that the alleged fraud and conspiracy of the appellants were denied.

The court found that Smith & Barmore were the owners of the lease, machinery, and products of the oil wells on the premises described, and were entitled to the possession thereof; that the lease had not been forfeited or abandoned by them, but, upon the contrary, that the appellants wrongfully and unlawfully ejected the partners and seized possession of the leased premises and property which they were illegally holding to the detriment of plaintiff. A judgment was accordingly rendered requiring an accounting of all property belonging to the estate of Smith & Barmore, bankrupts, entitling and author-

izing the plaintiff to take possession of the leased premises and personal property for the benefit of the creditors of Smith & Barmore, bankrupts, and enjoining the defendants from disposing of any of said property pending the litigation. From this judgment the defendants R. H. and Jennie S. Herron have appealed.

It is asserted by the appellants that the judgment should be reversed because the plaintiff, as receiver of the estate of Smith & Barmore, bankrupts, lacks capacity to sue or maintain this action in behalf of creditors.

[1] It is too late to object to the intervention or lack of capacity of a party plaintiff to sue, for the first time on appeal. In the absence of an objection to the intervention or disqualification of a party plaintiff, either by demurrer or motion to strike or otherwise, if an order of court is duly made upon notice and motion therefor, permitting one to intervene as a party plaintiff, an objection on the ground of misjoinder of parties or lack of capacity to sue, is waived, and may not be raised for the first time on appeal. *Carlin v. Masten*, 118 Cal. App. 373, 5 P.(2d) 65; *Chan Yo Chow v. Lim Sing*, 87 Cal. App. 278, 261 P. 1039; 47 C. J. 231, § 452; sections 378, 430, Code Civ. Proc.; 20 Cal. Jur. 565, §§ 52, 53.

[2, 3] In this case it appears the respondent Edward H. Marxen was duly appointed and qualified as receiver in the matter of the partnership estate of Smith & Barmore, bankrupts, by an order duly made in the District Court of the United States in and for the Southern District of California, and that he was subsequently duly authorized to employ counsel and appear in this action in behalf of all creditors of that estate; that upon due notice he was thereafter substituted in this action without objection as party plaintiff in the place of the original plaintiff, Dorothy O. Smith; that he served and filed an amended and supplemental complaint therein, to which appearance and alleged lack of capacity to sue the appellants failed to demur or move to strike. In response to the affirmative allegations of the supplemental complaint that Marxen was duly appointed and qualified as receiver of the estate of Smith & Barmore, and that he was thereafter authorized and did appear in this action and was substituted as party plaintiff herein, the appellants merely denied these recitals on information and belief. The question of his capacity to sue was not otherwise raised.

The denial of an answer on information and belief respecting the formal orders of a court of record recited in the complaint which are readily accessible to the defendant raises no issue which requires evidence to support the findings of such alleged facts. 21 Cal. Jur. 150, § 101; *Saylor v. Taylor*, 42 Cal. App. 474, 183 P. 843. There is no merit in the con-

tention that respondent lacked capacity to sue, or that the evidence fails to support the findings respecting his due authorization and substitution as party plaintiff herein.

[4] The appellants contend that a reversal of the judgment is imperative because certain material findings of the court are conflicting and irreconcilable. Among the chief issues in the case, upon which the judgment depends, is the question as to whether Smith & Barmore, to whom the oil lease was transferred by Jennie S. Herron, the original holder thereof, abandoned the lease and possession of the property. If they did not abandon the lease and property, then Mrs. Herron, the lessor, was not warranted in taking possession and exercising ownership thereof. In that event the court was right in declaring that her possession was unlawful and that the plaintiff is entitled to the possession of the property for the benefit of creditors and that an accounting should be had. If the partnership did abandon the lease and property, then the lessor, Mrs. Herron, may be deemed to be in lawful possession thereof, and the plaintiff would not be authorized to take the property for the benefit of creditors. It does seem to be vital to the validity of the judgment to determine whether the lease and property were abandoned.

In the complicated findings which were presented to the court and signed it was definitely and specifically determined that the lease and property were abandoned by Smith & Barmore. Under paragraph VI of the "third" portion of the answer to the amended and supplemental complaint the defendants say: "That subsequent to the service of said notices and some time prior to the 16th day of August, 1927, said Smith & Barmore abandoned said leased premises and ceased all work thereon, and that upon said day, said Jennie S. Herron, through her agent R. H. Herron, took possession of said leased premises and has continued since and now is in possession thereof, claiming to hold the same free of any claim or interest of Smith & Barmore or any creditors of Smith & Barmore."

Respecting these allegations of the answer, the court found: "That the allegations of subdivision VI of said answer are true, but referring to the allegations that Jennie S. Herron through R. H. Herron is claiming to hold State Oil and Gas Lease Nineteen (19) and all personal property thereon free from any claim of Smith and Barmore, or any creditors of Smith and Barmore, this court finds said claim to be without right or justification."

The first portion of the preceding finding is in direct conflict with other findings to the effect that the lease and premises were not abandoned. We are unable to reconcile this conflict. Since the evidence respecting the subject of abandonment is conflicting, it

becomes necessary to reverse the cause on account of the irreconcilable conflict of the foregoing findings. It is said in *Huling v. Seecombe*, 88 Cal. App. 238, at page 244, 263 P. 362, 365. "Where findings are irreconcilably in conflict the judgment must be reversed, for the reason that it is impossible, under such circumstances, to determine which findings controlled the court in rendering its judgment. *Los Angeles Land Co. v. Marr*, 187 Cal. 126, 200 P. 1051; *Estep v. Armstrong*, 91 Cal. 659, 27 P. 1091; *Learned v. Castle*, 78 Cal. 454, 18 P. 872 21 P. 11; 2 Cal. Jur. 1030, § 612."

[5, 6] It is claimed that the findings to the effect that the lease and property were not abandoned by Smith & Barmore are in conflict with the admissions of the complaint. It is true that findings which are in conflict with the unequivocal admissions of pleadings do not support a judgment and should be disregarded. *Traverse v. Tate*, 82 Cal. 170, 22 P. 1082; *Ortega v. Cordero*, 88 Cal. 221, 26 P. 80; *Robison v. Mitchel*, 159 Cal. 581, 114 P. 984; *Chase v. Van Camp Sea Food Co., Inc.*, 109 Cal. App. 38, 292 P. 179. In the present case the only alleged admission of the complaint in conflict with the findings that the lease and property were not abandoned is the statement in support of plaintiff's allegations of fraud and collusion on the part of appellants to procure the abandonment of the lease and property by Smith & Barmore, in the following language, to wit: "E. H. Barmore, Sr., on or shortly prior to the 6th day of September, 1927, with the knowledge and consent of said R. H. Herron and at his instigation *caused it to appear* that there was no one upon said real property and that said leasehold estate and real property had been abandoned by said partnership and caused all work and drilling operations to cease upon said real property *although said Barmore and said Herron, both, then and there well knew that said property had not been abandoned by said partnership.*"

It is apparent this is not an allegation that the lease and property had been abandoned. It may not be reasonably so construed. Clearly the pleader alleges conduct which he asserts was for the mere purpose of *making it appear* that an abandonment had occurred. It is specifically stated that it was well known

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by Barmore and Herron that the property was not abandoned. This allegation does not amount to an admission of abandonment.

[7, 8] The appellants assert that the findings respecting their alleged fraud in procuring the abandonment of the lease and property by Smith & Barmore are also in conflict. We are inclined to think not. The apparent conflict may be reasonably reconciled. However, since the court did specifically find that appellants were not guilty of fraud or collusion in obtaining possession of the property, and the findings are all favorable to them on this issue, they may not complain. The judgment is amply justified in the absence of fraud or collusion on the part of the appellants. Their illegal and wrongful possession of the property will justify the judgment even though they were free from fraud. This challenged conflict of findings is without merit.

[9, 10] It is further insisted that material findings are not adequately supported by the evidence. These challenged findings refer to the alleged violation of the terms of the lease by Smith & Barmore rendering that instrument void. They apply to the following subjects: "Non-payment of royalties," "lack of diligence in sinking wells," "lack of skill in performance of services," and finding of the insolvency of the partnership. In view of the necessity of reversing the judgment on account of the conflicting findings above referred to, it is unnecessary to review the evidence applicable to the alleged violation of the terms of the lease. It may be conceded the evidence in support of some of these subjects is scant. The weight of the evidence is a matter within the province of the trial judge. The law does not favor forfeiture. The court held that the lease was not forfeited for breach of its terms, and that the property was not abandoned. In a hasty examination of the record we are unable to say these findings are not adequately supported by the evidence.

For the reason that the findings regarding the alleged abandonment of the lease and property are in irreconcilable conflict, it becomes necessary to reverse the judgment. It is so ordered.

We concur: PULLEN, P. J.; PLUMMER, J.

129 Cal.App. 420

HOLLISTER v. KINGSBURY,
Surveyor General.

Civ. 4716.

District Court of Appeal, Third District,
California.

Feb. 2, 1933.

Hearing Denied by Supreme Court April 3,
1933.**1. Statutes** $\Rightarrow$ 251.

Urgency measures to secure public "safety" may consist in measures to protect use and enjoyment of property no less than in measures to provide against injury to persons (Const. art. 4, § 1).

[Ed. Note.—For other definitions of "Safety," see Words and Phrases.]

2. Statutes $\Rightarrow$ 251.

Amendatory act prohibiting permits to prospect for oil or gas on certain lands, while Legislature was reconsidering entire problem, held valid urgency measure, relating to public safety (St. 1921, p. 405, § 4, as amended by St. 1929, p. 11, § 1; Const. art. 4, § 1).

"Safety" is defined as immunity from harm or danger; preservation of freedom from injury, loss, or hurt, and includes freedom of property from burglary or fire, or from an unsightly forest of oil well derricks, or obnoxious fumes from overflowing crude oil, or the loss of any other natural property value.

3. Statutes $\Rightarrow$ 251.

Legislature's judgment as to when urgency measures are necessary is conclusive except when facts are not stated, or when they are so clearly insufficient as to leave no reasonable doubt that alleged emergency does not exist (Const. art. 4, § 1).

4. Statutes $\Rightarrow$ 251.

Every reasonable intendment will be made in favor of validity of urgency measures (Const. art. 4, § 1).

5. Statutes $\Rightarrow$ 251.

Statement of facts as to urgency of act prohibiting granting or approval of permits to prospect or drill for oil or gas on tide, overflowed, or submerged lands during period of eight months in which Legislature proposed to consider entire problem held sufficient (St. 1929, p. 14, § 3; Const. art. 4, § 1).

Statement was that the surveyor general since 1927 had refused to file any applications for or to grant permits on the tide and submerged lands of the state; that subsequently in 1928 a decision affecting such lands was rendered by Supreme Court; that, since such decision, numerous inquiries had been received by persons concerning such lands; that the Legislature desired an opportunity to consider to what extent, if at all, the provi-

sions of St. 1921, p. 404, § 1 et seq., as amended by St. 1929, p. 11, § 1 et seq., permitting prospecting for oil and gas, should be limited or withdrawn, and that it was to public interest that no rights under the act should be initiated while the Legislature was considering the matter. Besides the statement, the act contained a declaration that the immediate preservation of the public peace, health, and safety required that the act should take effect immediately.

6. Evidence $\Rightarrow$ 20(1).

Court will take judicial notice of general effect of operations for the discovery and pumping of oil.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Mandamus proceeding by J. James Hollister, Jr., against W. S. Kingsbury, Surveyor General and ex officio Register of the State Land Office. From judgment for plaintiff, defendant appeals.

Reversed and remanded, with directions.

U. S. Webb, Atty. Gen., Jess Hession, Deputy Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for appellant.

James G. Leovy and William Hazlett, both of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment of the Superior Court of Sacramento county directing a writ of mandamus to issue requiring the appellant to file the petitioner's application for a permit to prospect for oil and gas in state lands pursuant to Statutes of California of 1921, c. 303, p. 404. The question which is here involved is whether an urgency amendment to section 4 of that statute, which was adopted by the Legislature in 1929 (Stats. 1929, c. 7, pages 11, 12, 2 Deering's Gen. Laws, p. 3456, Act 6341), withdrawing certain state lands from exploration for oil and gas by private littoral owners, is in conflict with the provisions of article 4, § 1, of the Constitution of California, for failure to state therein the facts warranting such emergency legislation.

The Mineral Land Act of 1921 authorized the surveyor general to permit prospecting for oil and gas on certain state lands upon specified terms, by private littoral owners. In 1929 section 4 of this act was amended as an urgency measure, with the proviso: "That no permit to prospect or drill for oil or gas in or upon any tide, overflowed or submerged lands shall ever be granted by the surveyor general upon an application made between the date of approval of this act and the first day of September, 1929."

This amendatory act was approved January 17, 1929, to take effect immediately. In compliance with the provisions of article 4, § 1, of the Constitution, this emergency act stated the essential facts constituting the necessity therefor. This constitutional provision with which the petitioner contends the Legislature failed to adequately comply declares that: "No act passed by the legislature shall go into effect until ninety days after the final adjournment of the session of the legislature which passed such act, except * * * urgency measures necessary for the immediate preservation of the public peace, health or safety. * * * Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act. * * * Any law so passed by the legislature and declared to be an urgency measure shall go into immediate effect."

Pursuant to the foregoing constitutional provision, the emergency act declared the necessity and recited the reasons therefor, as follows:

"Sec. 3. This act is hereby declared to be an urgency measure deemed necessary for the immediate preservation of the public peace, health and safety within the meaning of section 1 of article four of the constitution of California, and as such it shall take effect immediately.

"The following is a statement of the facts constituting such urgency and necessity:

"The surveyor general, since some time in 1927, has refused to file any applications for, or to grant any permits on the tide or submerged lands of the state, and it is believed that but for such refusal a much greater area of tide and submerged lands would have been applied for. There was, during 1927, commenced in the supreme court of the state, one or more actions which involved the validity of the act hereby amended, in so far as the same related to tide and submerged lands, and the decision of the supreme court in these cases was rendered on the thirty-first day of December, 1928, and in such decision the supreme court held such act to be valid in the particulars in which its validity had been challenged. Since such decision was rendered, the surveyor general has received numerous inquiries in regard to the procedure to be followed in order to obtain permits for tide and submerged lands under the provisions of said act and it is believed that a large number of applications for such lands will soon be made. It is believed that the tide and submerged lands of the state should not be open for exploitation and prospecting or for the production of oil and gas, as provided by the act hereby amended.

"The Legislature desires opportunity to consider to what extent, if at all, the provi-

sions tendered by the act hereby amended should be limited or withdrawn, and it is deemed in the interests of public policy that no rights under the act hereby amended should be initiated during the time given by the Legislature to the consideration of the subject, nor until such legislation as may be adopted in furtherance of the legislative purpose shall go into effect. If such provisions be not suspended during the period indicated the tide and submerged lands may be so far covered by applications and leases that such legislation as may be adopted would fail to secure that protection of tide and submerged lands which was by the Legislature intended."

April 17, 1929, the petitioner posted notices of his application to prospect for oil and gas in accordance with the provisions of the statute. Within thirty days thereafter, on May 16, 1929, due application for authorization to explore the land for oil and gas, in strict compliance with the statute, was made to the surveyor general of the state of California, who refused to file the same on the ground that it was in conflict with the prohibition of the emergency act above referred to, since such applications were specifically forbidden prior to September 1, 1929.

[1-4] Urgency measures may be adopted by the Legislature when they are necessary "for the immediate preservation of the public peace, health or safety." Const. art. 4, § 1. For the securing of public safety, the Legislature may adopt emergency measures to protect the use and enjoyment of property as well as to provide against injury to persons. *Industrial Bank, etc., v. Reichert*, 251 Mich. 396, 232 N. W. 235; *Attorney General v. Lindsay*, 178 Mich. 524, 145 N. W. 98; *Simpson v. Winegar*, 122 Or. 297, 258 P. 562; *Webster's New International Dict.* 1867; 6 *Century Dict. Enc.* 5300. In the authority last cited the term "safety" is defined as "Immunity from harm or danger; preservation or freedom from injury, loss or hurt." It requires no distortion of the usual meaning of the term "safety" to hold that it includes freedom of property from burglary or fire or from an unsightly forest of oil well derricks or obnoxious fumes from overflowing crude oil, or the loss of any other natural property value.

In the case of *Detroit Trust Co. v. Stormfeltz-Loveley Co.*, 257 Mich. 655, 242 N. W. 227, 229, which involved an emergency act affecting property rights under a trust mortgage, the court said: "It is further contended that the act should not have been given immediate effect. In *Industrial Bank v. Reichert*, 251 Mich. 396, 232 N. W. 235, we upheld the powers of the legislature to give immediate effect to a law affecting the public safety by protection of property. See, also, *Naudzius v. Lahr*, 253 Mich. 216, 234 N. W. 581, 74 A. L. R. 1189."

It is strenuously contended by the respondent in the present proceeding that the emergency act is invalid for the reason that the statement of facts therein contained fails to show that the legislation was of an urgent nature, or that it was necessary for the immediate preservation of public peace, health, or safety.

We are of the opinion the emergency act is valid as such. By the terms of article 4, § 1, of the Constitution, exclusive authority is conferred upon the Legislature to determine when urgency measures are necessary for the immediate preservation of the public peace, health, or safety. When that necessity has been determined as provided by the Constitution, the judgment of the Legislature is final and conclusive, and may not be interfered with by the courts, unless no declaration of facts upon which the emergency is deemed to be founded is included in the act, or unless the statement of facts is so clearly insufficient as to leave no reasonable doubt that the urgency does not exist. It is an unwarranted violation of the Constitution and interference with the legislative prerogative for a court to substitute its judgment of what is deemed to constitute public necessity for urgency measures for that of the Legislature, unless it clearly and affirmatively appears that the emergency does not exist. Every reasonable intendment should support the validity of urgency measures of the Legislature which are adopted pursuant to the constitutional provisions therefor.

Our Supreme Court has said in the case of *In re McDermott*, 180 Cal. 783, 183 P. 437, that the determination of the existence of public necessity for the enactment of an emergency measure rests upon the "judgment of the Legislature." In several states where constitutions exist which authorize the Legislatures to enact emergency laws upon determining a public necessity therefor to preserve public peace, health, or safety, and directing the urgency therefor to be expressed in the act, it has been held that the necessity for such laws is purely a legislative question, the determination of which will not be interfered with by the courts. *Kadderly v. Portland*, 44 Or. 118, 74 P. 710, 75 P. 222; *Roy v. Beveridge*, 125 Or. 92, 266 P. 230; *Orrick v. Fort Worth*, 52 Tex. Civ. App. 308, 114 S. W. 677; *Roanoke v. Elliott*, 123 Va. 393, 96 S. E. 819; *Gentile v. State*, 29 Ind. 409; *In re Menefee*, 22 Okl. 365, 97 P. 1014; *Brown v. State*, 3 Okl. Cr. 475, 106 P. 975; *Arkansas Tax Comm. v. Moore*, 103 Ark. 48, 145 S. W. 199; *Hanson v. Hodges*, 109 Ark. 479, 160 S. W. 392; *Van Kleeck v. Ramer*, 62 Colo. 4, 156 P. 1108; *Diaz CINTRON v. People of Porto Rico* (C. C. A.) 24 F. (2d) 957; 1 *Lewis' Sutherland Stat. Const.* (2d Ed.) 314.

In the authority last cited it is said: "What may be deemed an emergency for this

purpose [of determining necessity for urgent measures] is purely a legislative question. The courts will not inquire into it, nor entertain any question of its sufficiency."

Article 3, § 1, of the California Constitution, provides: "The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the other, except as in this Constitution expressly directed or permitted."

It will be observed the Constitution of California (article 4, § 1), by inference, invests the Legislature with exclusive power to determine the necessity for emergency laws. It reads: "Whenever it is deemed [by the legislature] necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act."

Construing the Oregon Constitution, which is similar to that of our own with respect to emergency acts, with the exception of requiring the recitation of facts upon which the necessity rests, the court said in the case of *Kadderly v. Portland*, supra, 44 Or. 118, 74 P. 710 at page 721, 75 P. 222: "The existence of such necessity [for emergency acts] is therefore a question of fact, and the authority to determine such fact must rest somewhere. The Constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the Legislature alone must be the judge, and, when it decides the fact to exist, its action is final."

Under the California Constitution, it is the sole prerogative of the Legislature to determine the necessity for emergency legislation, which may not be disturbed by a court, except that, since our Constitution requires the statement of the facts constituting the necessity to be recited in the act, it follows that, if these facts clearly show that a public necessity does not exist, then the declaration of the necessity falls of its own weight. Unless the absence does so clearly appear from the facts recited in the act, then the determination of the Legislature is final. A number of cases hold that, unless the absence of necessity affirmatively appears in the act, the courts must accept the Legislature's finding of necessity as conclusive. In the case of *Newberry v. Starr et al.*, 247 Mich. 404, 225 N. W. 885, 887, involving an emergency act consolidating school districts, the court said: "I do not think it can be said with certainty that the act in question was not immediately necessary for the preservation of the public peace, health, and safety, and the courts

should interfere only where that conclusion is inevitable."

In the case of *Naudzius v. Lahr*, 253 Mich. 216, 234 N. W. 581, 585, 74 A. L. R. 1189, involving emergency legislation affecting the operation of automobiles, the court said: "It is not the province of the court to attempt to accurately ascertain and adjudicate the immediate necessity of the terms of the particular act, but, if the subject of the law has a real and substantial relation to public peace, health, or safety, all doubt will be resolved in favor of the legislative judgment that it is 'immediately necessary.' Attorney General v. Lindsay, 178 Mich. 524, 145 N. W. 98; People v. Urcavitch, 210 Mich. 431, 178 N. W. 224; People v. Stambosva, 210 Mich. 436, 178 N. W. 226; Newberry v. Starr, 247 Mich. 407, 225 N. W. 885."

[5, 6] Far from affirmatively appearing from the statement of facts in the challenged legislative act that the immediate necessity for the urgency measure does not exist, we think a reasonable construction of what the Legislature did recite, construed in the light of the general effect of operations for the discovery and pumping of oil, of which the courts may take judicial cognizance, prompts the conclusion that the Legislature was justified in determining there was urgent necessity for the amendment to the Mineral Land Act of California. In *re McDermott*, 180 Cal. 783, 183 P. 437, regarding a similar meager statement of facts in an emergency act affecting syndicalism, as follows: "At the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism," the court well said: "We think this to be a sufficient compliance with the provisions of section 1 of article 4 of the Constitution requiring a statement 'in one section of the act' of the facts making it necessary in the judgment of the Legislature that a law shall go into immediate effect, where the Legislature considers that this is necessary 'for the immediate preservation of the public peace, health, or safety.' The courts may not say that this conclusion of the Legislature was not justified."

In a separate section of the emergency act which is involved in the present proceeding, the Legislature made the following affirmative declaration: "This act is hereby declared to be an urgency measure deemed necessary for the immediate preservation of the public peace, health and safety." Section 3.

Following the foregoing affirmative determination of a public necessity for immediate legislation, the act contains, in part, the following statement of facts, upon which the legislative conclusions rest: "The surveyor general, since some time in 1927, has refused to file any applications for, or to grant any permits on the tide or submerged lands of the state, and it is believed that but for such re-

fusal a much greater area of tide and submerged lands would have been applied for."

This is a declaration that the Legislature feared large numbers of applicants would seek to file upon state tide and submerged lands to exploit the public domain in drilling for oil and gas, except for the refusal to register applications by the surveyor general.

The statement then relates the fact that certain litigation was prosecuted involving the constitutionality of this Mineral Land Act, and tells of the final sustaining of the validity of the act. Then the statement continues: "Since such decision was rendered, the surveyor general has received numerous inquiries in regard to the procedure to be followed in order to obtain permits for tide and submerged lands under the provisions of said act and it is believed that a large number of applications for such lands will soon be made."

This is a clear statement that from numerous inquiries for information it is believed the surveyor general may be overwhelmed with petitions of private parties for authority to exploit the public lands for oil and gas. The Legislature then concludes: "It is believed that the tide and submerged lands of the state should not be open for exploitation and prospecting or for the production of oil and gas, as provided by the act hereby amended."

The Legislature does not say why "it is believed" the state lands should not be "open to exploitation" for oil and gas by private parties. Such a declaration is unnecessary. Certainly the Legislature has a right to assume that it is wise and profitable to preserve the valuable minerals of the public domain for the benefit of the state. It may be reasonably assumed it would be profligate for the Legislature to abandon valuable mineral resources of the state to the exploitation of private interests. Much criticism has been directed toward public officers in the past for recklessly abandoning natural resources of the public domain to the exploitation of private interests. Moreover, we may assume the Legislature is warranted in preserving the scenic beauty of state coast lands, beaches, and water fronts against the unsightly results similar to Signal Hill of great activity in drilling for oil. The picturesqueness of our California coasts, the desirability of unobstructed beaches for recreation and beauty and a clear water front for boating and fishing, are property rights the Legislature is justified in considering in the preservation of state land for public welfare.

In this statement of facts the Legislature further declares the provisions of the original Mineral Land Act should be held in abeyance until a more critical examination of the situation may be made. It is laudable that the resources and natural condition of state lands should be preserved, at least until further in-

vestigation may be made. It is not an admission that an emergency does not exist. After first declaring that an emergency does exist, it is said, in effect, "In addition to the foregoing exigency, we desire further opportunity for investigation." If the exploitation of public lands by private interests be detrimental, as the Legislature asserts that it is, then it would be folly to delay the restraining of such prospecting and the acquiring of vested rights which might not be thereafter revoked, until the detriment could be proved beyond a reasonable doubt. That procedure would be an absurdity. It would result in "locking the barn" when it was too late.

Finally the Legislature declares in its statement: "If such provisions be not suspended during the period indicated the tide and submerged lands may be so far covered by applications and leases that such legislation as may be adopted would fail to secure that protection of tide and submerged lands which was by the Legislature intended."

In the language of the Supreme Court which was employed in the decision of the McDermott Case, *supra*, "We think this to be a sufficient compliance with the provisions of section 1 of article 4 of the Constitution. * * * The courts may not say that this conclusion of the Legislature was not justified."

The judgment is reversed, and the trial court is directed to discharge the writ of mandamus.

We concur: PULLEN, P. J.; PLUMMER, J.



